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Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate

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Summary

The appointment of a Supreme Court Justice is an event of major significance in American politics. Each appointment is important because of the enormous judicial power the Supreme Court exercises as the highest appellate court in the federal judiciary. Appointments are usually infrequent, as a vacancy on the nine-member Court may occur only once or twice, or never at all, during a particular President's years in office. Under the Constitution, Justices on the Supreme Court receive lifetime appointments. Such job security in the government has been conferred solely on judges and, by constitutional design, helps insure the Court's independence from the President and Congress.

The procedure for appointing a Justice is provided for by the Constitution in only a few words. The "Appointments Clause" (Article II, Section 2, clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court." The process of appointing Justices has undergone changes over two centuries, but its most basic feature — the sharing of power between the President and Senate — has remained unchanged: To receive lifetime appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate. Although not mentioned in the Constitution, an important role is played midway in the process (after the President selects, but before the Senate considers) by the Senate Judiciary Committee.

On rare occasions, Presidents also have made Court appointments without the Senate's consent, when the Senate was in recess. Such "recess appointments," however, were temporary, with their terms expiring at the end of the Senate's next session. The last recess appointments to the Court, made in the 1950s, were controversial, because they bypassed the Senate and its "advice and consent" role.

The appointment of a Justice might or might not proceed smoothly. From the first appointments in 1789, the Senate has confirmed 121 out of 157 Court nominations (a 158th is now before the Senate). Of the 36 unsuccessful nominations, 11 were rejected in Senate roll-call votes, while nearly all of the rest, in the face of committee or Senate opposition to the nominee or the President, were withdrawn by the President or were postponed, tabled, or never voted on by the Senate.

Over more than two centuries, a recurring theme in the Supreme Court appointment process has been the assumed need for excellence in a nominee. However, politics also has played an important role in Supreme Court appointments. The political nature of the appointment process becomes especially apparent when a President submits a nominee with controversial views, there are sharp partisan or ideological differences between the President and the Senate, or the outcome of important constitutional issues before the Court is seen to be at stake.

This report will be updated as events warrant. See CRS Multimedia MM70010, *The Supreme Court Appointment Process*, for a video presentation using both historical pictures and motion picture footage from more recent nominations.

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Background

The appointment of a Supreme Court Justice is an event of major significance in American politics. Each appointment to the nine-member Court is significant because of the enormous judicial power that the Court exercises, separate from, and independent of, the executive and legislative branches. The appointments are usually infrequent, as a vacancy may occur only once or twice, or even never at all, during a particular President's years in office.[1]

In 2005, however, in the space of less than six months, President George W. Bush was presented with four opportunities to make Supreme Court nominations in relation to two positions on the Court. First, on July 1, 2005, Associate Justice Sandra Day O'Connor, in a letter to President Bush, announced that, after almost 24 years as a Justice, she was retiring from the Court, "effective upon the nomination and confirmation" of her successor.[2] On July 19, 2005, President Bush announced his nominee for the O'Connor position — Judge John G. Roberts, Jr., of the U.S.

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[1] During President George W. Bush's first four years in office, no vacancies occurred on the Court. During President William J. Clinton's eight years in office, two Court vacancies occurred; during George H. W. Bush's four years in office, two vacancies; during Ronald Reagan's eight years in office, four vacancies; during Jimmy Carter's four years in office, no vacancies; during Gerald R. Ford's two and a half years in office, one vacancy.

[2] At the time of her announcement, the Court's current members had served together almost 11 years — longer than any other nine-member Court in history. Only one Court membership stayed together longer — for 11 years and 44 days, during the years 1812 to 1823. At that time, the Court consisted of seven Justices, the number of Court positions then provided for by law. The Justices then on the Court were John Marshall (the Chief Justice), Bushrod Washington, William Johnson, Henry Brockholst Livingston, Thomas Todd, Gabriel Duvall, and Joseph Story. The period in which these seven Justices served together began on Feb. 3, 1812, when Justice Story took his judicial oath of office, and ended when Justice Livingston died on Mar. 13, 1823.

The more typical historical pattern, however, has been for a given Court membership to last from two to four years before being changed by a new appointment. See "Table 5-2 — Natural Courts," in Lee Epstein et al., *The Supreme Court Compendium*: *Data, Decisions & Developments*, 2nd ed. (Washington: Congressional Quarterly Inc., 1996) (hereafter cited as Epstein, *Supreme Court Compendium*), pp. 339-348, identifying the periods of time during which the successive memberships of the Court remained stable.

Court of Appeals for the District of Columbia Circuit.[3] Then, on September 3, 2005, Chief Justice William H. Rehnquist died, after having served on the Court for nearly 34 years, 19 of them as Chief Justice. Three days later, on September 6, 2005, President Bush withdrew the Roberts nomination for Associate Justice and instead nominated Roberts to be Chief Justice. That nomination, after receiving four days of hearings by the Senate Judiciary Committee (on September 12, 13, 14 and 15) was approved by the committee on September 22, 2005, by a vote of 13-5, and was approved by the full Senate on September 29, 2005, by a vote of 78-22.

On October 3, 2005, President Bush announced his nomination of White House Counsel Harriet E. Miers to succeed Justice O'Connor.[4] However, on October 27, 2005, Miers delivered a letter to the President withdrawing her nomination, and the President "reluctantly accepted" her withdrawal. (Both Miers and the President indicated that the action was precipitated by the Senate's request for documents about her service in the White House. However, others suggested that other factors may have been involved.) Four days later, on October 31, 2005, President Bush announced his nomination of Samuel A. Alito, Jr., a judge on the U.S. Court of Appeals for the Third Circuit, to replace Justice O'Connor.[5] On November 3, 2005, Senate Judiciary Committee Chairman Arlen Specter and Ranking Minority Member Patrick Leahy announced that confirmation hearings on Judge Alito's nomination would begin on January 9, 2006, with a vote by the committee scheduled for January 17, 2006. They said that the full Senate would vote on the nomination on January 20, 2006.

Under the Constitution, Justices on the Supreme Court receive lifetime appointments, holding office "during good Behaviour."[6] Such job security in the federal government is conferred solely on judges and, by constitutional design, is intended to insure the Supreme Court's independence from the President and Congress.[7] Once Justices are confirmed, a President has no power to remove them from office. A Justice may be removed by Congress, but only through the difficult and involved process of impeachment. Only one Justice has ever been impeached

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[3] On July 29, 2005, ten days after the announcement, President Bush formally nominated Judge Roberts to the Associate Justice seat.

[4] The Miers nomination was not formally received in the Senate until October 7, 2005.

[5] The Alito nomination was not formally received in the Senate until November 10, 2005.

[6] U.S. Constitution, Article III, Section 1.

[7] Alexander Hamilton, in Federalist Paper 78 ("The Judges as Guardians of the Constitution"), maintained that while the judiciary was "in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches ... , nothing can contribute so much to its firmness and independence as *permanency in office*." He added that if the courts "are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the *permanent tenure* of judicial offices, since *nothing will contribute so much as this to that independent spirit in the judges*...." (emphases added). Benjamin Fletcher Wright, ed., *The Federalist by Alexander Hamilton, James Madison, and John Jay* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1966), pp. 491 (first quote) and 494 (second quote). (Hereafter cited as Wright, *The Federalist*.)

(in an episode which occurred in 1804), and he remained in office after being acquitted by the Senate.[8] Many Justices serve for 20 to 30 years and sometimes are still on the Court decades after the President who nominated them has left office.[9]

The procedure for appointing a Justice to the Supreme Court is provided for in the Constitution of the United States in only a few words. The "Appointments Clause" in the Constitution (Article II, Section 2, Clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court."[10] While the process of appointing Justices has undergone some changes over two centuries, its most essential feature — the sharing of power between the President and the Senate — has remained unchanged: To receive lifetime appointment to the Court, one must first be formally selected ("nominated") by the President and then approved ("confirmed") by the Senate. Although not mentioned in the Constitution, an important role is also played midway in the process — after the President selects, but before the Senate as a whole considers the nominee — by the Senate Judiciary Committee. Since the end of the Civil War, almost every Supreme Court nomination received by the Senate has first been referred to and considered by the Judiciary Committee before being acted on by the Senate as a whole.

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[8] In 1804 the House of Representatives voted to impeach Justice Samuel Chase. The vote to impeach Chase, a staunch Federalist and outspoken critic of Jeffersonian Republican policies, was strictly along party lines. In 1805, after a Senate trial, Chase was acquitted after votes in the Senate fell short of the necessary two-thirds majority on any of the impeachment articles approved by the House. "Chase's impeachment and trial set a precedent of strict construction of the impeachment clause and bolstered the judiciary's claim of independence from political tampering." David G. Savage, *Guide to the U.S. Supreme Court*, 4th ed. (Washington: Congressional Quarterly Inc., 2004), vol. 1, p. 258. (Hereafter cited as Savage, *Guide to Supreme Court*.)

[9] A Supreme Court booklet, published circa 1992, noted that since the formation of the Court in 1790, there had been only 16 Chief Justices and 95 Associate Justices, "with Justices serving for an average of 15 years." U.S. Supreme Court of the United States, *The Supreme Court of the United States* (Washington: Published by the Supreme Court with the cooperation of the Supreme Court Historical Society, undated), p. 8.

[10] The decision of the framers of the Constitutional Convention of 1787 to have the President and the Senate share in the appointment of the Supreme Court Justices and other principal officers of the Government, one scholar writes, was a compromise reached between "one group of men [who] feared the abuse of the appointing power by the executive and favored appointments by the legislative body," and "another group of more resolute men, eager to establish a strong national government with a vigorous administration, [who] favored the granting of the power of appointment to the President." Joseph P. Harris, *The Advice and Consent of the Senate: A Study of the Confirmation of Appointments by the United States Senate* (Berkeley: University of California Press, 1953; reprint, New York: Greenwood Press, 1968), p. 33. (Hereafter cited as Harris, *Advice and Consent*.)

Table 1. Current Members of the Supreme Court of the United States, Including Pending Nomination

Name	State [a]	Date of birth	Appointing President	Date Senate confirmed	Vote to confirm
John G. Roberts, Jr. (Chief Justice)	Md.	Jan. 27, 1955	Bush, George W.	Sept. 29, 2005	78-22
John Paul Stevens	Ill.	Apr. 20, 1920	Ford	Dec. 17, 1975	98-0
Sandra Day O'Connor [b]	Ariz.	Mar. 26, 1930	Reagan	Sept. 21, 1981	99-0
Antonin Scalia	Va.	Mar. 11, 1936	Reagan	Sept. 17, 1986	98-0
Anthony M. Kennedy	Calif.	July 23, 1936	Reagan	Feb. 3, 1988	97-0
David H. Souter	N.H.	Sept. 17, 1939	Bush, George H.W.	Oct. 2, 1990	90-9
Clarence Thomas	Va.	June 23, 1948	Bush, George H.W.	Oct. 15, 1991	52-48
Ruth Bader Ginsburg	D.C.	Mar. 15, 1933	Clinton	Aug. 3, 1993	96-3
Stephen G. Breyer	Mass.	Aug. 15, 1938	Clinton	July 29, 1994	87-9
Samuel A. Alito, Jr.	N.J.	Apr. 1, 1950	Bush, George W.	Nomination pending [c]	

a. State of Justice's residence at time of appointment.
b. On July 1, 2005, Justice O'Connor announced her decision to retire from the Court "effective upon the nomination and confirmation" of her successor.
c. Alito was nominated on Nov. 10, 2005, to succeed Associate Justice Sandra Day O'Connor. Hearings on the nomination are scheduled to begin on January 9, 2006.

For the President, the appointment of a Supreme Court Justice can be a notable measure by which history will judge his Presidency.[11] For the Senate, a decision to

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[11] Consider, for example, President John Adams's fateful nomination in 1801 of John Marshall to be Chief Justice. During his more than 34 years of service as Chief Justice, Marshall, "more than any other individual in the history of the Court, determined the developing character of America's Federal constitutional system" and "raised the Court from its lowly, if not discredited, position to a level of equality with the executive and legislative branches." Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd ed. (New York: Oxford University Press, 1992), p. 83. (Hereafter cited as Abraham, *Justices and Presidents*.) Looking back on his appointment a quarter century before, Adams in 1826 was quoted as saying, "My gift of John Marshall to the people of the United States was the proudest act of my life." Charles

(continued...)

confirm is a solemn matter as well, for it is the Senate alone, through its "Advice and Consent" function, without any formal involvement of the House of Representatives, which acts as a safeguard on the President's judgment. Traditionally, the Senate has tended to be less deferential to the President in his choice of Supreme Court Justices than in his appointment of persons to high executive branch positions.[12] The more exacting standard usually applied to Supreme Court nominations reflects the special importance of the Court, coequal to and independent of the Presidency and Congress. Senators are also mindful that, as noted earlier, Justices — unlike persons elected to legislative office or confirmed to executive branch positions — receive lifetime appointments.[13]

The appointment of a Supreme Court Justice might or might not proceed smoothly. Since the appointment of the first Justices in 1789, the Senate has confirmed 121 Supreme Court nominations out of 157 received, not counting the pending 158th nomination, of Samuel A. Alito, Jr., to be Associate Justice.[14] Of the 36 nominations which were not confirmed, 11 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate.[15] Six of the unconfirmed

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[11] (...continued)
Warren, *The Supreme Court in United States History*, rev. edition, 2 vols. (Boston: Little Brown, 1926), vol. 1, p. 178.

[12] "By well-established custom, the Senate accords the President wide latitude in the selection of the members of his Cabinet, who are regarded as his chief assistants and advisers. It is recognized that unless he is given a free hand in the choice of his Cabinet, he cannot be held responsible for the administration of the executive branch." Harris, *Advice and Consent*, p. 259.

[13] The Senate "is perhaps most acutely attentive to its [advise and consent] duty when it considers a nominee to the Supreme Court. That this is so reflects not only the importance of our Nation's highest tribunal, but also our recognition that while Members of the Congress and Presidents come and go ..., the tenure of a Supreme Court Justice can span generations." Sen. Daniel P. Moynihan, debate in Senate on Supreme Court nomination of Ruth Bader Ginsburg, *Congressional Record*, vol. 139, Aug. 2, 1993, p. 18142.

[14] See Savage, *Guide to Supreme Court*, pp. 1186-1189, which contain table, entitled "Supreme Court Nominations, 1789-2003." The table lists all confirmations to the Court for the period 1789-2003, including those of seven individuals who were confirmed but declined to serve and one who was confirmed but died before he could take his seat. Subsequent to the time period covered by this table, four more Supreme Court nominations have been received by the Senate. Of these, two were withdrawn (Roberts for Associate Justice and Miers), one was confirmed (Roberts for Chief Justice), and one is pending (Alito).

[15] The first rejection by the Senate of a Supreme Court nominee occurred on Dec. 15, 1795, when the Senate voted 14 to 10 not to confirm President George Washington's nomination of John Rutledge of South Carolina to be Chief Justice. See **Table 2** in the following pages of this report, listing all 35 Supreme Court nominations not confirmed by the Senate. For more complete information about Supreme Court nominations not confirmed by the Senate, including dates of relevant activity and votes in the Senate Judiciary Committee and the full Senate, see CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2001*, (continued...)

nominations involved individuals who subsequently were re-nominated and confirmed.[16]

From the presidency of George Washington until early in the twentieth century, the Senate took final action on the vast majority of Supreme Court nominations

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[15] (...continued)
by Henry B. Hogue. For short narratives regarding the Rutledge confirmation defeat and 25 subsequent Supreme Court nominees who failed to gain Senate confirmation, see J. Myron Jacobstein and Roy M. Mersky, *The Rejected* (Milpitas, California: Toucan Valley Publications, 1993), 188 p. (Hereafter cited as Jacobstein and Mersky, *The Rejected*.)

[16] The first Supreme Court nominee to be re-nominated and confirmed after his first nomination failed to be confirmed was William Paterson of New Jersey in 1793. Paterson was first nominated on Feb. 27, 1793, by President George Washington. The President, however, withdrew the nomination a day later, citing a constitutional technicality. In his withdrawal message (U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, vol. 1, p. 135), President Washington indicated that the nomination was in violation of Article I, Section 6 of the Constitution, which provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office ..., which shall have been created ... during such time ...." Paterson had been a member of the Senate when the Judiciary Act of 1789 was passed, creating the Associate Justice position to which Washington nominated Paterson in February 1793. Though Paterson had resigned from the Senate in 1790, the Senate term to which he had been elected would not conclude until March 3, 1793. Washington re-nominated Paterson on March 4, 1793, and later that day a special session of the Senate of a new Congress confirmed the nominee by voice vote.

Another Court nominee to be re-nominated and then confirmed was Pierce Butler of Minnesota, in 1922. Butler was first nominated by President Warren G. Harding on Nov. 23, 1922, during the 3rd session of the 67th Congress. Although reported favorably by the Judiciary Committee, the nomination failed to be confirmed before the end of the 3rd session. President Harding re-nominated Butler on Dec. 5, 1922, during the 4th session of the 67th Congress, and shortly thereafter, on Dec. 22, 1922, the Senate confirmed Butler by a 61-8 roll-call vote.

A third Court nominee to be re-nominated and then confirmed was John M. Harlan II of New York. Harlan was first nominated by President Dwight D. Eisenhower on Nov. 9, 1954, but the nomination received no action in the Senate before the the final adjournment of the 83rd Congress less than a month later. President Eisenhower re-nominated Harlan on Jan. 10, 1955, at the beginning of the 84th Congress, and shortly thereafter, on Mar. 16, 1955, the Senate confirmed Harlan by a 71-11 roll call vote.

