

The Politics of Choosing United States Supreme Court Justices

by Deborah Goldberg and Mark Kozlowski

There is only one legal rule governing the selection of United States Supreme Court Justices (or any other federal judge, for that matter). That rule is embedded in the nation's Constitution, which states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."¹ Although not explicitly stated in the Constitution, "Advice and Consent" has always been taken to mean a simple majority vote of the Senate, which now contains 100 members.

The retention of Justices of the Supreme Court is governed by another constitutional provision: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour"² For all practical purposes, this means that Justices remain on the Court until they retire or die.³

¹U.S. CONST., art. II, § 2(2).

²U.S. CONST., art. III, § 1. By contrast, the judges in the court systems of the 50 states do not have life tenure, and approximately 87 percent of them, at both trial and appellate levels, face some form of popular election to attain or to retain their seats on the bench. See Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149, 154 (1998). The fact that many of these judicial elections are increasingly influenced by monied interests, which finance the campaigns or run independent advertising, is a matter of no small concern. See DEBORAH GOLDBERG, CRAIG HOLMAN, & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL CAMPAIGNS (Justice at Stake Campaign, 2002), available at www.brennancenter.org.

³Justices are subject to impeachment by the House of Representatives and removal from the Court after trial in the Senate, but only one Justice has ever been impeached, and he was acquitted in his 1805 Senate trial. This unsuccessful attempt at removal was undertaken largely because of political opposition to the decisions of the Justice. See RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 69-107 (1971). In 1969 Justice Abe Fortas, who had been nominated to the Court by his close friend President Lyndon Johnson, resigned in the face of likely impeachment for unethical conduct stemming from personal financial impropriety.

Taken together, the nine current Justices make for a very old Court. Six of the Justices are at least 65 years old. A seventh will turn 65 in 2003, and an eighth will do so the following year. It is thus universally expected that there will be vacancies on the Court in the very near future, either through retirement or the inexorable fact of mortality. There is much speculation among Court watchers about which Justices will retire and when. Facts and rumors about the state of each Justice's health are followed closely.

In anticipation of imminent personnel changes, much has been written about the roiling controversy that will almost certainly occur as soon as President George W. Bush gets the opportunity to fill a vacancy on the Court. There has already been considerable discord over many of the President's nominations to the lower federal courts. The majority Democratic Senate of the 107th Congress rejected two of his choices, whom the President promptly renominated when the Republicans gained control in 2002. Two of the President's nominations to appellate courts are now subject to filibuster (including one of the re-nominated judges). With a 51-member majority, the Republicans have repeatedly been unable to win cloture, which requires 60 votes.

Looking upon both the wrangling over Bush's nominees to the lower federal courts and the likelihood that at least one Supreme Court vacancy will occur during the balance of Bush's White House tenure, American conservatives have lately been offering a great deal of prescriptive commentary on how the judicial selection process should properly be conducted. Their recommendations are overwhelmingly directed at the Senate's "Advice and Consent" function.

Conservatives first assert that Senators should pay considerable deference to the President's choice of judicial nominees. More specifically, Senators are urged to take a

narrow view of the necessary and sufficient qualifications for federal judicial office. According to this theory, the Senate's review of a nominee's fitness for the bench should be limited to two inquiries: (1) Has the nominee assembled a record of distinction in the legal profession, whether as a practitioner, judge or legal academic? and (2) Does the nominee possess the intellectual and temperamental capacity to decide cases in accordance with principles of judicial impartiality?

As a corollary to this view, conservatives are forcefully arguing that Senators should not pursue any investigation of the nominee that is intended as a means of predicting how the nominee will likely decide certain cases. Or, in more pedestrian terms, the Senate should not consider how a nominee's personal political views may influence the decisions the nominee may make as a judge.

Any such focus upon the results a nominee is likely to reach in deciding cases is said to misconceive the nature of the judicial function. A judge's only commitment should be to the *process* of deciding cases impartially through the application of neutral legal principles; a proper judge has no commitment to reaching a particular *outcome* in any given case. Thus, a Senator who votes to approve judicial nominees according to the results they might reach is not really seeking impartial federal courts, but rather a bench populated by judges whose personal political views will prejudice their rulings so as to reach the Senator's preferred results.

