

The selection of U.S. Supreme Court Justices

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Rezumat:

Procesul de selecție pentru judecătorii Curții Supreme a Statelor Unite a devenit tot mai complex. Președinții au puterea constituțională de a numi judecătorii, și, în acest sens, ei au stabilit mai multe criterii în momente diferite, inclusiv de merit profesional, compatibilitate ideologică și sprijin politic de către președinte și consilierii săi. Conform Constituției, Senatul are autoritatea de a consimți sau respinge pe cei propuși. În ultimele decenii, s-au utilizat audieri publice pentru a se stabili calificările unui candidat și, în anumite limite, atitudinile ideologice. Acest proces este extrem de politic și, ca atare, reflectă autoritatea largă a Curții Supreme de Justiție ca interpret final al Constituției, ale cărei numeroase prevederi ridică probleme extrem de contestate de o importanță politică mare. Acest articol discută aceste probleme, având în vedere numirile Curții Supreme în secolul trecut.

Abstract:

The selection process for U.S. Supreme Court justices has grown ever more complex. Presidents have the constitutional power to nominate justices, and, in doing so, they have employed several criteria at different times, including professional merit, ideological compatibility, and political support by the president and his advisers. Under the Constitution, the Senate has the authority to consent to or reject appointees. In recent decades it has used public hearings to ascertain a nominee's qualifications and, within certain limitations, the nominee's ideological attitudes. This process is intensely political and, as such, it reflects the Supreme Court's broad authority as the final interpreter of the Constitution, many of whose provisions raise highly contestable issues of great political significance. This article discusses these matters in light of Supreme Court appointments over the past century.

Keywords: U.S. Supreme Court, selection process, judicial independence, judiciary, judges, political influence

1. There have been 110 justices of the United States Supreme Court, with about thirty presidential nominations to the Court that were rejected by the Senate. But there were no new appointments from 1994 to the summer of 2005, the longest such hiatus in more than one hundred years and the second-longest period in American history



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without a change in the composition of the Court.⁷⁷

Then, rapidly, Associate Justice Sandra Day O'Connor announced her retirement in June 2005, and President George W. Bush nominated Judge John Roberts to replace her. While Judge Roberts's nomination was pending before the Senate, Chief Justice William Rehnquist died on September 3. The president then decided to nominate Judge Roberts to the succeed the chief justice's seat, and, after hearings and public debate, the Senate confirmed him by a vote of 78–22. But this left O'Connor's seat unfilled, and the president soon appointed his White House counsel, Harriet Miers, to replace O'Connor. After interviews with individual Senators, which did not proceed as well as the Bush Administration had hoped, and after criticism by several conservative groups and individuals who, while ordinarily supportive of President Bush, did not find Ms. Miers either sufficiently conservative or qualified professionally, she withdrew herself from consideration. President Bush thereupon nominated Judge Samuel Alito, who was confirmed by a vote of 58 to 42 on January 31, 2006. This flurry of activity has brought the selection process for Supreme Court justices sharply to the attention of the American public.

In this discussion I do not attempt a comprehensive review of the topic, nor do I canvass the broad and varied powers of the Supreme Court. Instead, I will discuss

the president's authority to nominate Supreme Court justices and the Senate's authority to "advise and consent" to these appointments or, by failing to consent, to defeat them.

Chief Justice Beverley McLachlin of Canada has observed that the appointment of judges to the Supreme Court of Canada appears "to respect the dual requirements of choice based on merit and preservation of judicial independence. In my own view, the goal should be to appoint individuals who embody the most valuable judicial qualities of competence, impartiality, empathy and wisdom. Unlike the appointments process for the Supreme Court of the United States, candidates are not questioned on their beliefs, their views on the law or their previous decisions."⁷⁸

Chief Justice McLachlin addresses two key elements in the Canadian system: the importance of "merit" and the exclusion of political factors, which she underscores by emphasizing "judicial independence." Merit is also considered in the U.S. appointment process, while judicial independence is protected by the constitutional provision that allows justices to remain in office permanently "during good behavior." Nevertheless, as she suggests, there are important differences between the U.S. and Canadian systems.

