ELECTING JUSTICE

Fixing the Supreme Court Nomination Process

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Contents

Introduction

A Broken Process

On June 14, 1993, after introducing his first Supreme Court nominee to the nation in a Rose Garden ceremony, President Clinton turned the podium over to the 60-year-old Brooklyn-born judge. Ruth Bader Ginsburg gave a moving speech, including warm praise for her mother, and then closed with a touching self-challenge: "I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve, and daughters are cherished as much as sons."

Tears welled up in the president's eyes as he and the audience gave Ginsburg warm, sustained applause. He was pleased. His announcement and Judge Ginsburg's short speech reinforced the White House's effort to show that the president had made history by choosing the second woman to the Court and a long-time legal activist for women's rights.

Then, according to the previously announced schedule, President Clinton turned to the press to take questions. The first, and ultimately only, question was asked by Brit Hume of ABC News. Hume, trying to be respectful, yelled toward the president from the edge of the Rose Garden:

> The withdrawal of the Guinier nomination, sir, and your apparent focus on Judge Breyer and your turn, late, it seems, to Judge Ginsburg, may have created an impression, perhaps unfair, of a certain zigzag quality in the decision-making process here.

> I wonder, sir, if you could kind of walk us through it and perhaps disabuse us of any notion we might have along those lines. Thank you.

Visibly annoyed by the question, Clinton responded curtly: "I have long since given up the thought that I could disabuse some of you of turning any substantive decision into anything but political process." The president warmed to his topic: "How you could ask a question like that after the statement she just made is beyond me." Then, probably anticipating further similar questions, President Clinton quickly began to escort Judge Ginsburg off the platform, signaling an abrupt end to the press conference.

Old Myths and New Realities

The exchange between the president and the journalist represents the ideal of the Supreme Court nomination process versus its present reality. The ideal is cherished in American culture. Many Americans would like to think the manner in which people become justices on the United States Supreme Court is governed by merit and objectivity.[1] They would like to think the president chooses the most qualified individual and the Senate confirms such a person promptly.

However, recent events suggest something very different. Supreme Court nominations have become public pitched battles involving partisans, ideological groups, single-issue groups, and the press. These groups and the media have taken center stage to argue less the merits of a nominee than political traits such as acceptability to particular issue groups, ideological bent, and appeal to the public. They declare that the nominee must be pro-choice or pro-life, sympathetic to the gay rights movement or hostile to its agenda, ideologically liberal or clearly conservative.

Individual nominees have been scrutinized for signs of agreement or disagreement with group agendas. Robert Bork was pilloried by liberal

groups because of his views on privacy, abortion, and judicial review. Conservative groups challenged the potential nominations of Mario Cuomo and Bruce Babbitt in 1993 as liberal politicians who would undo the gains conservatives had made in the Rehnquist Court.

Not only has an actual vacancy activated these forces but also even the prospect of a Supreme Court nomination now resembles sharks smelling the scent of blood in the water. As groups face the reality of aging justices nearing retirement, a narrowly divided Senate, and an ideologically driven president, the battle is joined.

Early in George W. Bush's first term, the prospect for a major confirmation fight seemed imminent. With Republican control of both the White House and the Senate, the White House finally could press presidential nominees through the Senate Judiciary Committee and the Senate as a whole. The Republicans promised to expedite judicial nominees. Conservative interest groups pushed for the confirmation of favored judicial nominees. The Eagle Forum launched a major grassroots campaign to lobby the president to nominate and the Senate Judiciary Committee to confirm socially conservative judges.[2]

The Democrats lashed back, claiming partisanship. Senator Pat Leahy of Vermont charged: "Many see this as part of a partisan effort to pack the courts. This is not the way to discharge our constitutional duty to advise and consent."[3] Liberal groups urged Democrats to stop the movement of conservative justices onto the federal bench and sought to mobilize supporters to lobby their senators to oppose confirmation. NOW urged their grassroots supporters to "write or call your Senators and ask them NOT to confirm these nominees," while People for the American Way set up a Web site titled savethecourt.org.[4]

Democrats threatened to use their only viable remaining institutional weapon—the filibuster—knowing that if they held ranks a cloture vote would fail. Judiciary Committee chair Senator Orrin Hatch shot back: "If that starts, then that means that this will devolve into a total ideological exercise, which would be very unfortunate."[5] Nevertheless, Democrats filibustered appellate court nominees and

promised to do so for an even bigger prize. Senate Minority Leader Tom Daschle warned Republicans that Democrats might use their tool even on a Supreme Court nominee:

> "I think it just depends on how qualified the nominee will be and if there is such an opening," he said. "If a replacement for the chief justice of the U.S. Supreme Court represents an extreme far-right position on most of the issues of the day, or issues relating to the Constitution, I think he or she would be in for a rough ride, in terms of the confirmation."[6]

Senators Daschle and Leahy urged the White House to open a "bipartisan process of consultation" when a Supreme Court vacancy appeared in order to help the president find a confirmable appointee. However, the White House press secretary quickly rejected the idea of discussing an appointment with senators and argued that "the Constitution is clear, and the Constitution will be followed."[7]

What these events indicate is that the mechanism of appointing Supreme Court justices looks little like the ideal the public envisions. Instead, it has become a public political battleground where groups wage holy war and the tactics reflect a no-prisoners approach to combat. One former senator compared the Senate's role in judicial selection to legislative lobbying, concluding that groups "have turned the confirmation process into something that's not very different than passing a bill."[8] Indeed, groups mobilize their members to pressure senators to vote for or against confirmation.