American conservatives are emphatic that the very idea of a society conducting itself pursuant to the rule of law is at stake here. Senators and other elected representatives of the people may properly adhere to a political ideology, but a proper judge vigorously strives to purge ideology from the application of neutral legal

principles. Judges who do not do this are really acting as politicians, not adjudicators. A prominent conservative legal academic has recently made the point in stark terms:

There are those in the academy, and perhaps in the Senate, who believe that clear rules of law do not exist and that our pretensions to have a government of laws not men, ought to give way before the reality that all law is politics. Consequently, they argue that we might as well start selecting judges who will practice the politics we favor. The day the Senate commits to that view will be the day that our greatest glory – our commitment to the rule of law and the equality of all persons before the law – is lost. To place an ideological burden of proof on judicial nominees is to take a dangerous step along the road that leads to the abandonment of the rule of law.⁴

For decades now, the American right has been accusing American liberals of politicizing courts to win ideological victories they cannot win at the ballot box.⁵ Conservatives assert, for example, that Americans are highly receptive to recent educational reform proposals that provide government aid to religious schools, but liberals allegedly obsessed with secularism have sought to defeat such efforts by securing court decisions mandating a rigid separation church and state.

In sum, it is an article of conservative faith that the left *needs* the courts. Consequently, it is alleged that American liberals have for decades engaged in a no-holds-barred campaign to encourage like-minded Senators to subject Supreme Court nominees, and all nominees to the federal courts, to a strict ideological test. This charge has recently been leveled by Robert Bork in a much-discussed article:

⁴Stephen B. Presser, *Should Ideology of Judicial Nominees Matter? Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 264 (2001).

⁵For an explanation and critique of these charges, see MARK KOZLOWSKI, *THE MYTH OF THE IMPERIAL JUDICIARY: WHY THE RIGHT IS WRONG ABOUT THE COURTS* (NYU Press 2003).

The interest groups of the Left proceed by systematic lying about judicial nominees who adopt the traditional approach of interpreting the Constitution according to its actual meaning. . . . The left wing has discovered an effective tactic of labeling any conventional jurist an ideologue with a right-wing agenda and hence “outside the mainstream.”⁶

Again, the fruits of liberal victory are the undermining of the rule of law itself:

Born in Europe, central to the American founding, and fundamental to Western civilization, the ideal of the rule of law no longer commands much more than verbal allegiance. If prophecies of what the Court will do in fact is the meaning of law, then, in cultural matters the law may be predicted by the known personal inclinations of the Justices, nothing more pretentious. That is not the rule of law; it is the rule of judges.⁷

It is well to quote Bork here because he is the person whom American conservatives have designated as the primary individual victim of the liberal perversion of the judicial confirmation process. In 1987 President Ronald Reagan nominated Bork to fill a vacancy on the Supreme Court. Bork had served as a federal appellate judge, a prominent government official, and a professor at Yale Law School. After a tumultuous round of televised hearings before the Senate Judiciary Committee, Bork’s nomination was defeated by a vote of 58 to 42.

There is no question that Bork’s defeat was based upon evaluations of the results he would have likely reached as a Supreme Court Justice in a range of politically charged cases. Interest groups supportive of abortion rights were alarmed by Bork’s unrelenting criticisms of *Roe v. Wade*, the 1973 Supreme Court decision that first held that reproductive choice is a right protected under the Constitution. Civil rights organizations

⁶Robert H. Bork, *Adversary Jurisprudence*, THE NEW CRITERION 17 (May 2002).

⁷*Id.* at 18-19.

were aghast that Bork had opposed passage of the Civil Rights Act of 1964, one of the single most important anti-discrimination laws in U.S. history. Thus, in spite of Bork's professional credentials, and in spite of his repeated declarations that his past views would not determine his future course on the bench, he was voted down.

It is difficult to overestimate the bitterness engendered among American conservatives as a result of Bork's defeat, even more than 15 years after the event. It is now a piece of conventional wisdom on the right to observe that Bork's fate was the result of the left's new approach to the judicial confirmation process. This is how one prominent conservative commentator wrote about the event a few years ago:

Since the vote in the Senate not to confirm Bork, one of the most qualified nominees in history, the politics of law in the United States – and especially the politics surrounding judicial nominations – has been vicious.