Two other nominees who were not confirmed the first time only to be later re-nominated and confirmed received Senate confirmation in spite of significant Senate opposition. One was Roger B. Taney, nominated twice by President Andrew Jackson in 1835, and Stanley Matthews, nominated first by President Rutherford B. Hayes in 1881 and by President James A. Garfield, later in 1881. Taney's first nomination, to Associate Justice, was postponed indefinitely by the Senate. During the next Congress, he was re-nominated and confirmed as Chief Justice by a 29-15 roll-call vote in the Senate. Mathews' first nomination was never reported out of committee, but in the following Congress, under a new President, he was re-nominated and confirmed by a 24-23 roll-call vote.

The final nominee not confirmed but later renominated and confirmed was current Chief Justice John G. Roberts. As noted previously in this report, Judge Roberts was first nominated to replace Associate Justice Sandra Day O'Connor, but when Chief Justice Rehnquist died unexpectedly, President Bush withdrew his nomination and resubmitted it for the position of Chief Justice.

within one week of receiving them. In recent decades, by contrast, the Senate has tended to proceed much more slowly. From 1967 through 1994 (the year of the most recent Supreme Court appointment), 12 out of 19 Court nominations received by the Senate were pending in the Senate for more than nine weeks before receiving final action. The contemporary Senate inclination to proceed more slowly with Supreme Court nominations has been due at least in part to several developments:

- Starting with the "Warren Court" in the 1950s (under then-Chief Justice Earl Warren), the Supreme Court became an ongoing focal point of controversy, as it handed down a succession of rulings ushering in profound changes in American society and politics. By the late 1960s, the perceived potency of the Court as a catalyst for change underscored to many Senators, especially those on the Judiciary Committee, the importance of closely evaluating the attitudes and values of persons nominated to serve on the Court.

- A general trend among Senate committees in the 1970s and 1980s was to intensify their scrutiny of presidential nominations and to augment their investigative staffs for this purpose. Thorough and unhurried examination was regarded as especially justified in the case of Supreme Court nominations. Accordingly, close scrutiny by the Senate Judiciary Committee became the norm, even if a nominee were highly distinguished and untouched by controversy.

- Many, if not most, of the nominees in recent decades proved to be controversial because of questions raised concerning their backgrounds, qualifications, or ideological orientation.

- It has become increasingly common for Presidents to state the philosophical or ideological values that they look for in a Supreme Court nominee — a practice which may immediately raise concerns about the nominee on the part of Senators who do not share the President's philosophical preferences or vision for the Court.

- Many Court appointments in recent decades were made during times of "divided government," when one political party controlled the White House and the other was in the majority in the Senate.

- The frequency of 5-4 decisions by the Court has underscored to Senators how important even just one new appointment might be for future Court rulings.

President's Selection of a Nominee

The need for a Supreme Court nominee arises when a vacancy occurs on the Court, due to the death, retirement, or resignation of a Justice (or when a Justice

announces the intention to retire or resign).[17] It then becomes the President's constitutional responsibility to select a successor to the vacating Justice.[18]

The Role of Senate Advice

Constitutional scholars have differed as to how much importance the framers of the Constitution attached to the word "advice" in the phrase "advice and consent." The framers, some have maintained, contemplated the Senate performing an advisory, or recommending, role to the President prior to his selection of a nominee, in addition to a confirming role afterwards.[19] Others, by contrast, have insisted that the Senate's "advice and consent" role was meant to be strictly that of determining, after the President's selection had been made, whether to approve the President's choice.[20] Bridging these opposing schools of thought, another scholar recently asserted that the "more sensible reading of the term 'advice' is that it means that the Senate is constitutionally entitled to give advice to a president on whom as well as what kinds of persons he should nominate to certain posts, but this advice is not binding."[21] Historically, the degree to which Senate advice has been sought or used has varied, depending on the President.

It is a common, though not universal, practice for Presidents, as a matter of courtesy, to consult with Senate party leaders as well as with members of the Senate

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[17] As noted above, a Supreme Court vacancy also would occur if a Justice were removed by Congress through the impeachment process, but no Justice has ever been removed from the Court in this way. For a comprehensive review of how and why past Supreme Court Justices have left the Court, see Artemus Ward, *Deciding To Leave: The Politics of Retirement from the United States Supreme Court* (Albany, NY: State University of New York Press, 2003), pp. 25-223. Ward, in introduction at p. 7, explains that his book, among other things, examines the extent to which Justices, in their retirement decisions, have been "motivated by strategic, partisan, personal, and institutional concerns."

[18] For a book-length examination of how Presidents since World War II have selected nominees to serve on the Supreme Court, see David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999), 296 p. (Hereafter cited as Yalof, *Pursuit of Justices*.)

[19] See, for example, John Ferling, "The Senate and Federal Judges: The Intent of the Founding Fathers," *Capitol Studies*, vol. 2, Winter 1974, p. 66: "Since the convention acted at a time when nearly every state constitution, and the Articles of Confederation, permitted a legislative voice in the selection of judges, it is inconceivable that the delegates could have intended something less than full Senate participation in the appointment process."

[20] See, for example, Harris, *Advice and Consent*, p. 34: "The debates in the Convention do not support the thesis since advanced that the framers of the Constitution intended that the President should secure the advice — that is, the recommendations — of the Senate or of individual members, before making a nomination."

[21] Michael J. Gerhardt, *The Federal Appointments Process* (Durham, NC: Duke University Press, 2000), p. 33. The Constitution, Gerhardt adds, "does not mandate any formal prenomination role for the Senate to consult with the president; nor does it impose any obligation on the president to consult with the Senate prior to nominating people to confirmable posts. The Constitution does, however, make it clear that the president or his nominees may have to pay a price if he ignores the Senate's advice." Ibid.

Judiciary Committee before choosing a nominee.[22] Senators who candidly inform a President of their objections to a prospective nominee may help in identifying shortcomings in that candidate or the possibility of a confirmation battle in the Senate, which the President might want to avoid. Conversely, input from the Senate might draw new Supreme Court candidates to the President's attention, or provide additional reasons to nominate a person who already is on the President's list of prospective nominees.[23]

As a rule, Presidents are also careful to consult with a candidate's home-state Senators, especially if they are of the same political party as the President. The need for such care is due to the longstanding custom of "senatorial courtesy," whereby Senators, in the interests of collegiality, are inclined, though not bound, to support a Senate colleague who opposes a presidential nominee from that Member's state. While usually invoked by home-state Senators to block lower federal court nominees whom they find unacceptable, the custom of "senatorial courtesy" has sometimes also played a part in the defeat of Supreme Court nominations.[24]

Besides giving private advice to the President, Senators may also counsel a President publicly. A Senator, for example, may use a Senate floor statement or issue a statement to the news media indicating support for, or opposition to, a potential Court nominee, for the purpose of attracting the President's attention and influencing the President's choice.[25]

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[22] "To a certain extent, presidents have always looked to the Senate for recommendations and subsequently relied on a nominee's backers there to help move the nomination through the Senate." George L. Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York, HarperCollins College Publishers, 1995), p. 78. (Hereafter cited as Watson and Stookey, *Shaping America*.)

[23] President William Clinton's search for a successor to retiring Justice Harry A. Blackmun, during the spring of 1994, is illustrative of a President seeking and receiving Senate advice. According to one report, the President, as he came close to a decision after holding his options "close to the vest" for more than a month, "began for the first time to consult with leading senators about his top candidates for the Court seat and solicited advice about prospects for easy confirmation." The advice he received included "sharp Republican opposition to one of his leading choices, Interior Secretary Bruce Babbitt." Gwen Ifill, "Clinton Again Puts Off Decision on Nominee for Court," *The New York Times*, May 11, 1994, p. A16.

[24] "Numerous instances of the application of senatorial courtesy are on record, with the practice at least partially accounting for rejection of several nominations to the Supreme Court." Henry J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, new and rev. ed. (New York: Rowman & Littlefield Publishers, 1999), pp. 19-20. (Hereafter cited as Abraham, *Justices, Presidents and Senators*.) Senatorial courtesy, Abraham writes, appeared to have been the sole factor in President Grover Cleveland's unsuccessful nominations of William B. Hornblower (1893) and Wheeler H. Peckham (1894), both of New York. Each was rejected by the Senate after Senator David B. Hill (D-NY) invoked senatorial courtesy.

[25] In 1987, for instance, some Senators publicly warned President Ronald Reagan that he could expect problems in the Senate if he nominated U.S. appellate court judge Robert H. Bork to replace vacating Justice Lewis F. Powell. Among them, Sen. Robert C. Byrd, D-

(continued...)

Advice from Other Sources

Advice, it should be noted, may come to Presidents not only from the Senate but from many other sources. One key source of influence may be high-level advisers within the President's Administration.[26] Others who may provide advice include House Members, party leaders, interest groups, news media commentators, and, periodically, Justices already on the Court.[27] Presidents are free to consult with, and receive advice from, whomever they choose.

Criteria for Selecting a Nominee

While the precise criteria used in selecting a Supreme Court nominee vary from President to President, two general motivations appear to underlie the choices of almost every President. One is the desire to have the nomination serve the President's political interests (in the partisan and electoral senses of the word "political," as well as in the public policy sense); the second is to demonstrate that a search was successfully made for a nominee having the highest professional qualifications.

Virtually every President is presumed to take into account a wide range of political considerations when faced with the responsibility of filling a Supreme Court vacancy. For instance, most Presidents, it is assumed, will be inclined to select a nominee whose political or ideological views appear compatible with their own. "Presidents are, for the most part, results-oriented. This means that they want

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[25] (...continued)
WV, said the Reagan Administration would be "inviting problems" by nominating Bork. The chair of the Senate Judiciary, Joseph R. Biden Jr. (D-DE), said that, while Bork was a "brilliant man," it did "not mean that there should be six or seven or eight or even five Borks" on the Court. Helen Dewar and Howard Kurtz, "Byrd Threatens Stall on Court Confirmation," *The Washington Post*, June 30, 1987, p. A7. In what was regarded as a thinly veiled reference to a possible Bork nomination, Senate Majority Whip Alan Cranston (D-CA) called on Senate Democrats to form a "solid phalanx" to block an "ideological court coup" by President Reagan. Al Kamen and Ruth Marcus, "Nomination to Test Senate Role in Shaping of Supreme Court," *The Washington Post*, July 1, 1987, p. A9. In spite of these warning signs, President Reagan nominated Judge Bork, only to have the nomination meet widespread Senate opposition and ultimate Senate rejection.

[26] Modern Presidents, one scholar writes, "are often forced to arbitrate among factions within their own administrations, each pursuing its own interests and agendas." In recent Administrations, he maintains, the final choice of a nominee "has usually reflected one advisor's hard-won victory over his rivals, without necessarily accounting for the president's other political interests." Yalof, *Pursuit of Justices*, p. 3.

[27] For numerous examples of Justices advising Presidents regarding Supreme Court appointments, both in the nineteenth and twentieth centuries, see Abraham, *Justices, Presidents and Senators*, pp. 21-23; see also in Abraham's earlier work, *Justices and Presidents*, pp. 186-187 (Chief Justice William Howard Taft's influence over President Warren G. Harding); pp. 233-234 (Justice Felix Frankfurter's advice to President Franklin D. Roosevelt); pp. 243 (former Chief Justice Charles Evans Hughes' and former Justice Owen J. Roberts's advice to President Harry S. Truman); pp. 305-306 (Chief Justice Warren Burger's advice to President Richard M.Nixon).

Justices on the Court who will vote to decide cases consistent with the president's policy preferences."[28] The President also may consider whether a prospective nomination will be pleasing to the constituencies upon whom he especially relies for political support or whose support he would like to attract. For political or other reasons, such nominee attributes as party affiliation, geographic origin, ethnicity, religion, and gender may also be of particular importance to the President.[29] A President also might take into account whether the existing "balance" among the Court's members (in a political party, ideological, demographic, or other sense) should be altered. Another consideration will be the prospects for a potential nominee receiving Senate confirmation. Even if a controversial nominee is believed to be confirmable, an assessment must be made as to whether the benefits of confirmation will be worth the costs of the political battle to be waged.[30]

Most Presidents also want their Supreme Court nominees to have unquestionably outstanding legal qualifications. Presidents look for a high degree of merit in their nominees not only in recognition of the demanding nature of the work that awaits someone appointed to the Court,[31] but also because of the public's expectations that a Supreme Court nominee be highly qualified.[32] With such

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[28] Watson and Stookey, *Shaping America*, pp. 58-59.

[29] Considerations of geographic representation, for example, influenced President George Washington in 1789, to divide his first six appointments to the Court between three nominees from the North and three from the South. See Watson and Stookey, *Shaping America*, p. 60, and Abraham, *Justices, Presidents, and Senators*, pp. 59-60. President Ronald Reagan in 1981, for example, was sensitive to the absence of any female Justices on the Court. In announcing his choice of Sandra Day O'Connor to replace vacating Justice Potter Stewart, President Reagan noted that "during my campaign for the Presidency, I made a commitment that one of my first appointments to the Supreme Court vacancy would be the most qualified woman that I could possibly find." U.S. President (Reagan), "Remarks Announcing the Intention To Nominate Sandra Day O'Connor To Be an Associate Justice of the Supreme Court of the United States, July 7, 1981," *Public Papers of the Presidents of the United States, Ronald Reagan, 1981* (Washington: GPO, 1982), p. 596

[30] While the "desire to appoint justices sympathetic to their own ideological and policy views may drive most presidents in selecting judges," the field of potentially acceptable nominees for most presidents, according to Watson and Stookey, is narrowed down by at least five "subsidiary motivations" — (1) rewarding personal or political support, (2) representing certain interests, (3) cultivating political support, (4) ensuring a safe nominee, and 5) picking the most qualified nominee. Watson and Stookey, *Shaping America*, p. 59.

[31] Commenting on the nature of the Court's work, and the degree of qualification required of those who serve on the Court, the American Bar Association, in a recently published booklet, said the following: "The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability." American Bar Association, *The ABA Standing Committee on Federal judiciary; What It Is and How it Works*, pp. 9-10, [http://www.abanet.org/scfedjud/], visited June 18, 2003.

[32] One of the "unwritten codes," two scholars on the judiciary have written, "is that a judicial appointment is different from run-of-the-mill patronage. Thus, although the political rules may allow a president to reward an old ally with a seat on the bench, even

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expectations of excellence, Presidents often present their nominees as the best person, or among the best persons, available.[33] Many nominees, as a result, have distinguished themselves in the law (as lower court judges, legal scholars, or private practitioners) or have served as Members of Congress, as federal administrators, or as Governors.[34] Although neither the Constitution nor federal law requires that a Supreme Court Justice be a lawyer, every person nominated to the Court thus far has been.[35] A President's search for excellence in a nominee, however, rarely proceeds without also taking political factors into account. Rather, "more typically," a President "seeks the best person from among a list of those who fulfill certain of these other [political] criteria and, of course, who share a president's vision of the nation and the Court."[36]

Closely related to the expectation that a Supreme Court nominee have excellent professional qualifications are the ideals of integrity and impartiality in a nominee. Most Presidents presumably will be aware of the historical expectation, dating back to Alexander Hamilton's pronouncements in the *Federalist Papers*, that a Justice be a person of integrity who is able to approach cases and controversies impartially, without personal prejudice.[37] In that same spirit, a bipartisan study commission on

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[32] (...continued)
here tradition has created an expectation that the would-be judge have some reputation for professional competence, the more so as the judgeship in question goes from the trial court to the appeals court to the Supreme Court level." Robert A. Carp and Ronald A. Stidham, *Judicial Process in America*, 3rd ed. (Washington: CQ Press, 1996), pp. 240-241.

[33] President Gerald R. Ford, for example, said he believed his nominee, U.S. appellate court judge John Paul Stevens "to be best qualified to serve as an Associate Justice of the Supreme Court." U.S. President (Ford), "Remarks Announcing Intention To Nominate John Paul Stevens to Be an Associate Justice of the Supreme Court, November 28, 1975," *Public Papers of the Presidents of the United States; Gerald R. Ford; 1975*, Book II (Washington: GPO, 1977), p. 1917. Similarly, in 1991, President George H. W. Bush said of nominee Clarence Thomas, "I believe he'll be a great justice. He is the best person for this position." U.S. President (Bush, George H.W.), "The President's News Conference in Kennebunkport, Maine, July 1, 1991," *Public Papers of the President of the United States*; *George Bush; 1991*, Book II (Washington: GPO, 1992), p. 801.

[34] For lists of the professional, educational, and political backgrounds of every Justice who has served on the Court, see Epstein, *Supreme Court Compendium*, pp. 252-303.

[35] A legal scholar notes that while the Constitution "does not preclude a president from nominating nonlawyers to key Justice Department posts or federal judgeships," the delegates to the constitutional convention and the ratifiers "did occasionally express their expectation that a president would nominate qualified people to federal judgeships and other important governmental offices; but those comments were expressions of hope and concern about the consequences of and the need to devise a check against a president's failure to nominate qualified people, particularly in the absence of any constitutionally required minimal criteria for certain positions." Gerhardt, *Federal Appointments Process*, p. 35.

[36] Watson and Stookey, *Shaping America*, p. 64.