In the U.S., unlike in many other countries, neither the Constitution nor a statute establishes any requirement for the position of Supreme Court justice: not

⁷⁷ The longest period in American history without a change in the Court's composition was 1812–1823. Michael J. Gerhardt, 39 U. RICH. L. REV. 909, 909 (2005) (citing Charlie Savage, *Win May Bring Power to Appoint 4 Justices; Campaigns Urged to Focus on Impact*, BOSTON GLOBE, July 7, 2004, at A3 ("The decade since the confirmation of Justice Stephen Breyer is the second-longest interval without a vacancy in American history—a period just shy of the 11-year record for Supreme Court stability, from 1812 to 1823.")).

⁷⁸ Beverly McLachlin, Chief Justice of the Supreme Court of Canada, Remarks at the IACL Roundtable on the Future of the European Judicial System, *supra* note*. Less than four months after Chief Judge McLachlin spoke, the prime minister of Canada announced a change in the process, "with prospective judges now for the first time being required to face a televised parliamentary hearing before the prime minister makes his final decision to appoint." Clifford Krauss, *Canada: New Justices Will Face Public Hearings*, N.Y. TIMES, Feb. 21, 2006, at A6.

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age, not experience (judicial or otherwise), not even U.S. citizenship.⁷⁹ Indeed, there is no constitutional requirement that a federal judge, including a Supreme Court justice, be a lawyer. Nonetheless, the justices have all been lawyers, although President Franklin D. Roosevelt apparently contemplated appointing a nonlawyer to the Court during World War II.⁸⁰ Nor does the Constitution establish the size of the Supreme Court.⁸¹ Early in the Republic it became a court of nine members, but in the aftermath of the Civil War, which ended in 1865, the Congress provided for as few as seven before allowing the number to revert to nine in 1869.⁸² There it has remained, and it seems highly unlikely that Congress would again change its size.

2. What are the criteria for a presidential appointment to the Supreme Court? There are several, and each appointment ordinarily will involve more than one. The first is professional merit, which Chief Justice McLachlin emphasizes. The recent appointment of Chief Justice John Roberts is an apt example. Even those unsympathetic to his conservative philosophy acknowledged his sterling record as a lawyer for the U.S. government and in private practice, and observers were immensely impressed with his testimony before the Senate Judiciary Committee. Roberts answered difficult constitutional and jurisprudential questions without notes and without the assistance of aides, and he carefully articulated a jurisprudential philosophy without committing himself to specific outcomes.

On the other hand, as suggested above, Harriet Miers was undone in part because neither her record as a lawyer nor her conversations with senators persuaded them that she was of sufficient legal stature or adequately familiar with the complex and nuanced field of constitutional law to serve on the Court. The verdict on this point may be ungenerous to Ms. Miers. After graduating

⁷⁹ The Constitution merely states, "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." U.S. Const. art. III, x 1

⁸⁰ Arthur S. Miller & Jeffrey H. Bowman, Break the Monopoly of Lawyers on the Supreme Court, 39 Vand. L. Rev. 305, 317 (1986) ("It is a matter of historical record that Professor Edward Corwin of Princeton, not a lawyer but a highly respected constitutional scholar, thought he would be named to the Court by Franklin Roosevelt.")

⁸¹ See Lee Epstein, Jack C. Knight, Jr. & Olga Shvetsova, Comparing Judicial Selection Systems, 10 Wm. & Mary Bill Rts. J. 7, 23 (2001) (survey of twenty-seven European countries finds compulsory time limits or mandatory retirement in most places).

⁸² In 1866, for example, Congress passed the Judicial Circuits Act, which provided that the next

three justices to retire would not be replaced. The Act was intended to reduce Southern states' perceived influence on the federal government in the post-Civil War environment. With the Circuit Judges Act of 1869, the number of justices was returned to nine. See generally FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 30, 72 (Wm. W. Gaunt & Sons 1993) (1927). See also Barry Friedman, The History of the Countermajoritarian Difficulty, Part II, 91 GEO. L.J. 1, 38-40 (2002). Act of 1869, the number of justices was returned to nine. See generally FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 30, 72 (Wm. W. Gaunt & Sons 1993) (1927). See also Barry Friedman, The History of the Countermajoritarian Difficulty, Part II, 91 GEO. L.J. 1, 38-40 (2002).

from law school, she fashioned an admirable career in the private practice of law, as an elected member of the Dallas City Council, as president of the Texas Bar Association, and as a lawyer for George W. Bush, before and after he assumed the presidency. When one considers that Ms. Miers began her career about thirty-five years ago, before it was common for women to achieve the higher reaches of the profession, she had a record that of which any lawyer could be proud. The decisive element in her decision to withdraw was the opposition of right-wing Republicans who concluded that she would not be reliable on the “social” issues—including abortion, gay marriage, and voluntary end of life.