Like an Election

But a perhaps more accurate analogy is that of an electoral campaign. The similarities between presidential elections and judicial appointments are becoming increasingly apparent.

For example, presidential candidates are subject to intense press scrutiny over past and current public and private activities, including

past drug use, sexual affairs, financial problems, and brushes with the law. So are Supreme Court nominees. Like a presidential candidate, the nominee's background is open to public scrutiny, including every past public statement, action, and affiliation. Even private activity is fair game. Video rental records and past girlfriends are not beyond the pale.

Candidate campaigns design elaborate image-making strategies for public consumption, complete with popular personal themes—"working class background," "leadership skills," or "executive experience." Similarly, the White House "sells" a nominee as representative of a certain group—women, Italian American, African American, Catholic—and/or pushes certain themes with nominees, such as the candidate is a "strict constructionist" who interprets the Constitution literally or the candidate reflects certain American values, such as the "pinpoint" strategy used by the George H. W. Bush administration to promote Clarence Thomas as a model of American success.[9]

Groups research presidential candidates' backgrounds to determine whether to endorse or oppose and then often devote extensive funding and other resources to reinforce their decisions. Similarly, groups tout or support Supreme Court nominees and are willing to spend large sums of their money to shape public opinion and win the eventual votes of senators.

The transformation of the Supreme Court appointment process into a mechanism similar to that of an electoral campaign has occurred because of the introduction of new, powerful players—the news media, interest groups, and public opinion. These forces now shape the system of judicial selection in a way unknown a half century ago.

This change into a quasi election is not unique. Other appointment processes in national politics also have undergone similar makeovers. Cabinet members now can face intense public scrutiny if significant opposition arises.[10]

However, the nature of the Court itself offers a qualitative difference. The small size of the institution, the longevity of the jus-

tices (life terms), and the policy-making power of the institution as a coequal branch makes such a transformation more dramatic than one involving a cabinet secretary who serves as an underling for the president and at the president's will.

It also moves further than other processes from the constitutional underpinnings that traditionally defined judicial selection. Although bureaucratic appointments ultimately are part of the executive branch and are accountable to the legislative branch—both governed by officials elected in partisan elections—the Court has been an institution apart in many ways, including personnel selection.

Constitutionally, the Court is the most distant institution from the public. So is the selection system of justices. The two bodies that constitute the formal selection process were designed to be one step removed from the public. Originally, the president was elected by the electoral college, the states' elites, and the Senate was elected by the state legislatures. Their role in judicial selection established a barrier between the Court and the public.

Today's process reflects the changes for the other players involved in judicial appointment. The president no longer enjoys the distance from the public envisioned by the framers. Rather, presidents are virtually directly elected by the voters in each state. Nor are senators as distant as they once were. They now are elected directly by the voters in their respective states. As the barriers between the public and the president and senators have fallen, the public has drawn one step closer to the judicial selection process.

Yet, today the public is not directly involved in the Supreme Court nomination process, which is a crucial difference between presidential elections and today's judicial selection process. All the trappings of mass electorate involvement exist, but in fact the electorate is still a body of essentially 101 people—the U.S. Senate, plus the president of the United States. That group is even smaller than the number of electors in the electoral college.

Of course, one could argue that in that sense presidential selection really is much like a Supreme Court nomination. The actual electors are not the 100 million people who vote in presidential elections,

but the 535 individuals who constitute the electoral college—an elite much like the president and the Senate.

However, there are significant differences. The presidential electors are chosen by the state political party organizations and therefore nearly always personally support the victor of the popular vote in the state. Moreover, the moral expectations placed on electors are that they will vote for the candidate who wins the popular vote. (In some cases, the obligation hypothetically is stronger than an ethical one because 26 states legally *require* the electors to vote for the popular vote total winner.)[11] And historically, few electors actually have done otherwise, which suggests the compelling role of such an expectation.

Senators, on the other hand, have no such moral obligation to vote a certain way on a Supreme Court nominee. In fact, senators have voted for or against nominees when their constituencies seemingly did not approve. For example, Senator Alan Dixon of Illinois voted to confirm Clarence Thomas in 1991 and was defeated for reelection within six months by Carol Moseley Braun, who strongly opposed Thomas.

According to Alexander Hamilton in Federalist number 77, in fact, the elite nature of the body was its appeal when the framers sought a check on the president's power. No constitutional provision, state law, or Senate rule requires senators to represent their state populations in a vote on a Supreme Court nomination. Compared with electors, who are similar to automatons in the discharge of their constitutionally appointed duty, senators are inclined to play truly deliberative roles in their "advise and consent" function.

In a sense, selecting justices for the Supreme Court is an election without voters. Admittedly, the U.S. Constitution specifically excluded the voters, just as it did with presidential selection. Yet, over 200 years of history, and particularly in the last quarter century or so, we have transformed the judicial selection process into one with all of the trappings of an electoral campaign but without the key players—the electorate. This is an untenable situation—a reality that looks only vaguely familiar to the formal structure designed for it more than 200 years ago and a process that no longer reflects reality.

A Hybrid Process

The introduction of these new external forces—the media, groups, and the public—and the resulting quasi-election status of Supreme Court appointments have created a procedure divergent from that outlined in the Constitution. It produces a hybrid arrangement, where the constitutional requirements that favor elites and exclude the general public collide with the current version, in which external forces, including the general public, actually help determine the outcome. Although one solution might be to return to the elite-dominated process of yore, in fact, that is impossible. Rather, the formal outline of the process should conform to what the process actually has become.