[37] In Federalist Paper 78 ("Judges as Guardians of the Constitution"), Hamilton extolled the "benefits of the integrity and moderation of the Judiciary," which, he said, commanded "the esteem and applause of all the virtuous and disinterested." Further, he maintained, there
(continued...)

judicial selection in 1996 declared that it was "most important" to appoint judges who were not only learned in the law and conscientious in their work ethic but who also possessed "what lawyers describe as 'judicial temperament.'" This term, the commission explained, "essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result."[38] Accordingly, Presidents sometimes will cite the integrity or fairness of Supreme Court nominees to buttress the case for their appointment.[39]

Background Investigations

An important part of the selection process involves investigating the background of prospective nominees. In recent years the investigative effort generally has followed two primary tracks — one concerned with the public record and professional credentials of a person under consideration, the other with the candidate's private background. The private background investigation, which includes examination of a candidate's personal financial affairs, is conducted by the Federal Bureau of Investigation (FBI). The investigation into a candidate's public record and professional abilities ordinarily is headed by high Justice Department officials, White House aides, or both, working together.

The investigatory process may be preliminary in nature when the object is to identify potential candidates and consider their relative merits based on information already known or readily available. The investigations become more intensive as the list is narrowed. The object then becomes to learn as much as possible about the prospective nominees — to accurately gauge their qualifications and their compatibility with the President's specific requirements for a nominee, and, simultaneously, to flag anything in their backgrounds that might be disqualifying or jeopardize their chances for Senate confirmation. For help in evaluating the backgrounds of Court candidates, Presidents sometimes also have enlisted the assistance of private lawyers,[40] legal scholars,[41] or the American Bar Association

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[37] (...continued)
could "be but few men" in society who would "unite the requisite integrity with the requisite knowledge" to "qualify them for the stations of judges." Wright, *The Federalist*, pp. 495 (first quote) and 496 (second quote).

[38] *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges*, Miller Center of Public Affairs (Charlottesville, VA: University of Virginia, May 1996), p. 10.

[39] For example, President George H. W. Bush, in announcing the nomination of David H. Souter to be an Associate Justice in 1990, declared that he wanted "a Justice who will ably and fairly interpret the law," then added "I believe that we've set a good example of selecting a fair arbiter of the law." U.S. President (Bush, George H.W.), "Remarks Announcing the Nomination of David H. Souter To be an Associate Justice of the Supreme Court of the United Sates and a Question-and-Answer Session with Reporters," *Public Papers of the President of the United State*s; *George Bush; 1990*, Book II (Washington: GPO, 1991), p. 1047.

[40] Perhaps the most extensive use of private attorneys for this purpose was made by President William J. Clinton in the spring of 1993 during his consideration of candidates to (continued...)

(ABA).[42] Near the culmination of this investigative effort, the President may want to personally meet with one or more of the candidates before finally deciding whom to nominate.

During the pre-nomination phase, Presidents vary in the degree to which they publicly reveal the names of individuals under consideration for the Court. Sometimes, Presidents seek to keep confidential the identity of their Court candidates. Such secrecy may allow a President to reflect on the qualifications of prospective nominees, and the background investigations to proceed, away from the glare of publicity, news media coverage, and outside political pressures. Other times, the White House may, at least in the early pre-nomination stage, reveal the names of Supreme Court candidates being considered. Such openness may be intended to serve various purposes — among them, to test public or congressional reaction to potential nominees, please political constituencies who would identify with identified candidates, or demonstrate the President's determination to conduct a comprehensive search for the most qualified person available.

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[40] (...continued)
fill the Supreme Court seat of retiring Justice Byron White. President Clinton, it was reported, utilized a team of 75 lawyers in the Washington, D.C. area, which "pore[d] over briefs," analyzed "mountains of opinions and speeches" and "comb[ed] through financial records," of the "final contenders" for the Court appointment — from whom the President ultimately selected U.S. appellate court judge Ruth Bader Ginsburg. The team funneled their analyses to the White House counsel, "who, along with other aides, advised the president during the search for a justice." Under the team's ground rules, its work was performed on a confidential basis, with contact between its lawyers and White House aides prohibited. Private attorneys were relied on in this way at least partly because, at that early point in the Clinton Presidency, a judicial search team for the Administration was not yet in place in the Department of Justice. Daniel Klaidman, "Who Are Clinton's Vetters, and Why the Big Secret?" *Legal Times*, vol. 16, June 21, 1993, pp. 1, 22-23.

[41] "During President Gerald R. Ford's search to fill a high court vacancy, Attorney General Edward Levi discreetly asked a small group of distinguished constitutional scholars to review opinions and other legal writings of a number of candidates." Ibid. (Klaidman), p. 23.

[42] From the early 1950s through the 1990s, the ABA's Standing Committee on Federal Judiciary played a quasi-official evaluating role to every President regarding the qualifications of prospective nominees to the lower federal courts (providing its evaluations of judicial candidates to the White House via the Department of Justice). Three Presidents, each on at least one occasion, submitted to the ABA committee the names of prospective Supreme Court candidates as well (Dwight D. Eisenhower in 1957, Richard M. Nixon in 1971, and Gerald R. Ford in 1975). The committee, however, was unsuccessful in efforts to secure from Presidents a permanent role in evaluating potential Supreme Court nominees. See generally CRS Report 96-446, *The American Bar Association's Standing Committee on Federal Judiciary: A Historical Overview*, by Denis Steven Rutkus (available from author; hereafter cited as Rutkus, *ABA Historical Overview*), 61 p., for a narrative tracing the evolution of the ABA committee's role from the 1940s to 1995, and specifically pp. 8-9, 31-32 and 35 regarding its role in advising Eisenhower, Nixon, and Ford, respectively. See also Amy Goldstein, "Bush Curtails ABA Role in Selecting U.S. Judges," *The Washington Post*, March 23, 2001, pp. A1, A12, regarding the decision of President George W. Bush to discontinue the ABA committee's longstanding role in pre-nomination evaluations of lower court candidates.

Speed with Which President Selects Nominees

When a Supreme Court vacancy occurs, Presidents usually move quickly, often selecting their nominee within a week of the vacancy being announced.[43] A President may be well positioned to make a quick announcement when a retiring Justice alerts the President beforehand (thus giving the President lead time, before the vacancy occurs, to consider whom to nominate as a successor). Even when receiving no advance warning from an outgoing Justice, the President may already have in hand a "short list," prepared precisely for the event of a Court vacancy, of persons already evaluated and acceptable to the President for the appointment. If the President has a strong personal preference for a particular individual, nominating the person quickly preempts the issue of whether someone else should be nominated. Rather than focus on a range of individuals who should be considered for the Supreme Court, the appointment process moves to the next stage, to the question of whether that individual should be confirmed.

Selecting a Supreme Court nominee quickly, however, may sometimes have drawbacks. A President may be accused of charging ahead with a nominee without having first adequately consulted with the Senate, or without having taken the time necessary to determine who really would make the best nominee. Also, quick announcements might not allow time for the FBI to conduct a comprehensive background investigation prior to nomination, leaving open the possibility of unfavorable information about the nominee coming to light later.[44]

The speed with which a President chooses a nominee also can be affected by when a seat on the Court is vacated. Sometimes, Justices might announce their retirement when the Court concludes its annual term, in late June or early July, giving the President little or no advance notice. In such situations, a President might decide to nominate quickly, to allow the Senate confirmation process to begin as quickly as possible. A swiftly made nomination, in such a circumstance, affords the Senate

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[43] Presidents Ronald Reagan and George H. W. Bush, for instance, selected most of their Supreme Court nominees quickly, within days of the vacating Justices announcing their retirements from the Court. President William J. Clinton, however, took more time in selecting his two Supreme Court nominees, nominating Ruth Bader Ginsburg in 1993 two months after the retirement announcement of Justice Byron R. White and nominating Stephen G. Breyer in 1994 five weeks after the retirement announcement of Harry A. Blackmun.

[44] It is "precisely when presidents fail to require thorough checks," two scholars have written, "that trouble is likely." As illustrative, they cite the FBI investigation of President Richard M. Nixon's Supreme Court nominee Clement F. Haynsworth, Jr. in 1969. "Unfortunately for both Haynsworth and the president, the cursory FBI check left unrevealed questions of financial dealings and conflicts of interest that would eventually doom the nomination. Without learning from the first mistake, the Nixon Administration rushed headlong into another hurried selection, Harrold Carswell, without full knowledge of flaws that would prove fatal in his background. A similar failure occurred as the Reagan administration rushed to bring forth a nominee in the wake of the Bork defeat. In this instance, the rushed investigation failed to uncover the marijuana episodes of Douglas Ginsburg, which led to another presidential setback in the appointment process." Watson and Stookey, *Shaping America*, p. 82.

Judiciary Committee and the Senate as long as three months (July through September) in which to consider the nomination before the start of the Court's term in early October, thereby increasing the chances of the Court being at full nine-member strength when it reconvenes.

The President, however, is not obligated to nominate quickly, and other considerations might provide reasons for not doing so. For instance, from the President's standpoint, a nomination made in late June or early June, might, if followed by the scheduling of confirmation hearings by the Judiciary Committee as late as September, afford too much time in between (i.e., in July and August) for the nominee to be exposed to potential criticism by Senate or other opponents. A desire to minimize this exposure time for the nominee might cause a President to consider nominating later in the summer, putting more of the onus to act expeditiously on the Senate, if the Court is to be back at full strength when it reconvenes in October.

Sometimes, when Justices give advance notice of their intention to retire, Presidents might be under relatively little pressure to nominate quickly. In the spring of 1993, for example, Justice Byron R. White announced he would step down when the Court adjourned for the summer. His advance notice gave President William J. Clinton and the Senate together more than six months in which, respectively, to nominate and confirm a successor before the beginning of the Court's next term in October.[45] A year later, in the spring of 1994, Justice Harry A. Blackmun announced his intention to retire at the end of the Court term then in progress, again affording the President and the Senate ample time to appoint a successor to a retiring Justice before the start of the next Court term.[46]

Recess Appointments to the Court

On 12 occasions in our nation's history (most of them in the 19th century), Presidents have made temporary appointments to the Supreme Court without submitting nominations to the Senate. These occurred when Presidents exercised

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[45] Days after Justice White's retirement announcement on March 19, 1993, one newspaper reported that, while President Clinton had "an interest in a swift nomination so he can move on to other priorities, White's early notice gives him weeks, even months, to complete the selection process." Joan Biskupic, "Promises, Pressure in Court Search," *The Washington Post*, March 21, 1993, p. A1. The President ultimately nominated a successor to Justice White, U.S. circuit judge Ruth Bader Ginsburg, on June 22, 1993, and the Senate confirmed that nomination on August 3, 1993.

[46] Justice Blackmun himself was reported to have told friends "he wanted to make sure there would be ample time for a successor to be confirmed by the Senate and prepare for the start of a new term in October." Ruth Marcus, "Blackmun Set To Leave High Court, *The Washington Post*, April 6, 1994, p. A1. Despite the long lead time afforded by Justice Blackmun's announcement, White House advisers reportedly believed it was "important to act quickly" to name a successor to Blackmun, in order to "avoid a repeat of last year's drawn out process" in which President Clinton engaged in a "very public, three-month search" before nominating Ruth Bader Ginsburg to the Court. Ibid., pp. A1,A7. After Justice Blackmun's April 5 announcement, President Clinton deliberated five weeks before announcing, on May 13, 1994, his selection of U.S. circuit judge Stephen G. Breyer to be his Supreme Court nominee.

their power under the Constitution to make "recess appointments" when the Senate was not in session.[47] Historically, when recesses between sessions of the Senate were much longer than they are today, "recess appointments" served the purpose of averting long vacancies on the Court when the Senate was unavailable to confirm a President's appointees. The terms of these "recess appointments," however, were limited, expiring at the end of the next session of Congress (unlike the lifetime appointments Court appointees receive when nominated and then confirmed by the Senate). Despite the temporary nature of these appointments, every person appointed during a recess of the Senate, except one, ultimately received a lifetime appointment to the Court after being nominated by the President and confirmed by the Senate.[48]

The last President to make recess appointments to the Court was Dwight D. Eisenhower. Of the five persons whom he nominated to the Court, three first received recess appointments and served as Justices before being confirmed — Earl Warren (as Chief Justice) in 1953, William Brennan in 1956, and Potter Stewart in 1958. President Eisenhower's recess appointments, however, generated controversy, prompting the Senate in 1960, voting closely along party lines, to pass a resolution expressing opposition to Supreme Court recess appointments in the future.[49]

While President Eisenhower's were the most recent recess appointments to the Supreme Court, recess appointments to the lower federal courts, since the late 1960s, also have become relatively rare. While a President's constitutional power to make

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[47] Specifically, Article II, Section 2, Clause 3 of the U.S. Constitution empowers the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

[48] See "Recess Appointments to the Supreme Court — Constitutional But Unwise?" *Stanford Law Review*, vol. 10, December 1957, pp. 124-146, especially, p. 125, for table of first 11 recess appointments to the Court, including appointment dates and later Senate confirmation dates. The article was published prior to the twelfth recess appointment, President Eisenhower's recess appointment of Potter Stewart on Oct. 7, 1958.

[49] Adopted by the Senate on Aug. 29, 1960, by a 48-37 vote, S.Res. 334 expressed the sense of the Senate that recess appointments to the Supreme Court "should not be made, except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." Proponents of the resolution contended, among other things, that judicial independence would be affected if Supreme Court recess appointees, during the probationary period of their appointment, took positions to please the President (in order not to have the President withdraw their nominations) or to please the Senate (in order to gain confirmation of their nominations). It also was argued that Senate investigation of nominations of these recess appointees was made difficult by the oath preventing sitting Justices from testifying about matters pending before the Court. Opponents, however, said, among other things, that the resolution was an attempt to restrict the President's constitutional recess appointment powers and that recess appointments were sometimes called for in order to keep the Court at full strength and to prevent evenly split rulings by its members. "Opposition to Recess Appointments to the Supreme Court," debate in Senate on S.Res. 334, *Congressional Record*, vol. 106, Aug. 29, 1960, pp. 18130-18145. See also CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher, pp. 16-18.

judicial recess appointments was upheld by a federal court in 1985,[50] such appointments, when they do occur, may cause controversy, in large part because they bypass the Senate and its "advice and consent" role. Because of the criticisms of judicial recess appointments in recent decades, the long passage of time since the last Supreme Court recess appointment, and the relatively short duration of contemporary Senate recesses (which arguably undercuts the need for recess appointments to the Court), a President in the twenty-first century might be expected to make a recess appointment to the Court only under the most unusual of circumstances.[51]

Consideration by the Senate Judiciary Committee

Historical Background

While the Constitution of the United States assigns explicit roles in the Supreme Court appointment process only to the President and the Senate,[52] the Senate Judiciary Committee, throughout much of our nation's history, has also played an important, intermediary role. At first, after the creation of the Judiciary Committee in 1816, the Senate referred nominations to the Committee by motion only. As a result, until after the Civil War, no more than perhaps one out of three Supreme Court nominations was sent to the Judiciary Committee for initial consideration. In 1868, however, the Senate determined that all nominations should be referred to appropriate standing committees.[53] Subsequently, up to the present day, almost all Supreme Court nominations have been referred to the Judiciary Committee.

Through the mid-1940s, an important exception to the practice of referring Supreme Court nominees to the Judiciary Committee usually was made for nominees who, at the time of their nomination, were current or former Members of the U.S.

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[50] *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985).

[51] A notable, relatively recent instance in which the possibility of a recess appointment to the Court was raised occurred on July 28, 1987, when Senate Minority Leader Robert Dole (R-KS) observed that President Ronald Reagan had the constitutional prerogative to recess appoint U.S. appellate court judge Robert H. Bork to the Court. Earlier that month Judge Bork had been nominated to the Court, and at the time of Senator Dole's statement, the chair of Senate Judiciary Committee, Sen. Joseph R. Biden, Jr. (D-DE), had scheduled confirmation hearings to begin on September 15. With various Republican Senators accusing Senate Democrats of delaying the Bork hearings, Senator Dole offered as "food for thought" the possibility of President Reagan recess appointing Judge Bork during Congress's August recess. Michael Fumento, "Reagan Has Power To Seat Bork While Senate Stalls: Dole," *The Washington Times*, July 28, 1987, p. A3; also, Edward Walsh, "Reagan's Power To Make Recess Appointment Is Noted," *The Washington Post*, July 28, 1987, p. A8. Judge Bork, however, did not receive a recess appointment and, as a Supreme Court nominee, was rejected by the Senate in a 58-42 vote on Oct. 23, 1987.

[52] As explained earlier, Article II, Section 2, Clause 2, in pertinent part, provides simply that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court."

[53] U.S. Congress, Senate Committee on the Judiciary, *History of the Committee on the Judiciary, United States Senate, 1816-1981*. Senate Document No. 97-18, 97th Cong., 1st sess. (Washington: GPO, 1982), p. iv.