* * *

As President Bush names his nominees to the federal courts, and as speculation grows that one or more of the justices of the Supreme Court may soon retire, there is little doubt that much of the fight will once again center on how those picked to judge will actually do so.⁸

More recently, another commentator has declared that those opposed to the Bork nomination employed a “new model” of judicial confirmation, one supposedly dreamed up by Harvard Law School professor Laurence Tribe, a leading *bete noire* of the right:

Harvard law professor Tribe is a particularly forceful proponent of an activist, results-oriented judiciary.

* * *

Professor Tribe has not only advocated such a powerful outcome-based judiciary, he has helped to shape a judicial selection process that will produce it. At a time when President Ronald Reagan was appointing restrained judges, Professor Tribe wrote his book *God Save This Honorable Court* as “a model for the Senate to follow in

⁸Gary L. McDowell, *Blessings of Liberty*, TIMES LIT. SUPP., August 31, 2000, at 26.

carrying out its constitutional duty” of “Advice and Consent” on judicial nominations. In that new model, he urged the Senate to explore “the full range of views each Justice will bring to the Court” for the purpose of determining how they, if confirmed, would rule on particular issues.

Democrats became the Senate majority in the 1986 election and, the following year, used this new model to defeat President Reagan’s nomination of Robert Bork to the Supreme Court.⁹

Indeed, conservatives have made “bork” into a verb now in frequent use in American political discourse. To bork a nominee means to defeat him or her by employing the sort of ideological demagoguery purportedly used to defeat Bork himself in 1987. Thus, after President Bush named his first batch of nominees to the federal courts, the editorial board of the arch-conservative *Wall Street Journal* opined that “Democrats are out to bork every one of them.”¹⁰

But is this view historically accurate? That is, has it been only since 1987 that the nomination and confirmation of Supreme Court Justices has been bound up with considerations of the likely results that a particular nominee will reach if placed on the bench? The answer is decidedly no; or, as one scholar puts it, “a golden age . . . when the factious whims of public opinion were ignored by Senators, when the legal qualifications

⁹Thomas L. Jipping, *Winners and Losers Versus How You Play the Game: Should Ideology Drive Judicial Selection*, 15 REGENT U. L. REV. 1, 5-6 (2002-2003).

¹⁰*A New Borking Excuse*, WALL ST. J., July 22, 2002, at A14. This editorial also asserts the supposed perfidy of liberal interests groups, especially groups dedicated to the furtherance of reproductive freedoms: “This is dirty work, but the gals at the National Abortion Rights Action League (NARAL), the National Abortion Federation and the National Organization of Women are more than up to the job.”

of nominees were considered without the taint of political motivation . . . is largely fictitious.”¹¹

Wrangling over a nominee’s ideological proclivities is a hallowed tradition because, for most of its history, the Supreme Court has addressed in its decisions some of the most pressing political issues of the day. In the early 19th century, the Court decided numerous controversial questions concerning the allocation of power between the federal and state governments – as it is now doing again. Shortly before the Civil War, the Court issued the infamous *Dred Scott* decision, which largely negated the federal government’s authority to regulate the expansion of slavery into the Western territories. Later in the century, the Court frequently sided with the interests of railroad companies and industrialists against the claims of small farmers and the nascent American labor movement. For much of the 20th century, the Court was a crucial – if inconstant – supporter of the rights of racial minorities and a protector of the freedom of the press. One need only mention here the 1954 *Brown* decision, which declared unconstitutional the system of enforced racial segregation that before then prevailed in the American South (and in a good deal more of the nation than most Americans would care to remember), and the 1963 *New York Times v. Sullivan* decision, which swept away long established precedents to place severe limitations on the ability of government officials to bring libel actions.

In all of these eras, important Court decisions produced heated responses – both positive and negative – from the public. The *Dred Scott* decision has often been identified as a proximate cause of the Civil War, the Court’s pro-business stance of the

¹¹JOHN A. MALTESE, THE SELLING OF SUPREME COURT NOMINEES 10 (1998).

late 19th century was a spur to the Populist and Progressive reform movements, and the *Brown* decision helped to make civil rights a central domestic issue of the time. Indeed, as one scholar has noted, opposition to Court decisions has been a major catalyst in the formation of a number of American political movements:

[O]pposition to the Court [has served as] a critical rallying cry around which citizens and official representatives [have] mobilized. Examples include the Populist movement's response to various procorporate decisions in the late 19th century, the white prosegregation movement defying *Brown* . . . in the 1950s, the right to life movement following *Roe v. Wade* since the 1970s, and the antipornography coalition in the 1980s.¹²

In short, the jurisprudential course of the Supreme Court itself has not infrequently become an issue in American politics.