External forces perform functions today that were not acknowledged originally in the Constitution. Selection of justices should be changed constitutionally to reflect the reality of external players rather than the false idea of exclusive elite involvement.

What is that reality? External players, not constitutionally enumerated, affect the conduct and outcome of the Supreme Court nomination process. My argument is not that these players were not significant before. In fact, these players have participated on infrequent occasions in the past. Examples include the nominations of Louis Brandeis in 1916 and John J. Parker in 1930, both of which stirred interest group involvement and public debate.[12]

But from the late 1960s on, their role has grown in intensity, particularly in selected nominations, and since the 1980s their involvement has become highly public. And it has extended to all Supreme Court nominations, not just occasional controversial ones. Not only are these forces players in the process but also their effect on the outcome of some nominations, such as those of Robert Bork and Clarence Thomas, is widely accepted.[13]

As a consequence, there is a significant difference between the process existing during most of U.S. history and the one in operation today. The difference is the extent and permanence of the role of these external players. As a result, Supreme Court nominations are highly

public processes including new, and hardly shy, players. Their addition has altered the process of selecting Supreme Court nominees.

The legitimacy of these has grown gradually over the years but now has reached the point where their role goes unchallenged. The public vetting of candidates for presidential selection, White House and Senate consideration of interest group positions, and the extensive and highly public Senate investigation and hearing process all suggest that internal players have come to accept external forces as legitimate players in the process.

One response to this development is the argument that these players' involvement is merely an aberration. This argument suggests that at certain periods of American history, external players have entered the fray for brief periods. Examples are the failed nominations of candidates such as Abe Fortas (1968), Clement Haynsworth (1969), and G. Harrold Carswell (1970). Yet such instances are uncommon. Similarly, the argument goes, more recent controversial nominations such as those involving Clarence Thomas and Robert Bork were rare instances rather than part of a trend.

According to this theory, the public campaigns conducted by interest groups and the involvement of the media and public opinion in the nominations of Robert Bork, Douglas Ginsburg, and Clarence Thomas in the late 1980s and early 1990s could be viewed as isolated events. Indeed, the subsequent appearance of less controversial nominees such as Ruth Bader Ginsburg and Stephen Breyer would seem to be ample evidence that the elite-dominated process—that is, one controlled largely by Washington insiders, particularly the White House and the Senate—has reemerged. If this theory is correct, then we would expect that future nominees will escape the scrutiny accorded nominees in that period and that the judicial selection process will return to its elite-dominated state.

However, several signs point to continued high-profile conflict over the judicial selection process, which certainly spills over into Supreme Court nominations. One piece of evidence has been the recent treatment of nominations of lower federal judges. Lacking

a Supreme Court nominee for a decade, both liberal and conservative groups sparred over federal appellate judicial nominees. During the George W. Bush administration, groups such as the Alliance for Justice, the AFL-CIO, and People for the American Way targeted nominees such as Charles Pickering, Patricia Owen, and Miguel Estrada.[14] Charles Pickering was labeled by these same groups as a racist and unworthy of the federal bench, although President Bush gave him a temporary recess appointment. Pro-choice groups labeled Owen "anti-abortion" because she upheld a parental notification law, although she was eventually confirmed.[15] Estrada was accused of being much more conservative than he would reveal in Senate Judiciary Committee hearings, resulting in a Senate filibuster and successive failed votes on his nomination.[16]

Similarly, conservative groups such as the Heritage Foundation and the Free Congress Foundation targeted Clinton nominees during his presidency and, while Republicans controlled the Senate, effectively blocked votes on many of them. Richard Paez, a nominee for the 9th Circuit Court of Appeals, waited four years before achieving Senate confirmation. Others saw their nominations die when Clinton's term in office ended.[17]

Another sign of the battle over the lower courts is the length of a nominee's wait for confirmation. Today, the average length of time between nomination of judicial candidates and confirmation is six months. In contrast, judicial nominees during Ronald Reagan's first term were confirmed on average in just one month.[18]

Rather than a sign that the battle has permanently shifted to lower courts, the lower court judicial selection struggles suggest that the battle over Supreme Court nominations will be just as vicious, if not more so, than those over lower court nominees. Interest groups promise similar fights over potential Supreme Court nominees. For example, conservative activist Phyllis Schlafly promised that conservative groups would oblige Republican presidents to nominate committed conservatives: "We are not going to put up with another [David] Souter."[19] The process is now, and will be for the foreseeable future, highly political and public. According to scholar William G.

Ross, "groups have become a permanent and prominent feature of the judicial selection process."[20]

Then what should be done? Reform of a process to acknowledge and adapt to its current form is difficult for our political system. However, changing our public official selection processes in order to reflect democratic trends is hardly a new feature of American politics. Both presidential and senatorial selection modes have been reformed to acknowledge democratic trends. These institutions have survived such change. Supreme Court justice selection similarly needs restructuring to reflect the permanent roles of these external players. That reform is essential, not just at the confirmation stage but also earlier, during the nominee selection process.

But before proposing specific solutions to this dilemma, it is necessary to back up and fully describe the problem at hand. What is the traditional process, and how has it been changed by the addition of these new players as permanent fixtures? What roles do these external players play today—both in the nomination stage and in the confirmation stage? Finally, what can be done to reform judicial selection to mesh constitutional structure with reality and preserve the trend of democratization?