Senate. These nominees benefitted from "the unwritten rule of the all but automatic approval of senatorial colleagues,"[54] with the Senate moving quickly to confirm without first referring the nominations to committee.[55] The nomination of the most recent *sitting* Senator to be named to the Court, Harold H. Burton (R-OH), was unanimously confirmed in 1945, on the same day that President Harry S. Truman transmitted it to the Senate (then controlled by a Democratic majority). The decades since 1945 have yet to test again the Senate tradition of bypassing the Judiciary Committee when the Supreme Court nominee is a sitting U.S. Senator — as no President since then has nominated a sitting Senator. The last *former* Senator to be nominated to the Court, also by President Truman, in 1949, was Judge Sherman Minton of Indiana. (After defeat for re-election to the Senate in 1940, Mr. Minton had been appointed by President Franklin D. Roosevelt to a federal appellate court judgeship.) In a break with tradition, the Supreme Court nomination of ex-Senator Minton was referred to the Judiciary Committee (which reported the nomination favorably), followed by Senate confirmation.[56]

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[54] Abraham, *Justices, Presidents, and Senators*, p. 33. One notable exception to this "unwritten rule," Abraham observes, was Franklin D. Roosevelt's "controversial selection" of Sen. Hugo L. Black (D-AL) in 1937. Senator Black's nomination was referred to the Judiciary Committee "for full hearings, an action [i.e., confirmation hearings for a Senator nominated to the Supreme Court] that had not then been taken since 1888." Ibid., p. 34 (with discussion explaining various points of controversy over the Black nomination). Subsequently the Judiciary Committee, by a 13-4 vote, reported the Black nomination favorably, followed by a 63-16 vote of the Senate to confirm.

[55] Haynes's classic history of the Senate, published in 1938, noted what was then the "almost unbroken tradition that the nomination of a Senator or a former member of the Senate will be confirmed at once, without even being referred to a committee." Haynes cited, as illustrative, the contrasting experiences of two Supreme Court nominations in 1922 — one of an attorney in private practice, Pierce Butler, which, prior to being confirmed, "was in controversy for nearly a month," the other of former Sen. George Sutherland (R-UT), which "without being referred to a committee, was confirmed by the Senate in open session within ten minutes after the name was received." George H. Haynes, *The Senate of the United States: Its History and Practice*, vol. 2 (Boston: Houghton Mifflin Company, 1938), p. 740.

[56] It should be noted that not every Supreme Court nominee who was a Senator or former Senator when nominated was confirmed. While a Member of the Senate in 1853, George E. Badger of North Carolina was nominated to the Court but failed to gain Senate confirmation. Without being referred to the Judiciary committee, the Badger nomination was considered by the Senate, which ultimately voted to postpone taking any action on the nomination. Of eight sitting U.S. Senators ever nominated to the Court, Badger was the only one who failed to receive Senate confirmation. See Epstein et al., *Supreme Court Compendium*, pp. 265-273, listing every Supreme Court nominee's occupational position at time of nomination. In addition to the Badger nomination, however, the nomination in 1828 of a *former* U.S. Senator, John J. Crittenden of Kentucky, failed to be confirmed, after first being referred to the Senate Judiciary Committee. After the committee reported with the recommendation that the Senate not act on the Crittenden nomination during that session, the Senate voted to postpone taking action on the nomination. See Jacobstein and Mersky, *The Rejected*, pp. 23-23 and 57-59, for brief accounts of Crittenden and Badger nominations, respectively; also, see CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2001*, by Henry B. Hogue, pp. 17-20, for dates of committee and Senate actions, if any, on Supreme Court nominations not confirmed (including the Badger and Crittenden nominations).

During the nineteenth century, the Judiciary Committee routinely considered Supreme Court nominations behind closed doors, with its deliberations during the twentieth century gradually becoming more public in nature. According to one expert source,[57] the earliest Supreme Court confirmation hearings held in open session were those in 1916 for the nomination of Louis D. Brandeis to be an Associate Justice. In 1925, Harlan F. Stone became the first Supreme Court nominee to appear in person and testify at his confirmation hearings. Neither the Brandeis nor the Stone hearings, however, served as binding precedents. Until well into the 1950s, the Judiciary Committee often declined to hold open confirmation hearings or to invite Supreme Court nominees to testify.[58]

Hearings in 1955 on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing to the present, of each Court nominee testifying before the Judiciary Committee.[59] In 1981, Supreme Court confirmation hearings were opened to gavel-to-gavel television coverage for the first time, when the committee instituted the practice at the confirmation hearings for nominee Sandra Day O'Connor.[60]

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[57] Roy M. Mersky, Tarlton Law Library, University of Texas at Austin Law School, telephone conversation with the author, Apr. 3, 2003. Professor Mersky and J. Myron Jacobstein have jointly compiled 19 volumes of Senate Judiciary Committee hearings transcripts and reports for Supreme Court nominations, starting with the Brandeis nomination in 1916 and carrying through the most recent Court nomination of Stephen G. Breyer in 1994. See Roy M. Mersky and J. Byron Jacobstein, comp., *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1994*, 19 vols. (Buffalo, N.Y.: William S. Hein & Co., 1977-1996).

[58] See Thorpe, James A, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," *Journal of Public Law*, vol. 18, 1969, pp. 371-384. (Hereafter cited as Thorpe, *Appearance of Nominees*.) See also David Gregg Farrelly, "Operational Aspects of the Senate Judiciary Committee," (Ph.D. diss., Princeton University, 1949), pp. 184-199, in which author examines the procedures followed by the committee in its consideration of 15 Supreme Court nominations referred to it between 1923 and 1947. The author observes, on p. 192, that six of the 15 nominations were "confirmed without benefit of public hearings. Of the remaining nine nominations, full public hearings were used on two occasions, another appointee received a limited hearing, and six were given routine hearings. Only [John J.] Parker and [Felix] Frankfurter received full, open hearings." A "routine hearing," the author explained, on pp. 194-195, "differs from a full, open hearing in that a date is set for interested parties to appear and present evidence against confirmation. In other words, a meeting is scheduled without requests for one; an open invitation is extended by the committee for the filing of protests against an appointment." In 1930, although Supreme Court nominee John J. Parker had communicated his willingness to testify, the Judiciary Committee voted against inviting him to do so. "Committee, 10 to 6, Rejects Parker," *The New York Times*, April 22, 1930, pp. 1, 23.

[59] Thorpe, *Appearance of Nominees*, pp. 384-402.

[60] Although the standard practice of the Judiciary Committee, prior to the O'Connor hearings in 1981, was to prohibit broadcast coverage of Supreme Court confirmation hearings, there was at least one notable exception to this practice during the early years of television broadcasting. Archival records of the Columbia Broadcasting System (CBS), (continued...)

Whereas, historically, nominees usually were removed from the appointment process, they are now active participants. Indeed, at the hearings, the nominee's demeanor, responsiveness and knowledge of the law may be crucial in influencing the committee members' and other Senators' votes on confirmation.

Another important historical trend has involved the pace and thoroughness of the Judiciary Committee in acting on Supreme Court nominations. Throughout the second half of the nineteenth century and the first half of the twentieth century, it was the standard practice, unless Senators at the outset found a nominee to be objectionable for some reason, for the committee to act on and dispose of a nomination within days of receiving it. In recent decades, by contrast, the committee has tended to proceed much more deliberately, with its official involvement in the appointment process now usually measured in weeks or months.

Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages — a pre-hearing investigative stage, followed by public hearings, and concluding with a committee decision on what recommendation to make to the full Senate.

Pre-Hearing Stage

Immediately upon the President's announcement of a nominee, the Judiciary Committee initiates its own intensive investigation into the nominee's background. One primary source of information is a committee questionnaire to which the nominee responds in writing.[61] Confidential FBI reports on the nominee are another important information source. These are available only to committee members and a small number of designated staff under strict security procedures designed to prevent unauthorized disclosure. Also, independently of the FBI, committee staff conduct their own confidential investigations into the nominee's background.

Meanwhile, the nominee, in accordance with longstanding tradition, visits Capitol Hill to pay "courtesy calls" on individual Senators in their offices. For Senators not on the Judiciary Committee, this may be the only opportunity to converse in person with the nominee before voting on his or her confirmation to the

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[60] (...continued)
obtained by the Congressional Research Service (CRS), show that, on Feb. 26 and 27, 1957, the CBS television network filmed and broadcast a few minutes of the confirmation hearings of Supreme Court nominee William J. Brennan Jr. Much earlier, in 1939, in a deviation from its standard practice of not allowing film coverage of confirmation hearings, the Judiciary Committee permitted newsreel coverage of its hearing on Supreme Court nominee Felix Frankfurter. A newsreel excerpt from the Frankfurter hearing is included in a CRS video product; see CRS Multimedia MM70010, *The Supreme Court Appointment Process*, by Steve Rutkus.

[61] Treated as public information are sections of the questionnaire that request biographical and financial disclosure information, as well as the nominee's responses to questions about the Constitution and the law. Treated by the committee as confidential (and not available to the media or the public) are the nominee's responses to more sensitive questions, such as whether he or she ever had been under a federal, state or local investigation for possible violation of a civil or criminal statute or had ever been sued by a client or other party.

Court. Senators may use these meetings to share their views with the nominee and to indicate the issues that are important to them in the context of the nomination.

Also during the pre-hearing stage, the nominee is evaluated by the American Bar Association's Standing Committee on Federal Judiciary.[62] Whether the ABA committee, in evaluating the nominee, plays a quasi-official advisory role to the Senate Judiciary Committee will, as explained below, depend on the status accorded to it by the chair of the Senate committee.

The stated function of the ABA committee is to impartially evaluate judicial nominees. The focus of each evaluation, according to the committee, is on the candidate's "integrity, professional competence and judicial temperament,"[63] with the goal being "to support and encourage the selection of the best qualified persons for the federal judiciary."[64] At the culmination of its evaluation, the ABA committee votes on whether to rate the nominee "well-qualified," "qualified," or "not qualified." The rating of the ABA committee is then reported to the Senate Judiciary Committee.[65] In the past, the ABA committee chair routinely has been among the

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[62] Traditionally, this evaluation role has been performed at the official invitation of the chair of the Senate Judiciary Committee. In 1947, the ABA committee was first invited by the committee's chair, Sen. Alexander Wiley (R-WI), to testify or file a recommendation on each judicial nomination receiving a hearing. Grossman, Joel B. *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: John Wiley and Sons, Inc, 1966), p. 64. A central purpose of the Judiciary Committee, when it first invited the ABA committee to evaluate judicial nominees, was to "help insure that only the highest caliber [of] men and women ascended to the bench...." Statement of Sen. Joseph R. Biden, Jr., chair of the Senate Judiciary Committee, in U.S. Congress, Committee on the Judiciary, *The ABA Role in the Judicial Nomination Process*, hearing on the Role of the American Bar Association in the Judicial Evaluation Process, 101st Cong., 1st sess., June 2, 1989 (Washington: GPO, 1991), p. 2.

[63] *The ABA Standing Committee on Federal Judiciary: What It Is and How It Works*, American Bar Association, p. 9, available at [http://www.abanet.org/scfedjud/].

[64] Ibid., p. 2. In the ABA committee's investigation of a Supreme Court nominee, all 15 committee members take part in confidential interviews with practicing lawyers, judges, law professors and others "who are in a position to evaluate the prospective nominee's integrity, professional competence and judicial temperament." Ibid., p. 10. Meanwhile, teams of law school professors, as well as a separate team of practicing lawyers, examine the legal writing of the nominee. The results of these inquiries are forwarded to the full ABA committee.

[65] Ibid., pp. 8-9. Invariably, a nominee's ABA rating receives prominent news coverage when it is sent to the Senate Judiciary Committee. In the past, a unanimously positive rating by the ABA committee almost always presaged a very favorable vote by the Judiciary Committee on the nominee as well. Conversely, a divided vote, or less than the highest rating, by the ABA committee usually served to flag issues about the nominee for the Senate Judiciary Committee to examine at its confirmation hearings, and these issues in turn were sometimes cited by Senators on the Judiciary Committee who voted against reporting the nomination favorably to the Senate floor.

Since the inception of the ABA committee's evaluating role, most, but not all, Supreme

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first public witnesses to testify at each Supreme Court confirmation hearing, for the purpose of explaining the ABA committee's rating of the nominee.

For the most part, from its inception in the late 1940s, and continuing through the next three decades, the ABA committee evaluated Supreme Court nominees, as well as nominees to lower court judgeships, with bipartisan support in the Senate. In the 1980s and 1990s, however, the committee came under increasing criticism from some Senators, who questioned its impartiality and the usefulness of its nominee evaluations to the Judiciary Committee.[66] Among the critics has been Senator Orrin G. Hatch (R-UT), former chairman of the Judiciary Committee. In 1997, then-Chairman Hatch announced that, during his chairmanship of the Judiciary Committee, the ABA committee would no longer be accorded an "officially sanctioned role" in the judicial confirmation process. He noted, however, that individual Senators were, "of course, free to give the ABA's ratings whatever weight they choose."[67]

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[65] (...continued)
Court nominees have received the highest ABA rating, while none has been found by a committee majority to be "not qualified." See generally Rutkus, *ABA Historical Overview*.

[66] The ABA committee was accused by some Senators, as well as by some conservative interest groups, of holding a liberal ideological bias. The committee's ratings of judicial nominees Robert H. Bork in 1987 and Clarence Thomas in 1991 in particular were cited as demonstrating committee prejudice against nominees with conservative judicial philosophies. The ABA rating of Bork was unusual, with 10 of the committee's 15 members finding the nominee "well qualified," four members rating him "not qualified," and one member voting "not opposed" — with no members voting for the intermediate "qualified" rating. For the Thomas nomination, 12 of the committee's 15 members found the nominee "qualified," two found him "unqualified," and one abstained. The mid-level rating by the 12-member majority was in contrast to the "well qualified" ratings that the ABA panel had unanimously given the two previous Supreme Court nominees, David H. Souter and Anthony M. Kennedy. See CRS Report 93-290, *The Supreme Court Appointment Process: Should It Be Reformed?*, by Denis Steven Rutkus. (Hereafter cited as Rutkus, *Should Appointment Process Be Reformed?*; available from author), pp. 54-56; also see Rutkus, *ABA Historical Overview*, pp. 44-56.

[67] "One cannot assume," Chairman Hatch wrote,"that a group as politically active as the ABA can at the same time remain altogether neutral, impartial and apolitical when it comes to evaluating judicial qualifications." He added that "[p]ermitting a political interest group to be elevated to an officially sanctioned role in the confirmation process not only debases that process, but in my view, ultimately detracts from the moral authority of the courts themselves." Senator Orrin G. Hatch, letter to colleagues on the Senate Judiciary Committee, U.S. Senate, Feb. 24, 1997; see also, Associated Press, "Hatch Hits ABA's Screening Role, *The Washington Times*, Feb. 19, 1997, p. A4.

Although the new policy announced by Senator Hatch in 1997 ended the ABA committee's quasi-official relationship with the Judiciary Committee, the relationship was temporarily restored, in the 107th Congress — when the Democratic Party became the Senate's majority party, on June 5, 2001. With the change in party control, Sen. Patrick J. Leahy (D-VT) assumed the chairmanship of the Judiciary Committee, holding that position for the rest of the 107th Congress. Senator Leahy stated that the Judiciary Committee's Democratic members would oppose votes on any of President George W. Bush's judicial
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Nevertheless, the ABA committee, under both Republican and Democratic chairs, has been allowed to testify before the Judiciary Committee on all lower court judicial nominees who received "Not Qualified" ratings from the ABA committee. Similarly, the Judiciary Committee, in keeping with past practice, can be expected to include the ABA chair among the public witnesses at future Supreme Court confirmation hearings — to explain whatever rating the ABA committee gives to the nominee.

Meanwhile, it is common, well before the start of confirmation hearings, for public debate to begin on the nominee's qualifications and on the meaning of the nomination for the future of the Court. Much of this debate will be waged by commentators in the news media and by advocacy groups that actively support or oppose the nominee. Senators, too, sometimes contribute to this debate in Senate floor statements or other public remarks.

As the confirmation hearings approach, Judiciary Committee members and staff closely study the public record and investigative information compiled on the nominee, and then prepare questions to pose at the hearings. Likewise, the nominee also intensively prepares for the hearings, focusing particularly on questions of law and policy likely to be raised by committee members. Usually, the nominee is assisted in this effort by White House staff, who provide legal background materials and help coach the nominee on what questions to expect.

Hearings

A confirmation hearing typically begins with a statement by the chair of the Judiciary Committee welcoming the nominee and outlining how the hearing will proceed. Other members of the committee follow with opening statements, and a panel of "presenters" introduce the nominee to the committee.[68] It is then the nominee's turn to make an opening statement, after which begins the principal business of the hearing — the questioning of the nominee. Typically, the chairman begins the questioning, followed by the ranking minority member and then the rest of the committee in descending order of seniority, alternating between majority and minority members, with a uniform time limit for each Senator during each round. When the first round of questioning has been completed, the committee begins a

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[67] (...continued)
nominees who were not first reviewed by the ABA committee. Audrey Hudson, "Democrats Want ABA To Vet Judges," *The Washington Times*, March 28, 2001, p. A4; "Democrats Say ABA's Vetting of Nominees Still Counts," *The Washington Post*, Mar. 28, 2001, p. A5. During his chairmanship, Senator Leahy was critical of the Bush White House for declining to include the ABA in the pre-nomination evaluation process, "even though their decision adds to the length of time nominations must be pending before the Senate before they can be considered." Sen. Patrick J. Leahy, "Nomination of Morrison C. England, Jr. To Be United States District Judge for the Eastern District of California," *Congressional Record*, vol. 148, daily edition, Aug. 1, 2002, p. S7814.