Consequently, the Court has figured as an issue in many of the quadrennial electoral contests for the White House. An excellent recent book devoted to this subject states the matter this way:

For the Court to be in electoral contention . . . hardly seems novel, or so history suggests. After all, the Court figured prominently in the campaigns of 1968, 1980 and 1984, and was at least among the bones of contention in 1992. Put another way, an account of four of the last eight presidential contests would be strikingly incomplete without some discussion of the federal judiciary. And Court-driven electoral campaigns are hardly a recent phenomenon. The judiciary also found itself near or at the center of controversy as early as 1800 and again in 1832, 1860, 1896, 1912, 1924, and 1936.¹³

¹²Michael McCann, *How the Supreme Court Matters in American Politics*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST APPROACHES* 76 (Howard Gillman & Cornell Clayton, eds., 1999).

¹³DONALD G.R STEPHENSON JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* __ (1999).

Many presidential candidates have made statements about the ideological tenor of the individuals they will appoint to the Court should vacancies occur. And successful candidates have attempted to abide by these statements when given the chance. This has been true right from the beginning of government under the Constitution in 1789.

The 1790s were a period of constant discord between two factions, the centralizing Federalists and Thomas Jefferson's Republicans, who feared the expansion of the new federal government's power. Jefferson won the White House in the tumultuous election of 1800, and when he had his first opportunity to fill a vacancy on the Court in 1804 he explicitly sought a nominee who would counter what Jefferson saw as the Court's dangerous tendency of aggrandizing federal power. As one of Jefferson's aides candidly put it: "The importance of filling this vacancy with a Republican and a man of sufficient talents to be useful is obvious."¹⁴ Six years later, when Jefferson's collaborator James Madison was in the White House, Jefferson still felt very much the same way. In an 1810 letter to Madison written upon the death of Justice William Cushing, Jefferson gave the following advice: "The nation ten years ago declared its will for a change in the principles of the administration of their affairs. . . . The death of Cushing gives an opportunity of closing the reformation by a successor of unquestionable republican principles."¹⁵

Closer to our own time, analogous events have occurred more than once. During the early years of his presidency, Franklin Delano Roosevelt faced a Supreme Court that had ruled unconstitutional some of the central provisions of his New Deal program.

¹⁴ELLIS, *supra* note 3, at 238.

¹⁵MALTESE, *supra* note 11, at 33.

Roosevelt's denunciations of the Court's most conservative members, who were dubbed the Four Horsemen by the press, were blistering. In the end, however, he won the day by appointing staunch political allies to the Court, among whom were some of the most renowned judges in American history:

[I]n an astonishingly brief period Roosevelt gained the opportunity to remake the Court. By February 1941, all of the Four Horsemen had left the bench To succeed them, the President picked such faithful lieutenants as Solicitor General Stanley Reed, Attorney General Robert H. Jackson, and William O. Douglas of the Securities and Exchange Commission, as well as the loyal New Deal Senator Hugo Black, his close advisor, Felix Frankfurter, of the Harvard Law School, and Frank Murphy, who as governor of Michigan had enraged business elements by refusing to use force against sitdown strikers.¹⁶

And the complaints of American conservatives discussed above ignore the attitude of the Republican Party toward the Supreme Court for some years now. For the last six presidential elections, the platform of the Republican Party has included a declaration that federal judicial nominees should be individuals opposed to abortion. And during Ronald Reagan's eight years in the White House, the judicial selection process was at least as politically charged as it was during Roosevelt's tenure. Indeed, in what was perhaps an unguarded moment, Reagan's Attorney General declared that the judicial selection process would be used to "institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections."¹⁷ An internal White House memorandum drafted in 1985 set forth a number of explicitly political positions that any future Supreme Court nominee should possess, including a "disposition

¹⁶WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 220 (1995).