1

Traditional versus New Players

The day President Woodrow Wilson announced the nomination of Louis Brandeis to a seat on the U.S. Supreme Court, the press cornered Brandeis at a social event and asked for his reaction. Brandeis replied: "I have not said anything and will not." Brandeis said a lot privately about the confirmation battle that swirled around him, but he steadfastly maintained his public silence.[1]

That was 1916. Today, no Supreme Court nominee would dare make such a statement. Instead, they would be required to sit before a phalanx of senators at a hearing broadcast live to the nation and answer questions for several days. They would be expected to answer lengthy questionnaires and, if necessary, appear with the president at press conferences.

It is difficult to remember that for most of our history the selection process for Supreme Court justices was characterized by its insularity. Until the latter part of the twentieth century, most nominations involved exclusively the White House, the Senate, and legal community leaders. Public controversy over nominees erupted on occasion, but typically the debate was joined by a relatively small number of insiders.

The process of confirming a justice today is a media-oriented exercise. White House management of a Supreme Court nomination reflects concern about the press portrayal of a nominee. Senators are well aware that television cameras in the hearing room are beaming their faces and words to millions of Americans, even tens of millions

during controversial hearings, such as those held for Robert Bork and Clarence Thomas.

Group and press involvement—and their interaction as the press uses groups as news sources and groups use the press as a medium for communicating with others—draws the public into the process. Public opinion becomes the implicit gauge of selection and confirmation. A nominee who engenders the disapproval of the public would be a difficult call for the U.S. Senate. Obviously, such sentiment does not exist separate from the influence of elite messages in the form of White House image making, press coverage, and group response, but public opinion surveys and other less scientific measures such as letters to politicians, letters to the editor, and protests become tools for proponents and opponents in justifying appointment or rejection.

The public clearly become observers, particularly as the process is punctuated by media events such as presidential nomination, group reaction, and confirmation hearings. But the public serve as more than mere observers. The public's views—as expressed in public opinion surveys and interest group grassroots lobbying efforts—become factors in the decision making by the traditional players.

Traditional Players

The traditional process was dominated by the interaction of three players. The president nominated, the Senate confirmed (or not), and the justices of the Court both initiated the process (retirement or death) and were affected by it, since the process determined who sat with them on the Court.

Justice Ruth Bader Ginsburg once wrote: "Judicial confirmation is the extraordinary moment in which the three branches of government intersect."[2] The process of nominating Supreme Court justices indeed represents a nexus of the three branches of American national government. The Constitution provides for presidential appointment power over "judges of the Supreme Court" with the "Advice and Con-

sent of the Senate."[3] No other constitutional responsibility so joins the three branches.

Historically, the traditional players had the process largely to themselves. There have been exceptions to this rule when various interest groups and press coverage influenced the outcome of presidential selection and/or Senate confirmation. Some of those instances are discussed here, but the permanent fixtures in the process have been the president, the Senate, and the Court itself.

Presidential Politics

For the president, Supreme Court appointments serve as significant historical marks of an administration. This is especially true of the appointment of chief justices, whose terms of service punctuate periods of the Court's history. But even appointments of associate justices can turn the tide of history. Two of the justices appointed by Franklin Roosevelt in the 1930s, William O. Douglas and Hugo Black, spearheaded the civil liberties orientation of the Warren Court. Lewis Powell served as a swing justice for many Court decisions during the 1970s and 1980s. The appointment of Clarence Thomas in 1991 at the age of 43 is likely to presage a lengthy career as a justice and the ability to influence Court decisions for decades into the future.

Because presidents have the potential of affecting policy for many years beyond their own limited terms, their tendency is to search for younger nominees who can serve for a significant amount of time. Richard Nixon suggested the ideal Supreme Court nominee is "between forty and fifty years of age. I think that . . . sixty-year-old men would be a mistake."[4]

But in a more immediate sense, nominations to the Court determine the president's power to shape the judicial branch. Unlike lower level federal judiciary appointments typically driven by home state senatorial courtesy, the president participates directly in Supreme Court justice selection. Moreover, the appointment power allows the president to affect policy outcomes relative to the administration's

immediate priorities. The Reagan and George H. W. Bush administrations, with appointments such as William Rehnquist as chief justice and Antonin Scalia, Anthony Kennedy, and Clarence Thomas as associate justices, were able to move the Court decidedly to the right, even during their presidential administrations.

These appointments also can reflect on the president's political standing vis-à-vis the legislative branch. On one hand, a successful, easy confirmation can reinforce the image of presidential success; on the other hand, failure to confirm presidential nominations suggests presidential incompetence in directing the Senate. Such battles have clear ramifications for the long-term relationship between a president and the Congress. It is probably not insignificant that one of the most unsuccessful recent presidents in obtaining confirmation of Supreme Court nominees (Richard Nixon) was also the only president to resign from office.

Even when presidents win confirmation for their nominees, a tough confirmation fight can deplete precious political capital. As an example, President George H. W. Bush won the struggle to confirm Clarence Thomas, but the effort ultimately contributed to the image of a weakened president. He faced a stiff primary challenge and ultimately lost his reelection bid.

In an era of plebiscitarian presidencies, public approval of the president, and therefore the president's power, often rises or falls based on singular high-profile events.[5] For example, both presidents Bush achieved soaring public approval ratings after Persian Gulf military victories.[6] And President Nixon faced a steady downward trend of public approval during the Watergate crisis, particularly after the release of tapes showing Nixon's role in the cover-up of the Watergate break-in. In the United States, popular approval ratings correspond to no-confidence votes in parliamentary governments. Although the president does not leave office as a prime minister does, the president may lose so much political capital that a mortal wound to the administration is inflicted.