Over the years, many justices were attractive to presidents because of their high professional standing or attainments as judges or lawyers. A sample from the twentieth century (excluding current members of the Court) includes Oliver Wendell Holmes (appointed 1905), Louis Brandeis (1916), Charles Evans Hughes (1910, as associate justice, and 1930, as chief justice), Harlan Fiske Stone (1925), Benjamin Cardozo (1932), Felix Frankfurter (1939), William O. Douglas (also 1939), Wiley Rutledge (1943), John Marshall Harlan (1955), and Lewis Powell (1972).

On the other hand, there have been appointments that have conspicuously failed the test of judicial quality, including James C. McReynolds (1915), Pierce Butler (1923), Fred M. Vinson (1945), Sherman Minton (1948), and Charles E. Whittaker (1957), all of whom were confirmed by the Senate.⁸³

There are other justices who, when chosen, were widely regarded as lightweights or simply political choices, but who confounded expectations and emerged as leaders of the Court. These include George Sutherland (1922), Hugo Black (1937), and William J. Brennan (1956).

A second important basis for appointment is ideology. Presidents ordinarily seek justices who, at least in a general way, will implement the president’s legal or political philosophy. In this respect, there have been many disappointments, as justices have veered from the philosophy of the appointing president or were asked to decide new and unpredictable issues. Some examples are President Theodore Roosevelt’s appointment of Justice Oliver Wendell Holmes, President Dwight Eisenhower’s appointments of Chief Justice Earl Warren (1953) and Justice Brennan, and President Richard Nixon’s appointment of Justice Harry Blackmun (1970).

Ideological appointments tend to follow the fashion of the day. For example, in the 1930s and early 1940s, the implicit test was loyalty to President Franklin Roosevelt’s New Deal program to combat the Great Depression. In the 1950s, the standard often related to racial desegregation and the degree to which free speech and association could be reconciled with punitive governmental action against Communists and other leftists.

In recent years, presidents have concentrated on abortion and gay rights and issues of presidential power. Thus,

⁸³ These justices and a few others have been deemed “failures” in questionnaires about Supreme Court justices submitted to scholars and lawyers. See generally Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1185 (1972); ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE*

FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 50–51 (Archon Books 1978); WILLIAM D. PEDERSON & NORMAN W. PROVIZER, *GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASES* (Peter Lang 1993).

President George W. Bush has nominated committed conservatives, although Harriet Miers turned out not to be conservative enough.⁸⁴ By the same token, President Bill Clinton nominated two liberal federal judges—Ruth Bader Ginsburg and Stephen Breyer—who were considered within the judicial mainstream and not strongly opposed by Republicans. The importance of ideology will be explored further during consideration of the Senate confirmation process.

Another important element in the appointment process is whether a candidate has a political mentor who can influence the president or those who advise him. In such cases, the president may not know the nominee or know him only slightly. In 1905, President Theodore Roosevelt nominated Holmes, of Massachusetts, destined to be one of the greatest Supreme Court justices, on the recommendation of Massachusetts senator Henry Cabot Lodge. It did Holmes no harm that Lodge and Roosevelt were Harvard graduates from the highest social circles, a group to which Holmes also belonged. In midcentury, President Eisenhower selected John Marshall Harlan largely on the say-so of his attorney general, Herbert Brownell, who had been a close friend of Harlan's from their days as lawyers in New York City. Eisenhower appointed William J. Brennan, a justice on the Supreme Court of New Jersey, apparently, at least in part, on the recommendation of Arthur

Vanderbilt, chief justice of that court. In the 1980s, after President Ronald Reagan's first two choices to succeed Justice Lewis Powell failed (Robert Bork and Douglas Ginsburg), he turned to Anthony Kennedy on the recommendation of Edwin Meese, a senior member of Reagan's staff. More recently, the first President Bush nominated David Souter, who was backed by Republican senator Warren Rudman, and Clarence Thomas, a former aide to an influential Republican senator, John Danforth of Missouri. Both senators carried weight with Bush.⁸⁵