[68] The "presenters" often will include the Senators from the state in which the nominee is a resident or from the state in which the nominee was born.

second round, which may be followed by more rounds, at the discretion of the committee chair.[69]

In recent decades, most nominees have undergone rigorous questioning in varying subject areas. They have been queried, as a matter of course, about their legal qualifications, private backgrounds, and earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular Court rulings, current constitutional controversies, constitutional values, judicial philosophy, and the analytical approach a nominee might use in deciding issues and cases.[70] To many Senators, eliciting testimony from the nominee may be seen as an important way to gain insight into the nominee's professional qualifications, temperament, and character. Some Senators, as well, may hope to glean from the nominee's responses signs of how the nominee, if confirmed to the Court, might be expected to rule on issues of particular concern to the Senators.

For his or her part, however, a nominee might sometimes be reluctant to answer certain questions that are posed at confirmation hearings.[71] A nominee might decline to answer for fear of appearing to make commitments on issues that later could come before the Court.[72] A nominee also might be concerned that the substance of candid

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[69] Almost invariably, the questioning is conducted exclusively by members of the committee. However, on at least two occasions in the twentieth century, a Senator who was not a committee member was allowed to join in the questioning of the nominee. This first instance, in 1941, involved Sen. Millard E. Tydings (D-MD) at the confirmation hearings for nominee Robert H. Jackson; the second instance, in 1956, involved Sen. Joseph R. McCarthy (R-WI) at the confirmation hearings for nominee William J. Brennan, Jr. Thorpe, *Appearance of Supreme Court Nominees*, p. 378 (Jackson hearings) and p. 385 (Brennan hearings).

[70] See CRS Report RL33059, *Proper Scope of Questioning of Supreme Court Nominees: The Current Debate*, by Denis Steven Rutkus; and CRS Report 90-429, *Questioning Supreme Court Nominees — A Recurring Issue*, by Denis Steven Rutkus (available from author).

[71] See Rutkus, *Should Appointment Process Be Reformed?*, pp. 32-37. See also William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals For Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review*, vol. 62, November 1987, pp. 109-174.

[72] Illustrative of such a concern was the following statement by nominee David H. Souter, at a September 14, 1990 hearing, explaining his refusal to answer a question concerning the issue of a woman's right, under the Constitution, to have an abortion: "Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest, and I will close with this question.

"Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience. ... With that in mind can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?" U.S. Congress, Senate Committee on the Judiciary, *Nomination of David Souter To Be Associate Justice of*

(continued...)

responses to certain questions could displease some Senators and thus put the nominee's chances for confirmation in jeopardy.

For their part, committee members may differ in their assessments of a nominee's stated reasons for refusing to answer certain questions.[73] Some may be sympathetic and consider a nominee's refusal to discuss certain matters as of no relevance to his or her fitness for appointment. Others, however, may consider the nominee's views on certain subjects as important to assessing the nominee's fitness and hence regard unresponsiveness to questions on these subjects as sufficient reason to vote against confirmation. Protracted questioning, occurring over several days of hearings, is likely especially if the nominee is relatively controversial or is perceived by committee members to be evasive or insincere in responding to certain questions.

For members of the Judiciary Committee, questioning of the nominee may serve various purposes. As already noted, for Senators who are undecided about the nominee, the hearings may shed light on the nominee's fitness, and hence on how they should vote. Other Senators, as the hearings begin, may already be "reasonably certain about voting to confirm the nominee," yet "also remain reasonably open to counter-evidence," and thus use the hearings "to pursue a line of questioning designed to probe the validity of this initial favorable predisposition."[74] Still others, however, may come to the hearings "having already decided how they will vote on the nomination" and, accordingly, use their questioning of the nominee to try "to secure or defeat the nomination."[75] For some Senators, the hearings may be a vehicle through which to impress certain values or concerns upon the nominee, in the hope of influencing how he or she might approach issues later as a Justice.[76] The hearings

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[72] (...continued)
the Supreme Court of the United States, hearings, 101st Cong., 2nd sess., Sept. 13, 14, 17, 18 and 19, 1990 (Washington: GPO, 1991), p. 194.

[73] As early as 1959, at the confirmation hearings for Supreme Court nominee Potter Stewart, there is record of Judiciary Committee members differing among themselves as to appropriateness of certain areas of questioning for the nominee. During the hearings, Sen. Thomas C. Hennings Jr. (D-MO), raised a point of order about interrogating a nominee on his "opinion as to any of the questions or the reasoning upon decisions which have heretofore ... [been] handed down" by the Supreme Court. The point of order, however, was overruled by the committee's chair, Sen. James O. Eastland (D-MS), who stated the rule he would follow: "[I]f the nominee thinks that the question is improper, that he can decline to answer. And that when he declines, his position will be respected." L.A. Powe Jr., "The Senate and the Court: Questioning a Nominee," *Texas Law Review*, vol. 54, May 1976, p. 892, citing unpublished transcript of April 9 and 14, 1959 hearings of the Senate Judiciary Committee on the Supreme Court nomination of Potter Stewart, pp. 43-44.

[74] Watson and Stookey, *Shaping America*, p. 150.

[75] Ibid., p. 152.

[76] See Stephen J. Wermiel, "Confirming the Constitution: The Role of the Senate Judiciary Committee," *Law and Contemporary Problems*, vol. 56, autumn 1993, p. 141, in which author maintains that, since the 1987 hearings on Supreme Court nominee Robert H. Bork, a purpose of Senators on the Judiciary Committee has been "to identify points of constitutional concern and pursue those concerns with nominees, with the hope that, once
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also may represent to some Senators an opportunity to draw the public's attention to certain issues, to advocate their policy preferences, or to associate themselves with concern about certain problems. Senators, it has also been noted, "may play multiple roles in any given hearings."[77]

After questioning the nominee, the committee, in subsequent days of hearings, also hears testimony from public witnesses. As stated earlier, among the first to testify, in recent decades, has been the chair of the ABA's Standing Committee on Federal Judiciary, who explains the committee's rating of the nominee. Other witnesses ordinarily include spokesmen for advocacy groups which support or oppose the nominee.

In a practice instituted in 1992, the Judiciary Committee also has conducted a closed-door session with each Court nominee. This session is held to address any questions about the nominee's background that confidential investigations might have brought to the committee's attention. In announcing this procedure in 1992, the then-chair of the committee, Senator Joseph R. Biden Jr. (D-DE), explained that such a hearing would be conducted "in all cases, even when there are no major investigative issues to be resolved so that the holding of such a hearing cannot be taken to demonstrate that the committee has received adverse confidential information about the nomination."[78] The first such hearing was held for Supreme Court nominee Ruth Bader Ginsburg in 1993. The closed-door hearing was separate from public hearings that the committee held on Judge Ginsburg's nomination.

Reporting the Nomination

Usually within a week of the end of hearings, the committee meets in open session to determine what recommendation to " report" to the full Senate. The committee may report favorably, negatively, or make no recommendation at all. A report with a negative recommendation or no recommendation permits the nomination to go forward, while alerting the Senate that a substantial number of committee members have reservations about the nominee.

If a majority of its members oppose confirmation, the committee technically may decide not to report the nomination, to prevent the full Senate from considering the nominee. However, dating back at least to the 1880s, the Judiciary Committee's practice has been to report even those Supreme Court nominations that were opposed by a committee majority,[79] thus allowing the full Senate to make the final decision

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[76] (...continued)
confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurance they gave during their hearings."

[77] Watson and Stookey, *Shaping America*, p. 155.

[78] Sen. Joseph R. Biden, Jr., "Reform of the Confirmation Process," remarks in the Senate, *Congressional Record*, vol. 138, June 25, 1992, p. 16320.

[79] Among the more than 70 nominations which the Senate received from the Judiciary Committee between 1881 and 1994 were those of Stanley Matthews (1881), reported (continued...)

on whether the nominee should be confirmed.[80] This committee tradition was reaffirmed in June 2001 by the committee's then-chairman, Senator Patrick J. Leahy (D-VT), and its then-ranking minority member, Senator Orrin G. Hatch (R-UT), in a June 29, 2001, letter to Senate colleagues. The committee's "traditional practice," their letter stated,

> ... has been to report Supreme Court nominees to the Senate once the Committee has completed its considerations. This has been true even in cases where Supreme Court nominees were opposed by a majority of the Judiciary Committee.
>
> We both recognize and have every intention of following the practices and precedents of the committee and the Senate when considering Supreme Court nominees.[81]

Reporting to the Senate almost always includes the transmittal of a written committee report,[82] which presents the views both of committee members supporting

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[79] (...continued)
unfavorably; Lucius Q.C. Lamar (1888), reported unfavorably; William B. Hornblower (1894), reported unfavorably; Wheeler H. Peckham (1894), reported without recommendation; John J. Parker (1930), reported unfavorably; Robert H. Bork (1987), reported unfavorably; and Clarence Thomas (1991), reported without recommendation.

[80] From President James A. Garfield's nomination of Stanley Matthews on March 14, 1881, to the present day, every person nominated to the Supreme Court except one has received Senate consideration and a vote on his or her nomination. The one instance when the Senate did not consider and vote on an individual nominated to be a Supreme Court Justice involved President Lyndon B. Johnson's nomination of federal appellate judge Homer Thornberry in 1968. Judge Thornberry was nominated to fill the Associate Justice vacancy that was to be created upon Justice Fortas's confirmation as Chief Justice. However, the Fortas nomination failed to gain Senate confirmation when, on Oct. 4, 1968, President Johnson withdrew both the Fortas and Thornberry nominations, after a motion to close Senate debate on the Fortas nomination on Oct. 1, 1968, failed by a 45-43 vote (falling short of the two-thirds majority needed to close debate).

[81] Sen. Patrick J. Leahy and Sen. Orrin G. Hatch, "Dear Colleague" letter, June 29, 2001, *Congressional Record*, daily edition, vol. 147, June 29, 2001, p. S7282.

[82] One of the last Supreme Court nominations to be reported to the Senate floor without a written report by the Judiciary Committee was the 1969 nomination of Warren E. Burger to be Chief Justice. During Senate consideration of the nomination, the absence of a written report from the Judiciary Committee prompted three Senators to express concerns. The Senators maintained that it was important for the Senate, when considering an appointment of this magnitude, to be able to consult a written report from the Judiciary Committee that provided a breakdown of any recorded votes by the committee and an explanation of the committee's recommendation regarding the nominee. "The Supreme Court of the United States," debate in the Senate, *Congressional Record*, vol. 115, June 9, 1969, pp. 15174-75 and 15192-94. Shortly after this discussion, the Senate concluded debate on the Burger nomination and voted to confirm the nominee, 74-3. Subsequent to the Burger nomination in 1969, the Judiciary Committee has reported a Supreme Court nomination to the Senate only once without a written report, doing so in December 1975 when it reported favorably the nomination of John Paul Stevens to the Court. The absence (continued...)

and those opposing the nominee's confirmation.[83] The process of preparing this written report is closed to the public. The Senate usually, but not always, has agreed with Judiciary Committee recommendations that a Supreme Court nominee be confirmed.[84] Historically, negative committee reports, or reports without recommendation, have been precursors to nominations encountering substantial opposition in the full Senate, although a few of these nominations have eventually been confirmed by narrow margins.[85]

Senate Debate and Confirmation Vote

Bringing the Nomination to the Floor

After the Judiciary Committee has reported a nomination, it is assigned an Executive Calendar number by the executive clerk of the Senate. As with other nominations listed in the Executive Calendar, information about a Supreme Court nomination will include the name and office of the nominee, the name of the previous holder of the office, and whether the committee reported the nomination favorably, unfavorably, or without recommendation. Business on the Executive Calendar, which consists of treaties and nominations, is considered in executive

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[82] (...continued)
of a written committee report was not mentioned during very brief Senate consideration of the Stevens nomination, which ended in a 98-0 confirmation vote.

[83] The written report ordinarily is produced within a week of the committee vote. On infrequent occasions, however, the report may entail weeks of preparation if the nomination is controversial or if the report is regarded as possibly crucial in influencing how the full Senate will vote on the nomination. In 1970, for instance, the committee submitted its written report on nominee Clement F. Haynsworth Jr. more than a month after voting 10-7 to recommend that Judge Haynsworth be confirmed. (Subsequently the full Senate rejected the Haynsworth nomination by a 55-45 vote.)

[84] The Senate disagreed with the Judiciary Committee's favorable assessment of a Supreme Court nominee three times in the twentieth century, declining to confirm Supreme Court nominees Abe Fortas in 1968, Clement F. Haynsworth Jr. in 1969, and G. Harrold Carswell in 1970, even though their confirmation had been recommended by the committee. At least once in the nineteenth century, the Senate, in 1873, questioned a favorable committee report on a nominee to the Court, recommitting the nomination of George H. Williams to be Chief Justice; the nomination later was withdrawn by the President, without having been reported out a second time by the committee. A year later, in 1874, the nomination of Caleb Cushing to be Chief Justice failed to receive Senate confirmation after being reported favorably by the Judiciary Committee. Soon after the committee's action and in the face of growing Senate opposition, the nomination was withdrawn by President Ulysses S. Grant without, however, having received formal Senate consideration. See Jacobstein and Mersky, *The Rejected*, pp. 82-87 (Williams), pp. 87-89 (Cushing), pp. 125-137 (Fortas), pp. 141-147 (Haynsworth), and pp. 147-155 (Carswell).

[85] Specifically, the following three Supreme Court nominations, though reported out of committee without a favorable recommendation, nonetheless were confirmed by the Senate: Stanley Matthews (1881), by a 24-23 vote; Lucius Q.C. Lamar (1888), by a 32-28 vote; and Clarence Thomas (1991), by a 52-48 vote.

session.[86] Unless voted otherwise by the Senate, executive sessions are open to the public.[87] Floor debate on a Supreme Court nomination, in contemporary practice, invariably has been conducted in public session, open to the press and, since 1986, to live nationwide television coverage.[88]

Consideration of a nomination is scheduled by the majority leader, in consultation with the minority leader. If, as is usually the case, the Senate begins the day in legislative session, it will, in order to consider the nomination, enter executive session, either by a non-debatable motion or by unanimous consent.[89] In recent decades, the almost invariable practice in calling up a Supreme Court nomination has been for the majority leader to ask for unanimous consent (UC) that the Senate consider the nomination. The leader may ask for unanimous consent to proceed to executive session to consider the nomination immediately,[90] or at some specified date and time in the future.[91]

Frequently, UC requests also include a limit on the time that will be allowed for debate and specify the date and time on which the Senate will vote on a nomination.[92]

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[86] CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki. (Hereafter cited as Rybicki, *Senate Consideration.*)

[87] In 1925 the full Senate for the first time considered a Supreme Court nomination — that of Harlan F. Stone to be an Associate Justice — in open session, waiving a rule requiring the chamber to consider nominations in closed session. In 1929, the Senate amended its rules to provide for debate on nominations in open session unless there is a vote to go into closed session. Thenceforth, it became the regular Senate practice to conduct debate on nominations, including those to the Supreme Court, in open session.

[88] The Senate has allowed gavel-to-gavel broadcast coverage of Senate floor debate since June 1986. The Senate's first floor debates on Supreme Court nominations ever to be televised were its September 1986 debates on the nominations of William H. Rehnquist to be Chief Justice and Antonin Scalia to be an Associate Justice.

[89] "It is not in order for a Senator to move to consider a nomination that is not on the calendar, and except by unanimous consent a nomination on the calendar cannot be taken up until it has been on the calendar at least one day." Rybicki, *Senate Consideration*.

[90] For instance, under a unanimous consent agreement requested by Majority Leader Robert C. Byrd (D-WV), on Oct. 21, 1987, the Senate proceeded immediately to consider the Supreme Court nomination of Robert H. Bork. Sen. Robert C. Byrd, "Executive Session," remarks in the Senate, *Congressional Record*, vol. 133, Oct. 21, 1987, p. 28654.

[91] For instance, on Sept. 27, 1990, a UC agreement was obtained by Majority Leader George J. Mitchell (D-ME) providing for the Senate to proceed to the Supreme Court nomination of David H. Souter at 2:30 p.m., Oct. 2. Sen. George J. Mitchell, "Nomination of David L. Souter To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 136, Sept. 27, 1990, p. 26387.

[92] In this vein, Majority Leader George J. Mitchell (D-ME), on July 28, 1994, while the Senate was in legislative session, asked, "as if in executive session," unanimous consent that at 9 a.m. on July 29, the Senate proceed to executive session to consider the Supreme Court nomination of Stephen G. Breyer. The UC request, which was agreed to, also specified that there be six hours of debate after which, the Senate, "without any intervening action on the nomination." would vote on whether to confirm. Sen. George J. Mitchell,

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Typically, the amount of time agreed upon for debate is divided evenly between the majority and minority parties, who usually have as their respective floor managers the chair and ranking minority member of the Judiciary Committee. A time limit, if agreed to, forecloses the use of unlimited debate as a delaying tactic by opponents of the nomination — a tactic known, in Senate procedural parlance, as the filibuster. Conversely, if the Senate agrees by unanimous consent to consider the nomination without a time limit, unlimited debate as a delaying tactic is possible, although not necessarily inevitable.[93]

When unanimous consent to call up a nomination cannot be secured, a procedural alternative is to make a *motion* that the Senate consider the nomination. Such a motion may be made while the Senate is in executive or legislative session. If the majority leader moves to consider the nomination during executive session, the motion is debatable under Senate rules, "and so it can be filibustered."[94] Closing debate on the motion requires an affirmative vote by a super-majority of three-fifths of the entire Senate membership (60 Senators if there are no vacancies).[95]

The debatable nature of a motion to consider, when made in executive session, was demonstrated in 1968, when the nomination of Associate Justice Abe Fortas to be Chief Justice was brought to the Senate floor. The episode marked the most recent Senate proceedings in which a *motion* was made to consider a Supreme Court nomination, a motion made while the Senate was in *executive* session. Significant opposition within the Senate to the Fortas nomination raised the theoretical possibility of two filibusters being mounted — the first against the motion to consider, and then (if Fortas supporters were successful in closing debate on the first filibuster) a second, against the nomination itself.[96] The second filibuster, however, failed to

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[92] (...continued)
"Unanimous-Consent Agreement," *Congressional Record*, vol. 140, July 28, 1994, p. 18544. Likewise, UC requests agreed to by the Senate limited the time for debate and set the date and time for Senate vote on the Supreme Court nominations of Ruth Bader Ginsburg (1993), Clarence Thomas (1991), Anthony M. Kennedy (1988), and Sandra Day O'Connor (1981).