¹⁷MALTESE, *supra* note 11, at 123.

toward less government rather than more,” an “appreciation for the role of the free market in our society,” and “a respect for traditional values.”¹⁸

How successful have presidents been when they have attempted to place ideologically compatible nominees on the Supreme Court? Not surprisingly, the answer turns on politics. Specifically, it greatly depends on whether the Senate, which must confirm the president’s nominee, is in a state of ideological compatibility with the president. The figures here are quite stark. Over the course of the history of government under the Constitution, presidents have had an 87.9% success rate with respect to Senate confirmation of Supreme Court nominees at times when the White House and the Senate are controlled by the same political party. During times of divided government, this figure drops to 54.5%.

There is no better illustration of this reality than the facts surrounding the nomination to the Supreme Court of Robert Bork. In 1986, the year before Bork’s nomination, President Reagan had the opportunity to fill a vacancy on the Court. He named Antonin Scalia, a legal academic and then federal judge, whose credentials as a conservative were as strong as those of Bork’s. (Scalia remains on the Court today as one of its most reliably conservative Justices.) Scalia was confirmed by a Senate vote of 98-0.

The next year Bork’s nomination was defeated. President Reagan was not able successfully to fill the vacancy for which Bork had been named until he nominated a less conservative figure. Indeed, Anthony Kennedy, the federal appellate judge who became the successful nominee, had been considered by the White House for the Court before the

¹⁸David A. Yalof, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 143-44 (1999).

choice of Bork. Kennedy was rejected specifically because he was too liberal. A White House memorandum of the time stated: “[His] easy acceptance of privacy rights as something guaranteed by the Constitution is really quite disturbing.”¹⁹ But, as one scholar has correctly noted, Kennedy was confirmed precisely because he “seemed to agree that there had been a sea change in American constitutional understanding and that the Constitution now embodied penumbral, unspecified rights. . . . Judge Bork was defeated, above all, because he rejected these views on rights.”²⁰

But if Bork was defeated, why was Justice Scalia, whose views on the constitutional right to privacy, and on just about everything else, are of a piece with Bork’s, successfully confirmed? The answer is simple. At the time Scalia won unanimous confirmation, the Senate was controlled by the Republican Party, and Senate Democrats saw no useful purpose in opposing him. But in the November 1986 mid-term elections, the Democrats won back the Senate. Bork’s confirmation could be defeated, and it was.

We are quick to add here that by no means *all* presidents have put a premium on ideological compatibility when filling Supreme Court vacancies. As the titanic battle over the Bork nomination shows, nominating persons to the Court who are likely to face stiff ideological opposition can mean the useless expenditure of a lot of precious political

¹⁹*Id.* at 142.

²⁰Morton Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT L. REV. 655, 664 (1989). All four individuals nominated to the Supreme Court since Justice Kennedy, including Justice Clarence Thomas, were successfully confirmed after public affirmation of a belief in the constitutional right to privacy. Since confirmation, Justice Thomas has joined Justice Scalia in consistent opposition to abortion rights. See NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* 92 (1996).

capital. Some presidents would simply rather not risk it. The best recent example is President Bill Clinton, a Democrat who confronted a Republican majority for six of his eight years in the White House.

So how exactly were candidates nominated and confirmed during the Clinton administration? Confidential conversations with participants – in the White House, the Supreme Court, and in the advocacy community – provide some insight into the process.

Selection began with the identification of potential nominees – something of a parlor game for White House lawyers. Trusted staff drew up a list of approximately 50 names of distinguished individuals between the ages of 45 and 60, who represented different aspects of the legal profession and provided gender, racial, ethnic, and geographic diversity. The list included mostly former and current trial and appellate judges from the state and federal courts, as well as law professors, private practitioners, and a “handful” of public interest lawyers. In the Clinton years, the potential nominees were supposed to reflect the President’s ideology in a very broad sense – no extremists from either side of the political spectrum. As one insider put it: “Not Michael Luttig” (a very conservative Fourth Circuit judge), “but not Stephen Reinhardt, either” (referring to the left-winger on the Ninth Circuit).