Sometimes a president is his own political mentor. This was a factor that hurt Harriet Miers, when it was suggested that Bush had exercised poor judgment because of personal loyalty to her and, therefore, had engaged in what was widely regarded as "cronyism."⁸⁶ But presidential appointments of close associates and friends have often succeeded. President Franklin D. Roosevelt appointed Felix Frankfurter, William O. Douglas, and Robert Jackson, all of whom were his advisers and frequent guests at the White House (Douglas regularly played poker with Roosevelt and Jackson sailed with him). President Harry Truman, a Democrat who acceded to the presidency when Roosevelt died in 1945, was a king of cronyism, especially favoring his former colleagues in the Senate. None of the three senators he appointed to the Court—Harold Burton (1946), Fred Vinson (1947), and Sherman

⁸⁴ John Roberts served as legal counsel to Feminists for Life, an antiabortion group. Samuel Alito was a member of the Federalist Society, a group of conservatives and libertarians. He was also affiliated with Concerned Alumni of Princeton, which opposed Princeton's affirmative action policies for women and racial minorities.

⁸⁵ John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 *CARDOZO L. REV.* 543, 556 n.35 (2005).

⁸⁶ See, e.g., Charles Krauthammer, Op-Ed., *Withdraw This Nominee*, *WASH. POST*, Oct. 7, 2005, at A23 (arguing that "If Harriet Miers were not a crony of the president of the United States, her nomination to the Supreme Court would be a joke..."); Randy E. Barnett, Op-Ed., *Cronysim: Alexander Hamilton Wouldn't Approve of Justice Harriet Miers*, *WALL ST. J.*, Oct. 4, 2005, at A26 (arguing that the core purpose of Senate confirmation of presidential nominees is to screen out the appointment of "cronies.").

Minton (1949)—nor Truman’s fourth appointee, Attorney General Tom Clark (1949), made much of a mark.

Another consideration, and often a decisive one, is a political debt owed to a nominee, even though the appointment may be meritorious in its own right. Two of Franklin Roosevelt’s nominees who cashed in a political debt were Black, a Roosevelt loyalist in the Senate during struggles over the New Deal, and Jackson, Roosevelt’s capable and effective attorney general. The political factor was dominant when Dwight Eisenhower appointed California governor Earl Warren to be chief justice in 1953. Eisenhower had struggled to win the Republican nomination for president in 1952, and he needed the support of California’s delegates at the Republican convention to prevail. Warren, the California leader at the convention, delivered these votes in exchange for a promise by Eisenhower that he would nominate Warren to fill the first vacancy on the Supreme Court. To his later regret, in light of Warren’s liberal judicial record, Eisenhower delivered on the promise even though he is said to have hesitated because his first appointment was for chief justice and not, as expected, for associate justice.⁸⁷

3. As noted above, presidential judicial nominations are subject to the Senate’s “advice and consent.” It is unclear, and usually not known, how often presidents seek the advice of senators before making an appointment, although it undoubtedly occurs at times, either because a president respects the views of particular senators or because he wants to learn how the political wind will blow on a particular nomination.

Senate hearings on the qualifications of a nominee are a natural outgrowth of the Senate’s authority to consent (or not) to a nomination, since its decision should be an informed one. This is especially important because all federal judges, including Supreme Court justices, hold their positions for life “during good behavior.” No justice has ever been removed from office under this standard, although Justice Abe Fortas resigned in 1968 under threat of impeachment because of credible allegations of financial and political corruption.

It is surprising to learn that, although congressional hearings on proposed legislation or for purposes of investigating the executive branch, go back to the mid-nineteenth century, the first Senate hearing on a Supreme Court nominee took place in 1916 regarding Louis Brandeis, who was opposed by many leaders of the bar, including several presidents of the American Bar Association. The first nominee to appear at his own confirmation hearing was probably Harlan Fiske Stone in 1925, although Stone did not testify. The Black and Frankfurter nominations in the late 1930s were moderately contentious and, after the path-breaking desegregation decision in *Brown v. Board of Education*,⁸⁸ the segregationist chairman of the Senate Judiciary Committee, James Eastland, delayed the confirmation of Justice Harlan for several months in 1955 because of the (correct) assumption that, as a justice, Harlan would support civil rights. In 1967, when Lyndon Johnson nominated Thurgood Marshall, the first African-American justice, there was sustained opposition by mainly Southern opponents of civil rights, in general, and Marshall’s record as a leading civil rights lawyer, in

⁸⁷ See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE*, 149–159 (Oxford Univ. Press 1987).