One example is the case of President Bill Clinton, whose Supreme Court nominations were intended to help stanch the flow of bad

press from administration mistakes, scandals, failed nominations, and unsuccessful legislative initiatives. For example, during the process to fill the Harry Blackmun vacancy in 1994, Clinton faced popular approval ratings hovering at 50 percent, and a major administration initiative, health care reform, faced stiff opposition. The White House hoped a popular Supreme Court nominee would reverse the perception of political failure, as well as the slide in the president's public approval rating.

Even the president's reelection effort may be affected by a Supreme Court nomination. Supreme Court appointments can be used to reach out to swing voters. In the fall of 1956, Dwight Eisenhower used a Supreme Court appointment to woo the votes of Democrats and Catholics by appointing New Jersey state judge William Brennan, a Catholic and a Democrat, to the Court.[7] While working in the Nixon White House, Pat Buchanan urged Richard Nixon only a year before Nixon's reelection to "appoint a conspicuous ethnic Catholic, like an Italian-American jurist with conservative views. Not blacks, not Jews, but ethnic Catholics, Poles, Irish, Italians, Slovaks."[8]

But an appointment also can be used to appease the president's core electoral constituency. George H. W. Bush's appointment of Clarence Thomas was designed to satisfy the right wing of the Republican Party as Bush launched his reelection campaign. The effort only partly succeeded, as Bush was wounded by the right-wing candidacy of Pat Buchanan in the Republican primaries and eventually lost his reelection bid.

The news portrayal of issues and events in national politics personalizes a Supreme Court nomination to the point that the president is inextricably bound to the success or failure of the nominee. Failure to confirm often produces the perception of presidential weakness, which in turn results in difficulties for the president in winning other contests with the Congress.

Thus, confirmation struggles have become major battlegrounds for presidents. Although historically four of five nominees have been confirmed (and the vast majority of those not confirmed were in the nineteenth century), since 1968, six of fifteen nominees have been rejected

by the Senate or withdrew in the midst of controversy. Indeed, the period between 1968 and 1987 saw the defeat of three Supreme Court nominees by Senate vote (Clement Haynsworth, G. Harrold Carswell, and Robert Bork) and the withdrawal in the face of intense opposition of two others (Abe Fortas and Douglas Ginsburg). By contrast, only one nominee was defeated in the period 1901–1967 (John J. Parker).

Gaining confirmation has become a major objective of presidents in the wake of these rejections and the stakes involved. Hence, in recent years, presidents have devoted increased attention to management of nominations. Presidential management has become a more salient determinant than in the past in the confirmation success of a nominee.[9] The White House undertakes an aggressive task of selling the nominee to the Senate and to the nation. Because self-presentation of the nominee to the mass public has become far more critical than in the past, the White House has been intensively preparing nominees for not only Senate Judiciary Committee hearings but also all appearances before the press. Unlike in the nineteenth century and most of the twentieth, Supreme Court nominations are not quick processes that involve the president only at the decision-making stage.

Senate Role: "Advice and Consent" to Aggressiveness

The stakes are also high for the Senate. The Senate's role, long pendulum-like in its shift from sycophancy to aggressiveness, at this point in history leans more toward the latter (or at least the appearance thereof). The constitutionally prescribed "advice and consent" role now includes at least several weeks (or months) of staff investigation, committee hearings and final vote, and floor debate and final vote. Moreover, the pressures senators feel no longer emanate primarily from the legal community and only indirectly from the vast majority of constituents. Now the roles have reversed. Senators now face direct lobbying from constituents who have mobilized to affect the result.

Calls for Senate assertiveness in the nomination process began with Republican senators during the unsuccessful confirmation effort

for Abe Fortas as chief justice in 1968. Senator Robert Griffin of Michigan reminded the Senate that the president's nomination was only part of the appointment process: "He's got only half the power. We've got the other half and it's time we asserted ourselves."[10] Calls became more frequent in the 1980s and 1990s, this time from Democrats who opposed Reagan and Bush nominees.[11] The press has summoned the Senate to sharply question nominees.[12] And, in response, the Senate has become more deliberative toward Supreme Court nominees in recent years, as measured by the length of time devoted to investigative research and the extent of questioning of the nominee. One scholar of confirmations concluded that the Fortas nomination significantly changed the Senate's attitude toward presidential nominees: "The presumption respecting presidential control was honored more in the breach than in the observance."[13]

One example is the contrast over time in the Senate Judiciary Committee's treatment of controversial Supreme Court nominees. In 1930, the Senate Judiciary Committee devoted one day of hearings to the controversial nomination of Judge John J. Parker as an associate justice. Parker himself never even testified.[14] However, nominees over the past 20 years have spent between three and five days on the witness stand, and other witnesses' testimony has taken from one to several days.

However, the danger is not all in one direction. The aggressiveness the Senate employs to scrutinize nominees can backfire. The Senate faces the danger of appearing belligerent. The mishandling of a Supreme Court nomination can damage the Senate's reputation, as demonstrated in the hearings involving Clarence Thomas and Anita Hill.

The Constitution is silent on what "advice and consent" means in the confirmation process. John Massaro's study of unsuccessful Court nominations concluded that ideology has been the main factor in Senate rejection.[15] But a vote centered explicitly on ideology may tarnish the process as too blatantly political. The Senate, then, walks a tightwire in judging Supreme Court nominees, with strong incentives to maintain balance throughout the process.

The Court's Role: Retirements, Court Functions, and Image Making

Obviously, the third major player with a stake is the Court itself. This may not seem obvious because, by outward appearances, the justices have little say in who joins their ranks, but the reality is much more complex. Like the other traditional players, the Court both affects and is affected by judicial selection.