[93] For example, the Sept. 27, 1990, UC agreement (discussed in footnote 88) which provided for the Senate to proceed to the Supreme Court nomination of David H. Souter at 2:30 p.m., Oct. 2, did not, however, also provide for a time limit on the debate. Despite the absence of a time limit in the UC agreement, the Senate concluded debate on, and voted to confirm, on the same day that it began debate on the Souter nomination, Oct. 2. Likewise, the Senate on Aug. 29, 1967, by unanimous consent, proceeded to consider the Supreme Court nomination of Thurgood Marshall, without also providing for a time limit on the debate. "Supreme Court of the United States," *Congressional Record*, vol. 113, Aug. 29, 1967, p. 24437. In the absence of a time limit on debate, the Senate concluded debate on, and voted to confirm, the Marshall nomination the next day, Aug. 30.

[94] Charles Tiefer, *Congressional Practice and Procedure* (New York: Greenwood Press, 1989), p. 607. (Hereafter cited as Tiefer, *Congressional Practice*.)

[95] For full details on the cloture process, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard Beth and Stanley Bach.

[96] For just as the motion to consider was a debatable question, permitting a filibuster by (continued...)

materialize when the Senate declined, by the super-majority vote required, to close debate on the motion to consider.[97]

A motion to consider a nomination, however, may also be made while the Senate is in *legislative* session, and such a motion is not debatable. Since 1980, the Senate precedent has been established that when the Senate is in legislative session, a non-debatable motion may be made to go into executive session to take up a specified nomination.[98] The 1980 precedent has procedural significance for any future Supreme Court nomination facing the likelihood of a filibuster in the Senate. If adhered to, the precedent, according to one congressional scholar, means that "there would be only one filibuster, on the nomination itself."[99]

Criteria Used to Evaluate Nominees

Once the Senate begins debate on a Supreme Court nomination, many Senators typically will take the floor. Some, in their opening remarks, will underscore the importance of the Senate's "advice and consent" role, and the consequent responsibility to carefully determine the qualifications of a nominee before voting to confirm.[100] Invariably, each Senator who takes the floor will state for the record his or her reasons for voting in favor of or against the nominee's confirmation.

The criteria used to evaluate a Supreme Court nominee are a personal, very individual matter for each Senator.[101] In their floor remarks, some Senators may cite a nominee's professional qualifications or character as the key criterion,[102] others may

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[96] (...continued)
opponents, so, too, would be the question of whether to advise and consent to the nomination.

[97] The vote on the motion to close debate on the motion to consider the Fortas nomination was 45-43,well short of the super-majority then required by Senate rules for passage of a "cloture motion" (two-thirds of Senators present and voting). Shortly after the unsuccessful attempt at cloture, the Fortas nomination was withdrawn by President Lyndon B. Johnson.

[98] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, Senate Doc. 101-28, 101st Cong., 2nd sess., Washington, GPO, 1992, pp. 941-942.

[99] Tiefer, *Congressional Practice*, p. 608.

[100] "The advice-and-consent role of the Senate,"one of its Members noted in 1994, "is something that we do not take lightly because this is the only opportunity for the people of this Nation to express whether or not they deem a nominee qualified to sit on the highest court in the land." Sen. Mark O. Hatfield, "Nomination of Stephen G. Breyer, of Massachusetts, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 140, July 29, 1994, pp. 18692-93.

[101] See CRS General Distribution Memorandum, *Criteria Used by Senators To Evaluate Judicial Nominations*, by Denis Steven Rutkus, June 14, 2002, 23 p. (available from author).

[102] For example, during 1991 Senate debate on the Supreme Court nomination of Judge Clarence Thomas, the criterion of professional qualification was cited by both supporters and opponents of the nominee to explain their votes. A Senator supporting the Thomas nomination maintained that instead of the nominee's "philosophy on particular issues" (continued...)

stress the importance of the nominee's judicial philosophy or views on constitutional issues,[103] while still others may indicate that they are influenced in varying degrees by all of these criteria."[104]

In recent decades, Senate debate on virtually every Supreme Court nomination has focused to some extent on the nominee's judicial philosophy, ideology, constitutional values, or known positions on specific legal controversies. Many highly controversial decisions of the Court in recent decades have been closely decided, by 5-4 votes, appearing to underscore a longstanding philosophical or

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[102] (...continued)
which might come before the Supreme Court, the "more appropriate standard" was that the nominee "have outstanding legal ability and wide experience and meet the highest standards of integrity, judicial temperament, and professional competence." Judge Thomas, the Senator added, "clearly meets that standard." Sen. Frank H. Murkowski, "Nomination of Clarence Thomas to the Supreme Court," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 1, 1991, p. 24748. Other Senators, however, used the criterion of professional competence to find Judge Thomas unqualified. One, for example, found the nominee's "legal background and experience" inadequate and added that if a President did not nominate to the court "well-qualified, experienced individuals, the American people have the right to expect that the members of the Senate will reject the nomination." Sen. Jeff Bingaman, "Justice Clarence Thomas," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 2, 1991, p. 24973.

[103] During debate over the nomination of Clarence Thomas in 1991, these criteria were used both by Senators favoring the nomination and by others opposing it. One Senator in support of the nomination, for example, declared his desire to have "Supreme Court Justices who will interpret the Constitution and not attempt to legislate or carry out personal agendas from the bench." Sen. Richard C. Shelby, "Nomination of Judge Clarence Thomas To Be an Associate Justice of the U.S. Supreme Court," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 1, 1991, p. 24703. By contrast, another Senator, explaining his opposition to confirming Judge Thomas, said that if Senators were "not confident that nominees possess a clear commitment to the fundamental constitutional rights and freedoms at the heart of our democracy, they should not be confirmed." Sen. Edward M. Kennedy, "Nomination of Clarence Thomas, of Georgia, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 3, 1991, p. 25271.

[104] "In addition to the obvious criteria any nominee for the Supreme Court ought to have — I suppose any nominee for any position on the judiciary ought to have — those of intellect, of integrity, and of judicial temperament, it is very appropriate of the Senate to inquire into a nominee's judicial philosophy. Of course, that includes the nominee's fidelity to the Constitution. It involves that nominee's understanding of the limited role of the courts, and it involves what I hope is a commitment to judicial restraint." Charles E. Grassley, "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 139, Aug. 2, 1993, p. 18133. Similarly evincing concern with both a nominee's professional qualification and his constitutional values was this 1991 Senate floor statement during debate on the nomination of Clarence Thomas: "When I face a Supreme Court nominee I have three questions: Is he or she competent? Does she or he possess the highest personal and professional integrity? And, third, will he or she protect and defend the core constitutional values and guarantees around free of speech, religion, equal protection of the law, and the right of privacy?" Sen. Barbara A. Mikulski, "Nomination of Clarence Thomas, of Georgia, To Be An Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 15, 1991, p. 26299.

ideological divide in the Court between its more "liberal" and "conservative" members. A new appointee to the Court, Senators recognize, could have a potentially decisive impact on the Court's ideological "balance" and on whether past rulings of the Court will be upheld, modified, or overturned in the future.[105] Announcements by the Court of 5-4 decisions, an analysis in the press observed, have "become routine, a familiar reminder of how much the next appointment to the court will matter."[106]

Senators sometimes will indicate in their floor statements whether they believe the views of a particular nominee, although not in complete accord with their own views, nonetheless, fall within a broad range of acceptable legal thinking.[107] Senators' concerns with a nominee's judicial philosophy or ideology may become heightened, and their positions more polarized relative to other Senators', if a nominee's philosophical orientation is seen as controversial, or if the President is perceived to have made the nomination with the specific intention of changing the Court's ideological balance.[108]

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[105] Three political scientists wrote recently that although "speculation about possible Supreme Court vacancies is usually met with much interest by court watchers, it is particularly intense at present due to the ideological balance of the current Court and the recent politics of the judicial confirmation process. Given the delicate ideological balance on the current Court, a single vacancy could produce a dramatic shift in the ideological direction of future rulings." Kenneth L. Manning, Bruce A. Carroll, and Robert A. Carp, "George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?," *Judicature*, vol. 85, May-June 2002, p. 278.

[106] Linda Greenhouse, "Divided They Stand: The High Court and the Triumph of Discord," *The New York Times*, July 15, 2001, Section 4, p. 1. Greenhouse noted that one-third of the Court's 79 full written opinions handed down during the October 2000 term had been decided by 5-4 votes, "often but not always the same 5 and the same 4." The next appointment, she commented, "when it comes, could change the court's, and hence the nation's, course on nearly every important constitutional question currently being debated."

[107] For example, during 1994 floor debate on the Supreme Court nomination of Stephen G. Breyer, one Senator said of the nominee's views: "Certainly in terms of an expansive definition of the Constitution, I have no doubt that Judge Breyer is going to make rulings that represent a different interpretation of the great document than I have and that people who share my views have. But I also believe that Judge Breyer's views are mainstream liberal views. I believe that anyone who voted for Bill Clinton knew or should have known that the chances than anyone more conservative than Judge Breyer being nominated by Bill Clinton were almost zero." Sen. Phil Gramm, "Nomination of Stephen G. Breyer, of Massachusetts, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 140, July 29, 1994, pp. 18671-18672.

[108] Senate concern with a nominee's judicial philosophy was especially heightened in 1987 when President Ronald Reagan nominated appellate court judge Robert H. Bork to the Court. The nomination sparked immediate controversy, and polarized the Senate generally along party lines, in large part because of the nominee's judicial philosophy of "original intent" and the perception that he had been nominated by President Reagan to move the Court in the future in a more conservative direction. For analysis of how central an issue Judge Bork's judicial philosophy was in the Senate confirmation battle, see See Massaro, *Supremely Political*, pp. 159-193.

(continued...)

Other factors also may figure importantly into a Senator's confirmation decisions. One, it has been suggested, is peer influence in the Senate.[109] Particularly influential, for instance, might be Senate colleagues who are championing a nominee or spearheading the opposition, or who played prominent roles in the Judiciary Committee hearings stage. Another consideration for Senators will be the views of their constituents, especially if many voters back home are thought to feel strongly about a nomination.[110] A third source of influence may be the views of a Senator's advisers, family, and friends, as well as the position taken on the nomination by advocacy groups that the Senator ordinarily trusts or looks to for perspective.[111]

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[108] (...continued)

In a Senate floor statement shortly after the Bork nomination was made, the then-chairman of the Senate Judiciary Committee, Sen. Joseph R. Biden, Jr. (D-DE), faulted the President for his choice. Senator Biden declared that when a President selects nominees "with more attention to their judicial philosophy and less attention to their detachment and statesmanship," a Senator "has not only the right but the duty to respond by carefully weighing the nominee's judicial philosophy and the consequences for the country." The Senate, he continued, had both the right and the duty to raise political and judicial "questions of substance," for "we are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends." Sen. Joseph R. Biden Jr., "Advice and Consent: The Right and Duty of the Senate To Protect the Integrity of the Supreme Court," remarks in the Senate," *Congressional Record*, vol. 133, July 23, 1987, p 20913 (first quote) and 20915 (second quote).

Various Senators who favored Judge Bork's confirmation, however, disagreed with Senator Biden regarding the importance of the nominee's judicial philosophy. Some expressed a preference for a narrower scope of Senate inquiry, focusing on Judge Bork's legal competence and character. Others considered Judge Bork's judicial philosophy and views of the Constitution appropriate areas of inquiry, but the crucial determination for the Senate to make in these areas, they argued, was whether his views fell within a broad range of acceptable thinking, not whether individual senators agreed with those views. Further, some Senators maintained, to evaluate a nominee according to political or judicial philosophy, or to vote to confirm only if Senators agreed with the nominee's views, would politicize the Supreme Court and undermine its independence of the legislative branch. See CRS Report 87-761, *Senate Consideration of the Nomination of Robert H. Bork to Be a Supreme Court Associate Justice — Background and an Overview of Issues*, by Denis Steven Rutkus (available from author), pp. 25-27.

[109] See Watson and Stookey, *Shaping America*, pp. 191-195, for discussion of how a relatively few number of Senators may serve as "cues" to other Senators during the consideration of controversial Supreme Court nominations.

[110] Illustrative of this, during 1991 Senate debate over the Clarence Thomas nomination, Sen. Frank H. Murkowski (R-AK) stated, "I have heard from a number of Alaskans and visited with them last week during our recess. Many have gone back and forth during the testimony, but now the hearings are concluded, and they are telling me by a substantial majority that they favor the confirmation of Judge Thomas by this body." Sen. Frank H. Murkowski, "Nomination of Clarence Thomas, of Georgia, to be An Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 15, 1991, p. 26300.

[111] See Watson and Stookey, *Shaping America*, pp. 198-199.

Just as Presidents are assumed to do when considering prospective nominees for the Supreme Court, Senators may evaluate the suitability of a Supreme Court nominee according to whether certain groups or constituencies are adequately represented on the Court.[112] Among the representational criteria commonly considered have been the nominee's party affiliation, geographic origin, ethnicity, religion, and gender.

When considering Supreme Court nominations, Senators may also take Senate institutional factors into account. For instance, the role, if any, that Senators from the home state of a nominee played in the nominee's selection, as well as their support for or opposition to the nominee, may be of interest to other Senators. At the same time, Senators may be interested in the extent to which the President, prior to selecting the nominee, sought advice from other quarters in the Senate — for instance, from Senate party leaders and from the chair, ranking minority member, and other Senators on the Judiciary Committee. A President's prior consultation with a wide range of Senators concerning a nominee may be a positive factor for other members of the Senate, by virtue of conveying presidential respect for the role of Senate advice, as well as Senate consent, in the judicial appointments process.

Sometimes, Senators may find themselves debating whether the Senate, in its "advice and consent" role, should defer to the President and give a nominee the "benefit of the doubt." This issue received particular attention during Senate consideration of the Supreme Court nomination of Clarence Thomas in 1991. In that debate, some Thomas supporters argued that the Senate, as a rule, should defer to the President's judgment concerning a nominee except when unfavorable information is presented overcoming the presumption in the nominee's favor.[113] Opponents, by contrast, rejected the notion that there was a presumption in favor of a Supreme Court nominee at the start of the confirmation process or that the President, in his selection of a nominee, is owed any special deference.[114]

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[112] In recent decades Presidents and Senators at various times have endorsed the goal of increasing the representation of women and persons of minority ethnicity in the lower courts, as well as on the Supreme Court, to make the judiciary more representative of the nation's population.

[113] Among those Senators supporting the nomination, one declared that he strongly believed "that a nominee comes to the Senate with a presumption in his favor. Accordingly, opponents of the nominee must make the case against him, especially since Judge Thomas has been confirmed to positions of great trust and responsibility on four separate occasions." Sen. Strom Thurmond, "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 3, 1991, p. 25257. Another Senator stated that while his vote in favor of Judge Thomas was not "cast without some doubt, ... I have tried to insist on every judicial nomination of every President that I would give both the President and the nominee the benefit of the doubt." Sen. Wyche Fowler, Jr., "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 3, 1991, p. 25270.

[114] During the Thomas nomination debate, for example, one Senator declared that "[i]n the selection of a person to serve on the Nation's highest court, in my view, the Senate is an equal partner with the President. The President is owed no special deference, and his nominee owed no special presumptions. We owe the public our careful and thorough consideration and our independent judgement." Sen. Frank R. Lautenberg, "Against the

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That Senators continue to have differing views regarding appropriate evaluation criteria for Supreme Court nominees was apparent at Senate hearings on the judicial selection process held on June 26, 2001. At the hearings, a Senate Judiciary subcommittee examined the question of what role ideology should play in the selection and confirmation of federal judges.[115] In his opening remarks, the chairman of the subcommittee, Senator Charles E. Schumer (D-NY), stated that it was clear that "the ideology of particular nominees often plays a significant role in the confirmation process." The current era, he said, "certainly justifies Senate opposition to judicial nominees whose views fall outside the mainstream and who have been selected in an attempt to further tilt the courts in an ideological direction."[116]

By contrast, Senator Orrin G. Hatch (R-UT), in testimony before the subcommittee, declared that there "are myriad reasons why political ideology has not been — and is not — an appropriate measure of judicial qualifications. Fundamentally," he continued, "the Senate's responsibility to provide advice and consent does not include an ideological litmus test because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge."[117]

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[114] (...continued)
Confirmation of Clarence Thomas," remarks in the Senate, *Congressional Record*, vol., 137, Sept. 27, 1991, p. 24449. Likewise, another Senator maintained that, on "a question of such vast and lasting significance, where the course of our future for years to come is riding on our decision, the Senate should give the benefit of the doubt to the Supreme Court and to the Constitution, not to Judge Clarence Thomas." Sen. Edward M. Kennedy, "Nomination of Clarence Thomas, of Georgia, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, vol. 137, Oct. 15, 1991, p. 26290.