⁸⁸ 347 U.S. 483 (1954).

particular. Nonetheless, the nomination was approved overwhelmingly by a vote of 69 to 11.⁸⁹ In addition, in 1969, the Senate refused to approve two of President Nixon's nominees, Clement Haynsworth and Harold Carswell, to replace Justice Fortas after his resignation, thus opening the door for Harry Blackmun to succeed to the Fortas seat. By and large, however, the hearings on presidential nominees during this period were brief and not bitter, leading to confirmation by handy margins.

This benign pattern was dramatically disrupted in 1987 by the extensive hearings into Court of Appeals judge Robert Bork, Ronald Reagan's choice to succeed Justice Lewis Powell. Bork was eminently qualified from a professional perspective: he had been a leading law professor, he had written important law review articles on antitrust law and constitutional law, and he had served in the U.S. Justice Department, rising to the position of solicitor general, the third-ranking official. There he acquired public notoriety when he discharged the Watergate Special Counsel, Archibald Cox, at President Nixon's request, after his two superiors, the attorney general and deputy attorney general, resigned rather than take this action. But fierce dissatisfaction with Bork developed in the Senate because of his extremely conservative record, and, in particular, the fear that he would be the fifth and deciding vote to overrule *Roe v. Wade*, the leading

abortion rights decision,⁹⁰ which Justice Powell had joined.

Liberals and women's groups organized broad public opposition to Bork, and the American Civil Liberties Union (ACLU) for the first and only time aggressively fought a nomination to the Supreme Court⁹¹ on the ground that Bork was fundamentally opposed to civil liberties. The ACLU's large and active membership in all parts of the country, and its reputation in many circles for standing on principle, contributed heavily to Bork's eventual defeat by a 58–42 vote, the largest losing margin in history.⁹² The Senate Judiciary Committee engaged in long and close questioning of Bork on a wide range of constitutional issues. Bork contributed to his own demise by testimony that many regarded as condescending if not arrogant. After Bork was rejected, President Reagan nominated Judge Douglas Ginsburg to take the Powell seat. Ginsburg, formerly a professor at Harvard Law School, was undone when it became known that he purportedly had smoked marijuana with his students.⁹³ Reagan then nominated Judge Anthony Kennedy, who was speedily and unanimously confirmed. The Bork episode underscores Chief Justice McLachlin's observation that candidates for the U.S. Supreme Court, unlike nominees in Canada (at least until now), are questioned "on political process, reflecting the vast authority of the Court

⁸⁹ See John P. MacKenzie, Thurgood Marshall, in *JUSTICES OF THE UNITED STATES SUPREME COURT* Vol. IV (Leon Friedman & Fred Israel eds., Chelsea House 1969) 3063–3110; O. TAYLOR, *Two Hundred Years, an Issue: Ideology in the Nomination and Confirmation Process of Justices to the Supreme Court of the United States* 65–66 (NAACP 1987). In 2000, the only other African-American nominee, Clarence Thomas, also endured serious opposition, but it was on wholly different grounds. See *infra*, p. XX.

⁹⁰ 410 U.S. 113 (1973).

⁹¹ The ACLU had voted in 1971 to oppose the nomination of William Rehnquist and in 2006 to oppose the nomination of Samuel Alito but it did not mount campaigns in either instance.

⁹² See generally MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (Simon & Schuster 1992).

⁹³ See McLachlin, *supra* note 2. On the Bork controversy, see ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (W.W. Norton 1989).

on many constitutional issues that are widely regarded as “political.”⁹⁴

The Senate, in the early 1990s, aggressively questioned the two appointees of the first President Bush, although both were confirmed. Justice David Souter of New Hampshire was a largely unknown quantity; indeed, he was called the “stealth candidate.” Souter had engaged in no extrajudicial writing and both liberal and conservative senators were perplexed and concerned. But after a strong intellectual and personal showing before the Judiciary Committee, Souter was confirmed comfortably by a vote of 90–9. The nomination of Judge Clarence Thomas, an African-American U.S. Court of Appeals judge, to succeed civil rights icon Thurgood Marshall, was a far different matter. From the outset there was widespread doubt that Thomas had the stature to succeed Marshall, and moderates as well as liberals raised many questions about his views on abortion, civil rights, and other issues. After the Senate hearing ended, a female law professor who had been an aide to Thomas accused him of sexual improprieties, leading to further hearings that were televised and captured national attention because of the titillating nature of the subject. The Senate eventually confirmed Thomas by the narrowest margin in history, 52–48.