The justices affect the process through timing. They typically control when they will leave the bench through retirement. Speculation often accompanies a justice's cryptic comments about retirement or the alignment of an aging justice, particularly one in poor health, with the incumbency of a president who reflects the justice's ideological views.

For instance, speculation was rampant immediately following the 2000 election because of the conjunction of several senior justices appointed by Republican presidents and a newly elected Republican president. Abetting this alignment was the strained atmosphere on the Court in the wake of the *Bush v. Gore* case settling the hotly disputed 2000 presidential election. The strident words contained in the variety of opinions issued by the Court in that case illuminated not only the importance of the Court in American political life but also the close divisions among the justices. Reportedly, the case of *Bush v. Gore* took an emotional toll on the justices and prompted Justice Sandra Day O'Connor to consider retirement.[16] Given O'Connor's prominent role as a swing justice over her tenure, the single vote of her replacement held the potential of being decisive in Court decision making for years to come.

Retirement of a chief justice attracts particular notice because Court eras tend to be marked by chief justices. And during this period another prospective retiree was Chief Justice William Rehnquist. Although the post carries only one of the nine votes on the court, the chief justice's power to assign opinions when in the majority and to determine a historical period offers the president an opportunity to shape the Court like no associate justice appointment.

The Court not only affects the appointment process but also is profoundly affected by it. Obviously, the appointment process determines who actually sits on the Court. Justices have no control over whom presidents select and senators confirm, yet that single individual (as one-ninth of the institution) can be a swing vote who shifts policy. Like most other people, sitting justices would like an additional colleague who thinks like them. Chief Justice Rehnquist once told a reporter: "You don't want eight of those people [who think like him] appointed, but, like all my colleagues, I would welcome two or three! If there were two or three people like me—I've been in dissent in a number of cases—perhaps some of those dissents would then become court opinions. That's a very iffy business, though."[17]

Moreover, that individual can affect the atmosphere on the Court. A tragic case was the appointment of James McReynolds, then U.S. attorney general, by President Woodrow Wilson in 1914. For the next 27 years, McReynolds's anticollegial behavior and outright anti-Semitism poisoned his relations with other justices and the general environment on the Court. McReynolds refused to acknowledge Jewish justices who spoke in conference and refused to participate in the annual Court photograph because it would require him to sit next to Justice Louis Brandeis, the first Jewish justice. Chief Justice Taft called him "a continual grouch," and when Chief Justice Harlan Stone remarked that an attorney's brief was the dullest one he had ever read, McReynolds replied: "The only thing duller I can think of is to hear you read one of your opinions."[18]

Yet there is even more than personnel selection in the effects on the Court. The Court's very prestige and power are affected by the conduct of the judicial nomination process. Reflecting the view of the institution, Henry Abraham argues that that process of judicial selection is one that must "assure [the justices] of independence, dignity, and security of tenure."[19]

But the current process has been criticized, particularly by the legal community, precisely for lack of dignity and the difficulty of maintaining the aura of independence throughout the proceedings.[20] One example is attention to the justices as individuals. Press and pub-

lic attention to the nominees has extended far beyond the individual nominee's record or legal views to an examination of private activities. The stakes for the individual nominees are great as well—a seat on the Supreme Court or lasting infamy due to the characterizations attached to the nominee during the process.

Another dangerous area for the Court is the image of justices who are appointed to settle political scores or are the darlings of particular interest groups. For example, during the George W. Bush presidency, conservative groups urged the president to appoint Clarence Thomas as chief justice when Chief Justice Rehnquist retired, presumably to anger liberal groups for years to come.[21]

With its emphasis on the titillating and partisan, not surprisingly, confirmation coverage has not endeared the news media to the justices. Admittedly, news media coverage, particularly broadcast media, long has been problematic for the Court.[22] But, after tentative moves toward televised coverage of the Court, the justices rejected it. The cause, at least partly, was the nature of news coverage of the Robert Bork confirmation hearings.[23]

The Evolving Role of New Players

The Bork nomination is often viewed as a landmark because of the involvement of news media, groups, and public opinion. However, that nomination was not a first in that respect. External forces had participated in Supreme Court nominations previously. Both the press and groups were players in occasional confirmation battles.

Long before Robert Bork, press coverage had harmed a nominee's chances at confirmation. Alexander Wolcott, a customs tax collector, was nominated by President James Madison in 1811. Wolcott's appointment was panned by New England newspapers. One termed it "this abominable nomination." Another opined that Wolcott was said to be "more fit by far to be arraigned at the Bar than to sit as a judge." The newspaper condemnation undoubtedly was encouraged

by Northern merchants who despised Wolcott because of his tax collector role. Wolcott was soundly defeated by the Senate.[24]

As Alexander Wolcott's story demonstrates, interest groups also intervened occasionally in the process, almost from the beginning of the selection process. That involvement arose on rare occasions throughout the nineteenth century. In 1881, railroad interests successfully lobbied President Rutherford B. Hayes to nominate Stanley Matthews, a former U.S. senator and a railroad's legal counsel. However, the nomination incurred the wrath of other economic groups. The New York Board of Trade and Transportation, a group representing 800 businesses, along with the National Grange and other farm groups, urged the Senate Judiciary Committee to defeat Matthews as too supportive of railroad interests.[25] Matthews eventually was confirmed. According to Henry J. Abraham, the fight over Matthews "marked the emergence of organized interest groups into the confirmation process of Supreme Court nominees."[26]