Once the list was compiled, meetings began with the President and Vice President. Early discussions focused on the type of appointment the President wanted, rather than specific individuals. The idea was to identify the President’s criteria and then to narrow the list to 7-8 names. For each potential nominee on the short list, a 10-12-page memorandum would then be prepared, summarizing his or her background, public profile, opinions (if the candidate was a judge), speeches, and articles. President Clinton

read through all of the source materials in the file for each candidate and then the list was further narrowed to 2-3 names.

The semi-finalists were subject to more intensive vetting. White House staff personally called prominent individuals who knew the candidates and compiled the results into memoranda describing the professional reputation of each. Staff also conducted internet research into each candidate. Following this stage, the President made a tentative selection.

Staff would then meet with the candidate for 7-8 hours, going through a thorough questionnaire designed to elicit potential political minefields. Candidates were instructed to disclose all dirty laundry – if secrets were not revealed during the interviews, nominees could expect them to be published in the media during the confirmation process, to their embarrassment and that of the President. Inquiries included personal medical and mental health questions, questions about tax compliance, every job they ever held, everything they ever said, every rumor circulated about them.

The “gumshoe phase” followed the lengthy interview. Every issue that came up through the interview would be researched. Teams of volunteer lawyers would read everything they could find by and about the candidate. Staff then went back to the candidate to discuss anything that might remain controversial.

Of course, throughout the process, White House staff were mindful that all of their questions would be discoverable during the confirmation process. In Clinton’s administration, potential nominees were never asked how they would rule on any issue. Any information about the candidate’s views came from their prior writings.

When a candidate survived this thorough vetting, the President would announce the nominee. The orchestration of the “roll out” was taken very seriously. The announcement would introduce the nominee to the country, and how he or she would be perceived was very important.

With the announcement, the White House would work with the nominee on an opening statement thanking the President – scripted only to the extent that the candidate would permit – and then expect the nominee to remain silent for the next two months. The White House would find other voices to fill the void, so staff had to know in advance the nominee’s friends and enemies, who to hook up with in the news media, who would be a good spokesperson for the candidate. After the announcement, the nominee’s name would be sent to the American Bar Association and the Federal Bureau of Investigation, and the White House would anxiously wait 4-6 weeks for their reports.

During this period, the nominee was prepared for hearings before the Senate Judiciary Committee. Research was conducted on each Committee member to identify questions that had been asked in prior confirmation hearings and calls were made to the Hill to find out what interested each Senator at that time. The candidate was given transcripts and videotapes of prior hearings. As many as 7-8 mock hearings, lasting 3-4 hours each, were held. At the same time, the White House would arrange courtesy calls by candidate on both Democratic and Republican Senators, who would ask many of the same questions they would eventually ask at the hearings.

The Senate hearings are now the central element in the process of “Advice and Consent.” They are conducted partly in fulfillment of the constitutional mandate and partly as a stage show for the Senate. As many as 10 million Americans watch them on

television, creating enormous stress for the candidate, even when they are going well. Throughout the hearings, the White House remains engaged in regular conversation with supportive Judiciary Committee members and their staffs, who provide intelligence about likely questions for the nominee and how they should be understood. When questions could be identified in advance, materials would be furnished to the nominee for review prior to the hearings. Each day, when the Committee adjourned, the candidate would have dinner and then repair to additional preparatory meetings.

The White House was also intensively lobbying the Senate – directly and indirectly – throughout this period. If word came through that a particular Senator was disinclined to confirm, supportive Senators would be dispatched to persuade the potential opponent to relent. At the same time, the President engaged in “lots of hand-holding” of his own constituencies, who would in turn urge senatorial support for his nominee. The resources of the White House communications office and its office of legislative affairs, as well as a private public relations consultant, were pressed into service to secure confirmation.

Interest groups are also involved in the selection of Supreme Court Justices. Even before a nominee is announced, they collect names of likely candidates from Hill and Supreme Court reporters and other knowledgeable news sources. They examine published decisions – especially those of particular interest to the constituency represented by the group – or other written work and news articles containing quotes from the candidates. If there is little written record, they may conduct informal investigations via conversations with people familiar with the candidate. The idea is to

allow the group to make its own evaluations of the potential nominees prior to nomination.