By contrast, President Clinton’s two appointees to the Supreme Court had nonadversarial hearings that led to prompt confirmation. Judge Ruth Bader Ginsburg,

while a law professor, had been a staff member and then a general counsel of the ACLU, a controversial organization, and she therefore could have been a highly contested choice. But Ginsburg received an endorsement from Ross Perot, a strong third-party presidential candidate in 1992 whose presence in the election had contributed to Clinton’s victory. She received an even more important boost when prominent conservative Supreme Court justice Antonin Scalia, who served with Ginsburg on the Court of Appeals for several years and had become a friend, assured leading Republicans that Ginsburg was qualified and not extreme in her views.⁹⁵ The appointment of Stephen Breyer had a similar trajectory. His main backer was the influential senator Edward Kennedy, to whom Breyer had been an aide on the Judiciary Committee while on leave from a professorship at Harvard Law School. Breyer was known and liked by the committee’s leading conservatives, Senators Orrin Hatch and Strom Thurmond, thus virtually guaranteeing Breyer a stressless hearing and easy confirmation.

An important issue at Senate hearings has been what sorts of questions are appropriate to ask nominees. It is widely accepted that it would be improper to ask how a nominee would rule on forthcoming cases, and, by extension, it has become rare for nominees to be questioned on how they would have voted on leading decided cases, including *Roe v. Wade* or the *Steel Seizure* case.⁹⁶ But it is also

⁹⁴ For a perceptive discussion of many recent nominations to the Supreme Court and citations to relevant Senate hearings, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure*, 26 *CARDOZO L. REV.* 579 (2005).

⁹⁵ Ginsburg was the second woman nominated to the court, following Sandra Day O’Connor (1981). Neither was subjected to overt sexist opposition, in part, because they were both highly

qualified and, in part, because there was a consensus that the time had arrived when a woman could and should be appointed to the Court. There has been no openly gay member of the Supreme Court.

⁹⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President Harry Truman’s “seizure” of American steel mills to assure continued production during the Korean conflict ruled unconstitutional).

tacitly agreed that senators can ask nominees to discuss their judicial philosophies, such as whether there is any right to privacy embodied in the Constitution even though privacy is not mentioned in the document. This is, of course, an indirect, and not infallible, way to learn how a nominee may vote on abortion and related cases. Similar indirections are used in connection with free speech, federalism, and other hot issues. The process is not tidy, and the line between proper and inappropriate questioning is unclear.⁹⁷

In many confirmation contests, senators, when deciding whether to support a nominee, often endure some tension in appraising the individual's professional qualifications and his or her ideological identity—sometimes referred to as the “legalist” and “political” approaches to a nomination. This tension surfaced in the recent nominations of Chief Justice Roberts and Justice Alito. Both men were widely regarded as deeply conservative and, therefore, likely to alter the direction of the Supreme Court—especially Alito, who would replace the more moderate Sandra Day O'Connor. On the other hand, Roberts and Alito were regarded as well qualified professionally, and this consideration eventually overcame some Democratic opposition to the nominations and their eventual confirmation.⁹⁸

Senate hearings are now established elements in the process of confirmation to the U.S. Supreme Court that Chief Judge McLachlin has contrasted with the

Canadian system. It may strike one as unseemly to subject nominees to such inquiries, but it is acceptable in the American context because of the vast power that Supreme Court justices wield through lifetime appointments—tenure not accorded in most other systems—which now can mean many decades of service. In these circumstances, it is desirable that both the public and the Senate have access to as much information about a candidate as can be learned without impropriety.

On the other hand, there is a broad consensus that Senate hearings, as they are now constituted, are a highly imperfect means of appraising a nominee. Senators tend to make speeches instead of probing a nominee's qualifications, and even intelligent questioning ordinarily permits the nominee to answer in generalities and avoid confrontation with the most difficult issues. Nevertheless, the current system is likely to continue because senators would not want to lose the opportunity to shine (or at least to appear) in nationally televised hearings and because nobody has come up with a plainly better alternative.⁹⁹

4. The Supreme Court is very different today than when I was a law clerk to Justice Harlan in 1957–1958. Not surprisingly, the composition of the Court has completely changed; Justice Brennan was the last survivor, retiring in 1990. Although the ideological balance has not altered on the surface—then as now (since 1994), four justices regarded as

⁹⁷ Professors Charles Fried and Ronald Dworkin engaged in a sophisticated debate on these issues in the context of the Alito nomination. *The Strange Case of Justice Alito: An Exchange*, 53 N.Y. REV. BOOKS 67 (Apr. 6, 2006).