[115] For official record of the June 26, 2001 hearing, entitled "Judicial Nominations 2001: Should Ideology Matter?," see pp. 1-109 in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *The Judicial Nomination and Confirmation Process*, hearings, 107th Cong., 1st sess, June 26 & Sept. 4, 2001 (Washington: GPO, 2002), 276 p.

[116] Ibid., pp. 2-3.

[117] Ibid., p. 30. Soon thereafter, on September 4, 2001, the same Senate Judiciary subcommittee held a hearing on a related issue involving judicial nominations — namely, does the "burden of proof" lie with the nominee, to demonstrate that he or she merits appointment to the federal bench, or with Senate opponents, to demonstrate that the nominee is unfit for confirmation? The hearing, entitled "The Senate's Role in the Nomination and Confirmation Process: Whose Burden?," featured two panels of witnesses, some arguing for, and others against, placing the burden of proof on the nominee. See Ibid., pp. 111-218, for official record of the September 4 hearing.

Filibusters and Motions to Close Debate[118]

Senate rules place no general limits on how long floor consideration of a nomination (or most other matters) may last.[119] With such time limits lacking, Senators opposing a Supreme Court nominee may be able, if they are so inclined, to use extended debate or other delaying actions to prevent a vote from occurring. The use of dilatory actions for such a purpose is known as the filibuster.[120]

By the same token, however, supporters of a Court nomination have available to them a procedure for placing time limits on consideration of a matter — the motion for cloture. When the Senate adopts a cloture motion, further consideration of the matter being filibustered is limited to 30 hours. In so doing, the Senate may be able to ensure that a nomination will ultimately come to a vote and be decided by a voting majority. The majority required for cloture on most matters, including nominations, is three-fifths of the full membership of the Senate — normally 60.[121]

Motions to bring debate on Supreme Court nominations to a close have been made on only three occasions.[122] The first use occurred in 1968, when Senate supporters of Justice Abe Fortas tried unsuccessfully to close debate on his nomination to be Chief Justice. After a motion to proceed to consider the Fortas nomination was debated at length, the Senate rejected cloture by a 45-43 vote,[123] prompting President Lyndon B. Johnson to withdraw the nomination. (The 45 votes in favor of cloture fell far short of the super-majority required — then two-thirds of Senators present and voting.) A cloture motion to end debate on a Court nomination occurred again in 1971, when the Senate considered the nomination of William H. Rehnquist to be an Associate Justice. Although the cloture motion failed by a 52-42 vote,[124] Rehnquist subsequently was confirmed. In 1986, a motion was filed to close debate on a third Supreme Court nomination, this time of sitting Justice Rehnquist to be Chief Justice. Supporters of the nomination mustered more than the three-fifths

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[118] Much of the discussion under this sub-heading is based on, and borrows extensively from, CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer. (Hereafter cited as Beth and Palmer, *Cloture Attempts*.)

[119] As discussed earlier, however, the Senat may set time limits on debates by unanimous consent.

[120] See discussion earlier in this report, regarding debatable motions and filibusters, under the sub-heading "Bringing the Nomination to the Floor."

[121] Prior to 1975, the majority required for cloture was two-thirds of Senators present and voting. Beth and Palmer, *Cloture Attempts*, p. 3.

[122] It has only been since 1949, under Senate rules, that cloture could be moved on nominations. Prior to 1949, dating back to the Senate's first adoption of a cloture rule in 1917, cloture motions could be filed only on legislature measures. *Ibid*., p. 2.

[123] "Supreme Court of the United States," *Congressional Record*, vol. 114, Oct. 1, 1968, pp. 28926-28933.

[124] "Cloture Motion,"*Congressional Record*, vol. 117, Dec. 10, 1971, pp. 46110-46117.

majority needed to close debate (with the Senate voting for cloture 68-31),[125] and Justice Rehnquist subsequently was confirmed as Chief Justice.

As one news analysis observed, Senators "are traditionally hesitant to filibuster judicial nominations."[126] Indicative of this, the article noted, was the fact that some of the "most divisive Supreme Court nominees in recent decades, including Associate Justice Clarence Thomas, have moved through the Senate without opponents resorting to that procedural weapon."[127] In 1991, five days of debate on the Thomas nomination concluded with a 52-48 confirmation vote. The 48 opposition votes would have been more than enough to defeat a cloture motion if one had been filed. In three earlier episodes, Senate opponents of Supreme Court nominations appear to have refrained from use of the filibuster, even though their numbers would have been sufficient to defeat a cloture motion. In 1969, 1970 and 1987 respectively, lengthy debate occurred on the unsuccessful nominations of Clement F. Haynsworth, G. Harrold Carswell and Robert H. Bork. In none of these episodes, however, was a cloture motion filed, and in each case debate ended with a Senate vote rejecting the nomination.

Although use of the filibuster against Supreme Court nominations has been relatively rare in the past, the number of filibusters conducted against lower court nominations has increased dramatically in recent years. During the 108th Congress, extended debate was successfully used in the Senate to block confirmation votes on 10 of President George W. Bush's 34 nominees to U.S. circuit court of appeals judgeships, and several of these nominations, after resubmission by President Bush in the 109th Congress, again faced the prospect of being filibustered by Senate Democrats. In response, in May of 2005, leaders of the Senate's Republican majority announced their intention, if filibusters against nominations continued, to amend the chamber's rules to require the vote of only a simple Senate majority to close Senate debate on judicial nominations.[128]

A Senate confrontation between the two parties over judicial filibusters was averted on May 23, 2005, when a compromise agreement was reached by a coalition of seven Democratic and seven Republican Senators. As part of the agreement, the coalition's Democratic Senators pledged not to lend their support to filibusters against judicial nominations except under "extraordinary circumstances," while the Republican Senators in the coalition agreed not to support any change in the Senate rules to bar filibusters against judicial nominations, as long as the "spirit and

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[125] "Nomination of William H. Rehnquist To Be Chief Justice of the United States," *Congressional Record*, vol. 132, Sept. 17, 1986, pp. 23729-23739.

[126] Matthew Tully, "Senators Won't Rule Out Filibuster of High Court Nominees," *CQ Daily Monitor*, March 21, 2002, p. 7.

[127] Ibid.

[128] Senate Republican leaders announced that their move to amend Senate rules to bar filibusters against judicial nominations would occur in conjunction with their efforts to close floor debate on the nomination of Priscilla Owen to be a U.S. circuit court of appeals judge. (An earlier nomination of Owen to the same judgeship, during the 108th Congress, had been filibustered successfully by Senate Democrats four times.) Keith Perine and Daphne Retter, "Judicial Showdown Starts with Owen," *CQ Today*, vol. 41, May 18, 2005.

continuing commitments made in this agreement" were kept by all of Senators in the coalition.[129]

In recent years, some Senators have raised the possibility of a filibuster being conducted against a future Supreme Court nomination, particularly if a vacancy on the Court occurred during the presidency of George W. Bush.[130] In the current political climate, a filibuster against a nomination to the Court also could be regarded as a possibility, if a substantial number of Senators opposed a nominee's confirmation and viewed extended debate as a tactic that might succeed in blocking a Senate vote on confirmation from occurring. Such a strategy, however, would no longer be an option to opponents of the nominee if the Senate's rules, either prior to or during debate over the nomination, were modified to curtail use of filibusters against judicial nominations.

Voice Votes, Roll Calls, and Vote Margins

When floor debate on a nomination comes to a close, the presiding officer puts the question of confirmation to a vote. In doing so, the presiding officer typically states, "The question is, Will the Senate advise and consent to the nomination of [nominee's name] of [state of residence] to be an Associate Justice [or Chief Justice] on the Supreme Court?" A vote to confirm requires a simple majority of Senators present and voting. Since 1967, every Senate vote on whether to confirm a Supreme Court nomination has been by roll call.[131] Prior to 1967, by contrast, less than half of all of Senate votes on whether to confirm nominees to the Court were by roll call, the rest by voice vote.[132] Historically, vote margins on Supreme Court nominations have varied considerably. Some recorded votes, either confirming or rejecting a

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[129] Charles Babington and Shailagh Murray, "A Last-Minute Deal on Judicial Nominations," *The Washington Post*, May 24, 2005, pp. A1, A4.

[130] Several Senate Democrats, it was reported in 2002, had said "they would consider staging a filibuster if President Bush nominates to the high court a conservative not to their liking." Matthew Tully, "Senators Won't Rule Out Filibuster of High Court Nominees," *CQ Daily Monitor*, March 21, 2002, p. 7. More recently, in June 2003, another Democratic Senator declared that he would filibuster any Supreme Court nominee that he found objectionable based on certain specified criteria. Adam Nagourney, "Senator Ready To Filibuster over Views of Court Pick," *The New York Times*, June 21, 2003, p. A13.

[131] Immediately prior to the Senate's roll-call vote in 1994 on whether to confirm Stephen G. Breyer to be an Associate Justice, Majority Leader George J. Mitchell (D-ME), stated to his colleagues on the floor that "it has been the practice that votes on Supreme Court nominations are made from the Senator's desk. I ask that Senators cast their votes from their desks during this vote." *Congressional Record*, vol. 140, July 29, 1994, p. 18704.

[132] The most recent voice votes on Supreme Court nominations were those by the Senate confirming Abe Fortas in 1965 (to be an Associate Justice) and Arthur J. Goldberg and Byron R. White, both in 1962.

nomination, have been close.[133] Most votes, however, have been overwhelmingly in favor of confirmation.[134]

Reconsideration of the Confirmation Vote

After a Senate vote to confirm a Supreme Court nomination, a Senator who voted to confirm may, under Senate Rule XXXI, move to reconsider the vote.[135] Under the rule, only one such motion to reconsider is in order on each nomination, and the tabling of the motion prevents any subsequent attempt to reconsider. The Senate typically deals with a motion to reconsider a Supreme Court confirmation in one of two ways. Immediately following the vote to confirm, a Senator may move to reconsider the vote, and the motion is promptly laid upon the table by unanimous consent.[136] Alternatively, well before the vote to confirm, in a unanimous consent agreement, the Senate may provide that, in the event of confirmation, the motion to reconsider be tabled.[137] The Senate, it should be noted, has never adopted a motion to reconsider a Supreme Court confirmation vote.

Nominations That Failed to Be Confirmed

As noted earlier, over the course of two centuries, roughly one out of every five Supreme Court nominations has failed to be confirmed (36 out of 157 received by the

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[133] Since the 1960s, the closest roll calls on Supreme Court nominations were the 52-48 vote in 1991 confirming Clarence Thomas; the 45-51 vote in 1970 rejecting G. Harrold Carswell; the 55-45 vote in 1969 rejecting Clement Haynsworth Jr.; the 58-42 vote in 1987 rejecting Robert H. Bork; and the 65-33 vote confirming William H. Rehnquist to be Chief Justice in 1986. The closest roll calls ever cast on Supreme Court nominations were the 24-23 vote in 1881 confirming President James A. Garfield's nomination of Stanley Matthews and the 25-26 vote in 1861 rejecting President James Buchanan's nomination of Jeremiah S. Black.

[134] Since the 1960s, the most lopsided of these votes have been the unanimous roll calls confirming Harry A. Blackmun in 1970 (94-0), John Paul Stevens in 1975 (98-0), Sandra Day O'Connor in 1981 (99-0), Antonin Scalia in 1986 (98-0), and Anthony M. Kennedy in 1988 (98-0), and the near-unanimous votes confirming Warren E. Burger in 1969 (74-3), Lewis F. Powell Jr., in 1971 (89-1), and Ruth Bader Ginsburg in 1993 (96-3).

[135] "According to Senate Rule XXXI, any Senator who voted with the majority has the option of moving to reconsider a vote on the nomination. The motion to reconsider is in order on the day of the vote or the next two days the Senate meets in executive session. The motion is made in executive session or, by unanimous consent, 'as in executive session.'" Rybicki, *Senate Consideration*, p. 10.

[136] For example, immediately after the votes to confirm David Souter in 1990 and Clarence Thomas in 1991, a motion in each case was made to reconsider the vote, followed by a motion "to lay that motion on the table," which was agreed to by the Senate. See *Congressional Record*, vol. 136, Oct. 2, 1990, p. 26997 and *Congressional Record*, vol. 137, Oct. 15, 1991, p. 26354.

[137] By unanimous consent, the Senate in 1993 and 1994, for example, agreed that the motion to reconsider be tabled upon confirmation, respectively, of the Supreme Court nominations of Ruth Bader Ginsburg and Stephen G. Breyer. See "Unanimous-Consent Agreement," *Congressional Record*, vol. 139, July 30, 1993, p. 17996, and "Unanimous-Consent Agreement," *Congressional Record*, vol. 140, July 28, 1994, p. 18544.

Senate, not counting the pending 158th nomination, of Samuel A Alito, Jr., to be Associate Justice). Eleven of the 36 were rejected outright by Senate roll-call votes. Nearly all of the rest, in the face of substantial Judiciary Committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate.[138] **Table 2**, in the following pages, provides information on the outcome of each of the 36 unconfirmed nominations.

Various scholars have analyzed or provided a broad overview of factors associated with unsuccessful Supreme Court nominations,[139] including a 2005 report by the Congressional Research Service.[140] In a history of Supreme Court appointments from Presidents Washington to Clinton, one scholar has identified eight of the more "prominent reasons" why Supreme Court nominations were ''rejected either outright or simply were not acted on by the Senate," listing these reasons as the following:

> (1) opposition to the nominating president, not necessarily the nominee; (2) the nominee's involvement with one or more contentious issues of public policy or, simply, opposition to the nominee's perceived jurisprudential or sociopolitical philosophy (i.e., politics); (3) opposition to the record of the incumbent Court, which, rightly or wrongly, the nominee presumably supported; (4) senatorial courtesy (closely linked to the consultative nominating process); (5) a nominee's perceived political unreliability on the part of the party in power; (6) the evident lack of qualification or limited ability of the nominee; (7) concerted, sustained opposition by interest or pressure groups; and (8) fear that the nominee would dramatically alter the Court's jurisprudential lineup. Usually several of these reasons — not one alone — figure in the rejection of a nominee, to which poor timing and poor presidential management of a nomination — e.g., Reagan in Bork's case — could readily be added.[141]

Another scholar, in analyzing the ill-fated nominations of Abe Fortas (1968), Clement F. Haynsworth Jr. (1969), G. Harrold Carswell (1970) and Robert H. Bork (1987), has focused on the "rich interplay among the three leading factors associated with unsuccessful Supreme Court nominations," specifically, "the Senate's perception of the nominee's ideology," the "timing of the nomination," and "a less appreciated" factor, "presidential management of the confirmation process."[142]

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[138] Five of the unconfirmed nominations, it again should be noted, involved individuals who subsequently were renominated and confirmed. See above in this report, footnote 14, regarding the re-nominations, and subsequent confirmations of William Paterson (1793). Roger B. Taney (1835), Stanley Matthews (1881), Pierce Butler (1922), and John W. Harlan II (1954-1955).

[139] For a lengthy bibliographic listing of scholarly sources who deal directly with the factors associated with unsuccessful Supreme Court nominations. see Massaro, *Supremely Political*, page 218, note 4**.**

[140] Hogue, *Nominations Not Confirmed*.

[141] Abraham, *Justices, Presidents and Senators*, p. 28.

[142] Massaro, *Supremely Political*, p. xi.

The timing of a nomination may create problems for confirmation of a Supreme Court nominee, especially against an election backdrop. Timing, for example, might be less favorable for a nomination if it is made during the last year of a President's term, if the President is not seeking re-election, if his re-election prospects are doubtful, or if an off-year election is approaching in which the President's party is expected to lose Senate seats. Such circumstances might influence some Senators to delay action on a nomination, in order to allow the next President to make the appointment or the next Senate to decide whether to confirm.[143]

Table 2. Supreme Court Nominations Not Confirmed by the Senate

Nominee	President	Date received in Senate [a]	Final action by Senate and/or President [b]	Date(s) of Final Action
William Paterson	Washington	Feb. 27, 1793	Withdrawn	Feb. 28, 1793
John Rutledge (for Chief Justice)	Washington	Dec. 10, 1795	Rejected (10-14)	Dec. 15, 1795
Alexander Wolcott	Madison	Feb. 4, 1811	Rejected (9-24)	Feb. 13, 1811
John J. Crittenden	J.Q. Adams	Dec. 18, 1828	Postponed (23-17)	Feb. 12, 1829
Roger B. Taney	Jackson	Jan. 15, 1835	Postponed (24-21)	Mar. 3, 1835
John C. Spencer	Tyler	Jan. 9, 1844	Rejected (21-26)	Jan. 31, 1844
Reuben H. Walworth	Tyler	Mar. 13, 1844	Tabled (27-20), Withdrawn	June 15, 1844, June 17, 1844
Edward King	Tyler	June 5, 1844	Postponed (29-18)	June 15, 1844
John C. Spencer	Tyler	June 17, 1844	Withdrawn	June 17, 1844
Reuben H. Walworth	Tyler	June 17, 1844	No action recorded	
Reuben H. Walworth	Tyler	Dec. 10, 1844	Tabled, Withdrawn	Jan. 21, 1845, Feb. 6, 1845
Edward King	Tyler	Dec. 10, 1844	Tabled, Withdrawn	Jan. 21, 1845, Feb. 8, 1845
John M. Read	Tyler	Feb. 8, 1845	No action recorded	
George W. Woodward	Polk	Dec. 23, 1845	Rejected (20-29)	Jan. 22, 1846
Edward A. Bradford	Fillmore	Aug. 21, 1852	Tabled	Aug. 31, 1852
George E. Badger	Fillmore	Jan. 10, 1853	Postponed (26-25)	Feb. 11, 1853

[143] Massaro, *Supremely Political*, p. 139, writes that a nomination made "during the last full year of a president's term or in the interregnum period after a new chief executive has been elected presents an additional factor upon which to base opposition to confirmation." The vacancy's "unfavorable timing," he explains, can "generate opposition of its own as well as activate the otherwise dormant ideological resistance, significantly increasing the likelihood of the Senate's refusal to confirm. This is readily seen in the remarkably high refusal rate of seventy-one percent (ten of fourteen) for such nominations when they are also forwarded to a Senate in which the chief executive's party is in the minority."