Once the nomination is made, the groups provide an alternative source of information on the nominee for the press and the public. They issue press releases, commission op-eds from academic lawyers, and field calls from interested reporters. When the groups are politically aligned with the President, they may conduct analysis and provide criticism of attacks from the opposition. When there is no alignment, the groups seek to ensure that the full record on the candidate is available, before key reporters “jump the gun” to support the President. The groups may also prepare background reports on the nominee and draft proposed questions for like-minded Senators, which are delivered to Senate staff for consideration. During the hearings, they may analyze the nominee’s responses to questioning and make their analyses available to the press. Interest groups may also engage in direct and grassroots lobbying to secure Senatorial votes in accordance with their position on the nominee.

Interest groups working on judicial nominations may work singly or in coalition at various times during the process. After nomination, they are more likely to coordinate efforts, especially if they oppose a candidate. Leadership is often taken by groups that work on multiple issues, while single-issue advocacy organizations coordinate within their sectors. Meetings of as many as 100 advocates may result in the allocation to subcommittees of research, communications, and grassroots mobilization tasks – all with the aim of defeating confirmation. Interest groups will also work with law professors or other academics, who may be called to testify about a nominee before the Senate Judiciary Committee.

During the Clinton administration, left-leaning interest groups felt little need to organize. Clinton was so clearly attempting to de-escalate the selection process – by consulting in advance about potential nominees with leading Republican Senate Judiciary Committee members, for instance – that there was little need felt for defensive research. The ultimate nominees were so uncontroversial that there was little need for advocacy.

Indeed, it was a source of constant irritation to the American left that Clinton did not actively counteract the effects of 12 previous years of Republican control of the White House by nominating staunch liberals to the federal bench. He had the opportunity to fill Supreme Court vacancies in 1993 and 1994 and both times opted for brilliant, but moderate, nominees, who won easy Senate confirmation. When he was elected to a second term of office in 1996, one of the most liberal and outspoken members of the federal judiciary urgently asked:

Will the president, having won his “last” election, be willing to appoint at least a sprinkling of liberal judges, even if it requires him to assert leadership and expend some of his political capital in the process? Will the president make it possible for the courts to fulfill their historic role of serving as a place for intellectual debate between opposing judicial philosophies – for the testing of conflicting ideas and approaches to the law – for the fertilizing of the judicial process and the development of innovative ideas and concepts? Or, will the president opt for the safe, if muddled, middle, avoiding all controversies and settling for single-minded centrism, moderation and uniformity.²¹

Clinton opted for centrism. The safe, if muddled, middle was his chosen habitat for most everything but personal comportment. Although he never got another chance to fill a Supreme Court vacancy, his nominees to the lower federal courts remained moderate and uncontroversial. And although the Republican majority in the Senate

²¹ Stephen Reinhardt, *Liberal Judges*, FEDERAL LAWYER, February 1997, at 46.

delayed the confirmation of many of his judicial nominees simply by refusing to schedule votes to confirm them, Clinton never mounted any serious effort to speed up the process, leaving numerous vacancies to be filled by his far more ideologically driven Republican successor.

American presidents have also used the opportunity to nominate individuals to the Supreme Court for more quotidian political purposes than the strictly ideological. Simply put, Supreme Court nominations have often been driven by the need to secure popular support or to suppress potential opposition in the next presidential election.

This practice is at least as old as Abraham Lincoln. Ever the skillful politician, Lincoln won the silence of Salmon P. Chase, one of the chief opponents to his reelection, by agreeing to nominate the latter for a seat on the Court.²² In 1953 President Dwight Eisenhower similarly nominated Earl Warren for the Chief Justiceship of the Supreme Court largely in gratitude for the fact that Warren had the previous year declined to run for the White House against him. Three years later, with reelection looming, Eisenhower nominated the William Brennan – a Catholic – to the Court as a means of pleasing that crucial voting bloc. Warren and Brennan went on to have long careers on the Court, retiring in 1969 and 1990 respectively, and proved to be two of the most consistently liberal Justices in its history. In order to assuage his fellow Republicans, Eisenhower expressed dismay over his nominations of Warren and Brennan until the day he died in 1969. But he had no one to blame but himself; their ascendancy to the Court was an

²²See DAVID HERBERT DONALD, LINCOLN 535-36, 551-52 (1995).