⁹⁸ For a full discussion of the “legalist” versus “political” approaches to Supreme Court appointments, see MICHAEL COMISKEY, *SEEKING JUSTICES* (Univ. Press of Kansas 2004), discussed

in D. Grier Stephenson, Jr., *The Judicial Bookshelf*, 30 J. SUP. CT. HIST. 284, 296–298 (2005). See also Michael J. Gerhart, *Merit v. Ideology*, 26 CARDOZO L. REV. 353 (2005).

⁹⁹ DAWN E. JOHNSEN, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 476 (2005) (“The prospects for substantial change appear dim, at least for the short run.”).

liberal have struggled to attract a decisive fifth vote. But the political dial during the past half century has moved considerably closer to the conservative pole. In the earlier period, there were at least two members—Justices Douglas and Brennan—who were far more liberal than any current justice, and there was no justice as aggressively conservative then as Chief Justice Rehnquist and Justices Scalia and Thomas have been, or as Justices Roberts and Alito may be.

Another important difference is that the current Supreme Court is composed entirely of former federal judges. By contrast, during my clerkship year, only three of the justices were former federal or state judges—Harlan, Brennan, and Whittaker, with Harlan having served only about one year in a U.S. court of appeals. This change in profile is directly related, in my view, to today's far more searching appointment and confirmation process, as described in this article. Political leaders do not want to risk approving a person without a judicial record that can be used as an important predictor of behavior on the Court.

This is not surprising. Over the past half century, many justices have disappointed their sponsors by going over to the other side, as it were. Such appointees by Republican presidents include Chief Justice Earl Warren and Justices Brennan, Blackmun, Stevens, and Souter, while and other justices (O'Connor and Kennedy) have not cast reliably conservative votes on important issues. Democrats have been less bedeviled than Republicans by this so-called switching problem. A notable

(and complex) exception is Justice Frankfurter, who, after a career as a distinguished liberal law professor (and a founder of the ACLU), was regarded as a turncoat by many for failing to support civil liberties adequately, especially when harsh anticommunist measures were enacted in the 1940s and 1950s.¹⁰⁰ But Frankfurter's record is not easy to summarize in conventional categories of liberal or conservative, and his eventual performance on the Court was foreshadowed by some of his scholarly writings while a law professor¹⁰¹ and, therefore, should not have come as a complete surprise. Another Democratic appointee who might be placed in this category is Byron White. Nominated by President John F. Kennedy in 1962 and speedily confirmed, White had a mixed ideological record on the Court—never fully joining either major bloc. But he had not been touted as a liberal when appointed.

While nominating and confirming only lower court judges may assist with predictability, it means foregoing the appointment of justices with high-level experience in the executive and legislative branches and in the private practice of law. For example, in 1950, there were five former senators sitting on the Supreme Court, and now there is none. The Court's docket is varied, and the wider the range of legal and political pre-Court experience, the more likely the justices will bring informed and diverse approaches to the cases. Nor is prior judicial experience a reliable indicator of the quality of an appointment; many excellent justices

¹⁰⁰ See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382, 415 (1950) (Frankfurter, J., concurring); *Dennis v. United States*, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring); *Galvan v. Press*, 347 U.S. 522 (1954) (Frankfurter, J.).

¹⁰¹ For a discussion of whether Frankfurter, prior

to his judicial appointment, "advocated civil liberties solely or primarily as a political ideal, while taking a different stance regarding the institutional role of the Supreme Court in resisting encroachments on protected rights," see Norman Dorsen, *Book Review*, 95 HARV. L. REV. 367, 377–380 (1981).

lacked such experience, including Hughes, Brandeis, Black, Frankfurter, Douglas, Powell, and Rehnquist. What is not in doubt, as we look ahead, is that a searching and complex process of nomination and confirmation will continue as long as the Supreme Court exercises its present broad authority. There is no

indication that this will change in the foreseeable future.

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