Nominee	President	Date received in Senate [a]	Final action by Senate and/or President [b]	Date(s) of Final Action
William C. Micou	Fillmore	Feb. 24, 1853	No action recorded	
Jeremiah S. Black	Buchanan	Feb. 6, 1861	Motion to consider rejected (25-26)	Feb. 21, 1861
Henry Stanbery	A. Johnson	Apr. 16, 1866	No action recorded	
Ebenezer R. Hoar	Grant	Dec. 15, 1869	Rejected (24-33)	Feb. 3, 1870
George H. Williams (for Chief Justice)	Grant	Dec. 2, 1873	Withdrawn	Jan. 8, 1874
Caleb Cushing (for Chief Justice)	Grant	Jan. 9, 1874	Withdrawn	Jan. 14, 1874
Stanley Matthews	Hayes	Jan. 26, 1881	No action recorded	
Wm. B. Hornblower	Cleveland	Sept. 19, 1893	No action recorded	
Wm. B. Hornblower	Cleveland	Dec. 6, 1893	Rejected (24-30)	Jan. 15, 1894
Wheeler H. Peckham	Cleveland	Jan. 22, 1894	Rejected (32-41)	Feb. 16, 1894
Pierce Butler	Harding	Nov. 23, 1922	No action recorded	
John. J. Parker	Hoover	Mar. 21, 1930	Rejected (39-41)	May 7, 1930
John M. Harlan	Eisenhower	Nov. 9, 1954	No action recorded	
Abe Fortas (for Chief Justice)	L. Johnson	June 26, 1968	Cloture motion defeated (45-43), Withdrawn	Oct. 1, 1968, Oct. 4, 1968
Homer Thornberry	L. Johnson	June 26, 1968	Withdrawn	Oct. 4, 1968
Clement F. Haynsworth, Jr.	Nixon	Aug. 18, 1969	Rejected (45-55)	Nov. 21, 1969
G. Harrold Carswell	Nixon	Jan. 19, 1970	Rejected (45-51)	Apr. 8, 1970
Robert H. Bork	Reagan	July 7, 1987	Rejected (42-58)	Oct. 23, 1987
John G. Roberts, Jr.	Bush, George W.	July 29, 2005	Withdrawn	Sept. 6, 2005
Harriet E. Miers	Bush, George W.	Oct. 7, 2005	Withdrawn	Oct. 28, 2005

Sources: *Journal of the Executive Proceedings of the Senate of the United States of America* (various volumes); CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2004*, by Henry B. Hogue.

Notes: *Italics* — Later renominated and confirmed; **Boldface** — Later nominated for Chief Justice and confirmed.

a. The date in this column is the date on which the President's nomination message was received in the Senate. This date may differ from the date of the message itself.
b. Indicates whether there was final action by the Senate (rejecting, postponing action on, tabling, or rejecting a motion to close debate on the nomination) or by the President (withdrawing the nomination).

A nominee's prospects also may be put in jeopardy if a President has not used careful presidential management to pave the way for a smooth confirmation process. Among other things, sound presidential management of the process, it has been suggested, entails good-faith consultation with the Senate before choosing a nominee, especially if the President's party is in the Senate minority. Another element of sound presidential management is selecting a nominee without obvious liabilities or attributes that are likely to generate serious Senate opposition.[144]

Calling Upon the Judiciary Committee to Further Examine the Nomination

Sometimes, after a Supreme Court nomination has been reported, the Senate may delay considering or voting on the nomination, in order to have the Senate Judiciary Committee address new issues concerning the nominee or more fully examine issues that it addressed earlier. Opponents of a nomination may also seek such delay, through recommittal of the nomination to the committee, to defeat the nomination indirectly, by burying it in committee.

Recommittals of Supreme Court Nominations. Although the Senate has never adopted a motion to reconsider a Supreme Court nomination after a confirmation vote, there have been at least eight pre-vote attempts to recommit Supreme Court nomination to the Judiciary Committee.[145] Only two of these were successful. In the first of these two instances, in 1873-1874, the nomination, after being recommitted, stalled in committee until it was withdrawn by the President. In the second instance, in 1925, the Judiciary Committee re-reported the nomination, which the Senate then confirmed.

On December 15, 1873, on the second day of its consideration of the nomination of Attorney General George H. Williams to be Chief Justice, the Senate ordered the

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[144] The Fortas, Haynsworth, Carswell and Bork nominations, one scholar wrote, were all instances in which Presidents failed to give enough care to presidential management of the confirmation process. In the cases of the Fortas, Haynsworth and Carswell nominations, he writes, opposition was "needlessly increased" when Presidents, without ensuring that "positive relationships with senators" were maintained, nominated individuals who were "vulnerable to non-ideological, non-partisan charges." Massaro, *Supremely Political*, pp. 140-142. In nominating Robert H. Bork, President Ronald Reagan, according to the author, fell short in exercising presidential management by failing to anticipate potential opposition in the Senate to a "controversial individual" at "a time demanding a careful and conciliatory course." Ibid., p. 190

[145] Besides the successful attempts in the Senate to recommit the nominations of George H. Williams as Chief Justice in 1873 and Harlan F. Stone as Associate Justice in 1925 (both discussed in this report), six other unsuccessful attempts to recommit Supreme Court nominations are recorded — specifically, the motions to recommit President Ulysses S. Grant's nomination of Joseph P. Bradley in 1870, President Warren G. Harding's nomination of Pierce Butler in 1922, President Herbert Hoover's nomination of Charles Evans Hughes as Chief Justice in 1930, President Franklin D. Roosevelt's nomination of Hugo L. Black in 1937, President Harry S. Truman's nomination of Sherman Minton in 1949, and President Richard M. Nixon's nomination of G. Harrold Carswell in 1970. *Congressional Quarterly Almanac; 91st Congress; 2nd Session,1970*, vol. 26, 1971, p. 161.

nomination to be recommitted to the Judiciary Committee.[146] The nomination had been favorably reported by the committee only four days earlier. During that four-day interval, however, various allegations were made against Williams, including charges that while Attorney General he had used his office to influence decisions profiting private companies in which he held interests.[147] In ordering the nomination to be recommitted, the Senate authorized the Judiciary Committee "to send for persons and papers"[148] — in evident reference to the new allegations made against the nominee. Although the Judiciary Committee held hearings after the recommittal, it did not re-report the nomination back to the Senate. Amid press reports of significant opposition to the nomination both in the Judiciary Committee and the Senate as a whole,[149] the nomination, at Williams's request, was withdrawn by President Ulysses S. Grant on January 8, 1874.[150]

On January 26, 1925, the Senate recommitted the Supreme Court nomination of Attorney General Harlan F. Stone to the Judiciary Committee. Earlier, on January 21, the Judiciary Committee had favorably reported the nomination to the Senate. However, one historian writes, "Stone's unanimous Judiciary Committee approval ran into trouble when it reached the Senate floor."[151] A principal point of concern to some Senators was the decision made by Stone as Attorney General in December 1924 to expand a federal criminal investigation of Senator Burton K. Wheeler (D-MT) — an investigation initiated by Stone's predecessor as Attorney General, Harry Daugherty. Stone's most prominent critic on this point, Montana's other Democratic Senator, Thomas J. Walsh, demanded that the nomination be returned to the Judiciary Committee.[152] By unanimous consent the Senate agreed, ordering the nomination to be "rereferred to the Committee on the Judiciary with a request that it be reported back to the Senate as soon as practicable."[153] Two days after the recommittal, on January 28, the Judiciary Committee held hearings, with the nominee, at the committee's invitation, taking the then-unprecedented step of appearing before the committee. Under lengthy cross examination by Senator Walsh and several other Senators, the nominee defended his role in the Wheeler investigation.[154] On February 2, 1925, the Judiciary Committee again reported the Stone nomination favorably to

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[146] U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, vol. 19 (Washington: GPO, 1901), p. 189. (Hereafter cited as *Senate Executive Journal*.)

[147] Jacobstein and Mersky, *The Rejected*, p. 86.

[148] *Senate Executive Journal*, vol. 19, p. 189.

[149] See, e.g., "The Chief Justiceship," *New York Tribune*, Jan. 6, 1874, p. 1, which reported that the President "has at last discovered that the nomination of Mr. Williams to be Chief-Justice of the Supreme Court is not only a very unpopular one, but that his confirmation will be impossible...." See also Jacobstein and Mersky, *The Rejected*, pp. 84-86.

[150] *Senate Executive Journal*, vol. 19, p. 211.

[151] Abraham, *Justices, Presidents and Senators*, p. 147.

[152] Thorpe, *Appearance of Nominees*, p. 372.

[153] *Senate Executive Journal*, vol. 63, p. 293.

[154] Thorpe, *Appearance of Supreme Court Nominees*, pp. 372-373.

the Senate, "by voice vote, without dissent,"[155] and on February 5, 1925, the Senate confirmed Stone by a 71-6 vote.

Delay for Additional Committee Hearings Without Recommitting the Nomination. In 1991, during debate on Supreme Court nominee Clarence Thomas, the Senate — without recommitting the nomination to the Judiciary Committee — delayed its scheduled vote on the nomination specifically to allow the committee time for additional hearings on the nominee. On October 8, 1991, after four days of debate, the Senate, by unanimous consent, rescheduled its vote on the Thomas nomination, from October 8 to October 15. The purpose of this delay was to allow the Judiciary Committee to hold hearings on sexual harassment allegations made against the nominee by law professor Anita Hill, which had come to public light only after the Judiciary Committee had ordered the Thomas nomination to be reported, without recommendation, on September 27.[156] Following three days of hearings, on October 11, 12, and 13, 1991, at which the Judiciary Committee heard testimony from Judge Thomas, Professor Hill, and other witnesses, the Senate, pursuant to its unanimous consent agreement, voted on the Thomas nomination as scheduled, on October 15, 1991, confirming the nominee by a 52-48 vote.

After Senate Confirmation

Under the Constitution, the Senate alone votes on whether to confirm presidential nominations, the House of Representatives having no formal involvement in the confirmation process. If the Senate votes to confirm the nomination, the secretary of the Senate then attests to a resolution of confirmation and transmits it to the White House.[157] In turn, the President signs a document, called a commission, officially appointing the individual to the Court. Then, the following technical steps occur:

> The signed commission is returned to the Justice Department for engraving the date of appointment . . . and for the signature of the attorney general and the placing of the Justice Department seal. The deputy attorney general then sends

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[155] Abraham, *Justices, Presidents and Senators*, p. 147.

[156] In October 8, 1991, floor remarks, Senate Majority Leader George J. Mitchell (D-ME) explained the need to delay the Thomas vote: "It is most unfortunate that we have been placed in this situation. But events which are unpredictable, unplanned, and unfortunate can and frequently do intervene and cause a change in the plans of human beings. That has now occurred in this matter, in my judgment.

"For that reason, I believe the action we have taken to change the time of the scheduled vote until next Tuesday [October 15], and to give time for further inquiry into this matter by the Judiciary Committee, is an appropriate action." Sen. George J. Mitchell, "Unanimous Consent Agreement," remarks in the Senate, *Congressional Record*, vol, 137, Oct. 8, 1991, p. 25920.

[157] If, on the other hand, the Senate votes against confirmation, a resolution of disapproval is forwarded to the President.

the commission by registered mail to the appointee, along with the oath of office and a photocopy of the confirmation document from the Senate.[158]

Upon the appointee's receipt of the commission and accompanying documents, only the formality of being sworn into office remains. In fact, however, the incoming Justice takes two oaths of office — a judicial oath, as required by the Judiciary Act of 1789, and a constitutional oath, which, as required by Article VI of the U.S. Constitution, is administered to Members of Congress and all executive and judicial officers. In recent years, the usual practice of new appointees has been to take their judicial oath in private within the Court, and, as desired by the Presidents who nominated them, to take their constitutional oaths in nationally televised ceremonies at the White House.[159]

Conclusion

Over the course of more than two centuries, the Supreme Court appointment process has undergone important changes, while remaining constant in other key respects. The process is now much longer than it used to be. From the appointment of the first Justices in 1789, continuing well into the twentieth century, most Senate confirmations of Supreme Court nominees occurred within a week of the nominations being made by the President. In recent decades, by contrast, it has become the norm for appointment to the Court, from nomination by the President to confirmation by the Senate, to take from two to three months, with the process even longer if a nomination is controversial.

The process is also much more open now than it once was. From the outset, starting with George Washington, and for more than a hundred years thereafter, Presidents transmitted their nominations to the Senate without public fanfare, and the confirmation process that followed in the Senate Judiciary Committee and the Senate as a whole likewise occurred away from public view, in closed executive sessions. By contrast, in the modern appointment process, Presidents typically announce their Supreme Court nominations to the nation before broadcast television cameras in carefully staged presidential news events. In turn, nearly all of the official confirmation process that follows — confirmation hearings by the Judiciary Committee, the committee's vote on the nominee, Senate debate, and finally Senate vote on the nomination — is conducted in public session, receives intensive news media coverage, and is watched by hundreds of thousands (and sometimes millions) of American television viewers.

In another major change from earlier practice, there are now many more participants in the Supreme Court appointment process. Whereas until 1868, the Senate Judiciary Committee, more often than not, was excluded from the process,

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[158] Sheldon Goldman, *Picking Federal Judges; Lower Court Selection form Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), p. 12.

[159] The Court itself regards the date a Justice takes the judicial oath as the beginning of his or her service, "for until that oath is taken he/she is not vested with the prerogatives of the office." Supreme Court of the United States, *The Supreme Court of the United States* (Washington: Published by the Supreme Court with the cooperation of the Supreme Court Historical Society, undated), p. 24.

it is now the Judiciary Committee, rather than the Senate as a whole, which is charged with the principal responsibility for investigating the background and qualifications of each Supreme Court nominee. Also, historically, nominees did not participate in the appointment process, but now they regularly appear before the Judiciary Committee. Likewise, in the modern era, public witnesses testify during each confirmation hearing. Among the witnesses are representatives of powerful interest groups, which often take positions in support of or in opposition to a nominee's confirmation. If a nominee is controversial, interest groups may commit themselves to sustained involvement in the confirmation process, mounting support for, or opposition to, a nominee at the very beginning of the process, and seeking through publicity, lobbying and grass-roots efforts of their members, to influence how both the Judiciary Committee and the Senate as a whole vote on the nomination.

From the beginning, an almost unchanging theme underlying the Supreme Court appointment process has been the assumed need for excellence or merit in a nominee as a requisite for appointment to the Court. The continuing expectation of high qualification in nominees has been demonstrated by the Senate's periodic rejection of nominees for alleged lack of qualification.

Also from the beginning, politics, as well as the search for excellence, has played a continuing, important role in Supreme Court appointments. The political nature of the Supreme Court appointment process becomes especially apparent when a President submits a nominee with controversial views, there are sharp partisan or ideological differences between the President and the Senate, or the outcome of important constitutional issues before the Court is seen to be at stake. Under these and other circumstances, divisions may occur in the Senate, bringing to the fore the differing political views of Senators supporting and those opposing the nominee.

If the nomination of a person to the Supreme Court sometimes produces confirmation battles, the appointment process at other times is remarkable for its lack of conflict, particularly when the Senate votes overwhelmingly for confirmation. Various factors might be present when a Supreme Court appointment process is characterized more by harmony than by conflict. At the start of the process, for example, there might be close consultation between the President and Senate members over suitable candidates for the Court; the President may choose a distinguished, uncontroversial nominee who immediately attracts widespread support from Senators of both parties; the President's party might be in firm numerical superiority in the Senate (thus discouraging detractors of the nominee from mounting vigorous opposition); or a particular Court vacancy might not be regarded as of great moment to the future of the Court (in contrast to vacancy situations where opposing political interests perceive very much to be at stake).

Over more than two centuries, the Supreme Court appointment process has remained constant in one other, constitutionally fundamental respect — in the sharing of the appointment power between the President and the Senate. No Justice has ever been appointed for life to the Court except through this shared process of appointment (although, as noted earlier, Presidents on rare occasions have made temporary "recess appointments" to the Court without the Senate's consent).

Whenever a new Supreme Court vacancy occurs, the President and the Senate face a situation that is both unique and familiar. Unique are the political circumstances of the moment, and the legal controversies that loom before the Court at that point in time. Familiar are the basic roles to be performed in the appointment process. Following a pattern adhered to for more than 200 years, the President and the Senate will again share the appointment power. One will nominate, the other will decide whether to confirm. Only when the two reach agreement may a new Justice join eight others on the Supreme Court of the United States.

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