outgrowth of the fact that Eisenhower simply did not care very much to pursue ideological prerogatives when it came to naming federal judges.²³

Ronald Reagan also used Supreme Court nominations to secure electoral support. In the 1980 presidential election, Reagan promised that he would nominate the Court's first female Justice upon his first opportunity to fill a vacancy. In 1991, he duly nominated Sandra Day O'Connor, who remains on the Court today. But O'Connor was suspect among many figures in the Reagan White House because she had not been relentlessly opposed to abortion as a state legislator or state court judge. Since her ascendancy to the Court, more than one conservative has rued the fact that Reagan missed his opportunity in 1981, when there was a Republican majority in the Senate, to nominate Robert Bork.²⁴

Electoral considerations have also figured in the nominations process of the first and second Presidents Bush. There can be no explanation for the nomination of Clarence Thomas as the replacement of Thurgood Marshall other than a clear understanding that politics required at least *one* African American on the Supreme Court bench. Although the current administration has not yet seen a vacancy on the High Court, it is widely reported that President George W. Bush seeks to be the first to nominate a Latino Supreme Court Justice. Even an administration that is actively opposing affirmative action on almost every other front cannot ignore the need to secure votes from the fastest growing ethnic constituency in the country.

²³See YALOF, *supra* note 18, at 41-69.

²⁴See TINSLEY E. YARBOROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 14-16 (2000).

There *is* one way in which the process of selecting Supreme Court Justices has changed in recent decades. That is, the process has become decidedly more public. It has only been since the mid-1950s that nominees to the Court have regularly appeared before the Senate Judiciary Committee in open hearings during which the nominee is expected to set forth his or her jurisprudential views and answer inquiries from Committee members. The hearings can turn into something of a complicated ritual. Nominees will speak broadly about matters of constitutional interpretation and about the proper role of the Supreme Court in American life, but it has been widely regarded as a violation of the principle of judicial impartiality for a nominee to make promises about how he or she would rule in certain cases if confirmed. Thus, the last several nominees to the Court have engaged in colloquies with Senators about whether the Constitution embodies a right to privacy, but no nominee has made any statement about whether or not he or she would seek to overrule *Roe v. Wade*, which is the question on every Senator's mind. Given the views recently expressed by certain Democratic Senators during the course of lower court confirmation hearings, it may soon be a question explicitly asked for the first time.

Supreme Court nominees occasionally appeared before the Judiciary Committee for open hearings before the 1950s, but these were almost all perfunctory affairs. For example, the 1939 confirmation hearings of Justice William O. Douglas took less than five minutes. But the routinization of public hearings has unquestionably increased the potential for conflict. Senator Joseph McCarthy got things going in 1957 by asking Justice William Brennan if he had ever been a member of the Communist Party, McCarthy's signature inquiry. More recently, with political party control of the federal

government so often divided or closely contested, Judiciary Committee hearings of Supreme Court nominees have become that most American of phenomena, the full-blown media event, with live television and instant commentary being the order of the day. Thus, the transcripts of Robert Bork's hearings run to well over 6,000 pages, while hearings of the 1950s and 1960s rarely take over more than a hundred.²⁵ And five years after Bork's defeat, the hearings of Justice Clarence Thomas, who had been accused of sexual harassment by a former employee, riveted the nation like nothing else so much as the murder trial of O.J. Simpson.

In conclusion, we offer a very safe prediction. After the next Justice of the Supreme Court retires, and the president names a nominee, the websites of groups for and against abortion rights, labor unions and business organizations, conservative and liberal think tanks, will within minutes be ablaze with statements as to whether the Senate should confirm that nominee. Television networks will quickly ramp up for the Judiciary Committee hearings. If the Senate is still closely divided along partisan lines, those hearings will be filled with emphatic declarations about the fate of constitutional government in the United States if that nominee should be confirmed. In sum, the process will be politically charged but not qualitatively distinct from what we have seen throughout American history. As one scholar has said in reference to the lower federal courts: "There has been a constant tension between patronage, merit and policy/ideological considerations in the appointments process. The balance that is struck

²⁵ See MALTESE, *supra* note 11, at 90-91.

has differed from administration to administration.”²⁶ The nominations process for the Supreme Court is no different.

²⁶SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 359 (1997).