That involvement by the press and interest groups grew dramatically in the twentieth century, particularly in the wake of the Seventeenth Amendment providing for the direct election of U.S. senators. The first controversial nomination thereafter was President Woodrow Wilson's nomination of Boston lawyer and social advocate Louis Brandeis. Not only was Brandeis a distinguished Boston attorney who had acquired a reputation as an articulate social liberal but also he was Jewish and, if confirmed, would therefore become the first Jewish justice on the Court.[27]

Brandeis's nomination earned the ire of both conservatives and anti-Semites. Conservative forces mobilized to block confirmation by recruiting press support. The *New York Times*, the *Wall Street Journal*, and most New York newspapers editorialized against Brandeis's confirmation because he was viewed as a radical and therefore a threat to the social and political establishment.[28] However, other media outlets supported Brandeis. The *New Republic* editorialized in Brandeis's favor, and New York newspapers such as the *Independent* and the *New York World* were strong Brandeis supporters.[29]

Interest groups were prominent players in the Brandeis confirmation process. While business groups opposed Brandeis, labor groups weighed in to support the appointment. The legal community split, with many former bar association presidents opposing Brandeis, but law professors and law students lined up in his favor.[30] The Senate Judiciary Committee's lengthy public hearings called on witnesses both for and against confirmation. Interest groups sent letters to the committee to support a certain outcome from the committee and the Senate as a whole.[31]

In 1930, President Herbert Hoover's nominee John J. Parker stirred up even more controversy than Brandeis had. Although widely recognized as an outstanding jurist, Parker angered labor groups with an opinion perceived as antilabor. Parker claimed he was merely following Supreme Court precedent, but labor groups were not convinced.

Additionally, Parker angered the NAACP.[32] While running for governor a decade earlier, Parker had commented: "The participation of the Negro in politics is a source of evil and danger to both races."[33] When given the opportunity by the executive director of the NAACP to retract those views or at least clarify his current position, Parker declined, thus fanning the flames of opposition on civil rights grounds.[34]

An intense group lobbying effort deluged senators. Telegrams from labor groups and the NAACP urged senators to oppose the nomination. Black newspapers editorialized against Parker. The opposition of blacks was particularly disturbing for Republican senators because most African Americans at the time were allied with the Republican Party and the bloc vote of black voters was a significant electoral force in several Northern states.[35] The NAACP targeted several pro-Parker Republican senators for defeat in their next elections. A prominent black newspaper edited by W. E. B. Dubois listed all the senators who had voted for Parker and urged readers to work for their defeat.[36]

In turn, the White House attempted to recruit a group to endorse Parker. Long known for support of civil rights, the Society of Friends (Quakers) was pressured by Hoover, also a Quaker, to blunt the

NAACP's campaign. But the effort failed. Parker eventually was rejected by the Senate because he was perceived as having an antilabor and anti-Negro bias.[37] Parker went down to defeat.[38]

A few years later, newspaper editorials lambasted Franklin Roosevelt's appointment of Senator Hugo Black of Alabama. The *Chicago Tribune* opined that "if [Roosevelt] wanted the worst man he could find he has him."[39] The *Washington Post* charged that if Black "has ever shown himself exceptionally qualified in either the knowledge or the temperament essential for exercise of the highest judicial function, the occasion escapes recollection."[40] However, press opposition made little impact on the Senate, which confirmed Black handily. It was also the press that uncovered evidence of the extent to which Black had been associated with the Ku Klux Klan a decade earlier, but only after Black had already been confirmed.[41]

Nor did interest groups gain much sway in nominations after their success in defeating Judge Parker. For example, several women's groups including the Young Women's Christian Association (YWCA), the American Association of University Women (AAUW), and the Business and Professional Women (BPW) lobbied Franklin Roosevelt to nominate Florence Allen to the Court in the late 1930s, but Roosevelt saw little political gain in satisfying these groups.[42]

External force involvement did not reemerge until the 1960s. By this point, group testimony was a given during Senate Judiciary Committee hearings. For example, during the confirmation hearings for Abe Fortas as chief justice in 1968, the Senate Judiciary Committee invited leaders of four interest groups to testify, including one from Citizens for Decent Literature who testified that Fortas had ruled in favor of obscenity in 49 cases. Twelve groups testified during committee hearings for Clement Haynsworth the next year.[43]

The change toward a greater role for the press, interest groups, and public opinion has been gradual—with certain nominations such as those of Louis Brandeis and John J. Parker as seminal events. But there is a critical difference between the past quarter century of Supreme Court nominations and the previous nearly 200 years: External force

involvement clearly has increased to the point of a significant and permanent role today rather than an occasional appearance. Earlier periods and today offer stark contrasts in the role of groups, the news media, and public opinion.

Groups

Interest group role today, as opposed to earlier in the twentieth century, is considered legitimate. Witnesses in the Brandeis hearing did not include interest groups. It was not until the Parker nomination in 1930 that groups were invited to testify at confirmation hearings."[44] Today, group representatives are a staple of committee hearings, even in less controversial nominations. Interest groups such as the Alliance for Justice, the National Abortion Rights Action League (NARAL), and the National Organization for Women (NOW) on the left and the Institute for Justice, the Family Research Council, and Concerned Women for America on the right are expected witnesses in the Senate's information-gathering process.

In the past, individual senators would have heard on occasion from group representatives, particularly those from their states. Of course, that became difficult in the numerous cases when confirmation occurred within days, sometimes even within hours, of a presidential nomination. Today, senators expect groups to weigh in on nominees via mail, fax, telephone calls, and e-mail, not to mention personal lobbying. In the past, interest groups sent letters to senators urging a vote for or against a nominee. But today groups use an arsenal of weapons to shape Supreme Court nominations, including advocacy ads, op-ed columns, interviews with group leaders, and press releases.

The News Media

In earlier nominations, the press at times editorialized on confirmation. But press coverage of nominees was limited by the lack of resources for covering a Supreme Court nomination. Editorials became the medium for supporting or opposing a nominee.

Now the news media uncover Supreme Court nominees as they do presidential candidates or cabinet appointments. Intense press scrutiny accompanies the announcement of a nominee. In fact, such scrutiny occurs even before a presidential selection, when names of potential nominees are floated by the White House or various groups.

Moreover, interest groups in the past used the press only occasionally to reach the public. A more effective means was the direct route to senators. Today, the effort to draw in the press and the public is expected, particularly after the high-profile success of opposition groups in the Bork nomination and the high-profile effort of interest groups on both sides in the Thomas nomination.

Public Opinion

Until the last quarter century or so, the public's role was minimal in Supreme Court confirmations. Some groups engaged their supporters to defeat the Parker nomination, yet such involvement was rare. In many cases, the brief period between presidential nomination and Senate confirmation meant the public did not even know a nomination had occurred until after (or at the same time) confirmation took place.

The direct election of senators opened the door to public involvement. However, the extent of such involvement was limited for some time. Even in the case of the Brandeis confirmation, the main players were the legal community and groups rather than the public generally. The Parker nomination more than a decade later was the first instance of public involvement, albeit still limited compared with today's confirmation processes.

One barrier to using public opinion in affecting confirmation outcomes was the absence of measures to assess broad public sentiment. The scientific measurement of public opinion did not gain widespread use until the 1930s.

Another barrier was lack of a vehicle for public information. Until 1930, the Senate Judiciary Committee held secret sessions on Supreme Court appointments (with only a few exceptions such as the Brandeis

nomination). Although other Senate hearings were aired on television beginning with the 1950s, hearings on Supreme Court nominees were not televised until 1981.

But the greatest change has been in widespread elite acceptance of the legitimacy of public responsibility in assessing Supreme Court nominees. Such a role was questionable even as late as the Parker nomination in 1930. When Parker was defeated by the Senate, President Herbert Hoover drafted a public statement claiming that the confirmation "was opposed by a vigorous nation-wide propaganda from different groups among our citizens" who have "carried the question of confirmation into the field of political issues rather than personal fitness." Hoover concluded that "public opinion as a whole cannot function in this manner."[45]

Only several decades later was such involvement no longer publicly challenged. Today, no president or senator would claim as Hoover did that public opinion should not matter. In his landmark study of interest group role, John Maltese concluded that since the 1980s, elite players in the process "pay much more attention to the mobilization of public opinion than participants ever did in the nineteenth century."[46]

Today's Nomination Process

The process of nominating Supreme Court justices in recent years might look unrecognizable to participants in the process 100 or even 50 years ago. In the past, presidents typically received recommendations from their staff, the legal community, and even sitting justices and then issued a statement to the Senate nominating someone to the Court. The Senate usually held low-key hearings or even bypassed them to offer swift confirmation. Even when opposition occurred, it was usually elements of the legal community acting privately to oppose the nomination.

In contrast, over the past quarter century, live television coverage of Senate hearings, "murder boards" in preparation for those hear-

ings, a flood of press releases, television and radio advertisements, and public opinion polls all characterize nominations. In addition, the president makes the announcement the subject of a major appearance before the press, with the nominee typically standing at the podium, and the president actively lobbies the Senate, the press, and the public to support the nominee.

These traits of public appearances, use of the press, and dependence on measures of public opinion are not new to the selection process for other offices in American politics. They have characterized the nomination and election processes of public officials, especially presidents. News media coverage, particularly with the emphasis on personal character, has dominated presidential electoral campaigns. As a result, issues such as adultery, military service, and prior drug use have emerged as major themes of recent presidential candidacies, as covered by the press. Presidential candidates now endure microscopic investigation of some aspects of their private lives, as do cabinet nominees and sometimes even candidates for other offices, such as governor or the U.S. Congress. For nominees to the U.S. Supreme Court, all of this is much more recent and still somewhat foreign. Like the sitting justices, nominees in the past were usually accorded a measure of public respect and media avoidance. But this is no longer true.

Like presidential candidates, Supreme Court nominees today are subject to exhaustive examination of their public records—papers, speeches, articles, decisions. But public scrutiny has gone beyond matters of public record. Their private lives, including past marriages and divorces (or the lack of marital status), financial records, and even video-watching habits have been examined. Senator Joseph Biden, Senate Judiciary Committee chair through two of the most contentious confirmations in U.S. history, reviewed examples of the effects of this disturbing trend: "Judge Bork had his video rental records exhumed and studied for possible rental of pornographic films. Judge Souter has his marital status questioned and felt obligated to produce ex-girlfriends to testify to his virility. Judge Thomas was assaulted by a whispering campaign that spread unsubstantiated rumors about the cause of the end of his first marriage."[47] Other nominees' personal

backgrounds were almost remarkable precisely because they seemed to include no odd quirks (Anthony Kennedy, 1988; Ruth Bader Ginsburg, 1993; and Stephen Breyer, 1994).

Some individuals such as Robert Bork and Douglas Ginsburg have failed at confirmation because of this scrutiny. Others, however, win the confirmation, but also suffer opprobrium, at least for a time. After taking his seat, Clarence Thomas's opinions were scrutinized to reveal his views on sexual harassment in the wake of Anita Hill's charges during his confirmation hearings. Stephen Breyer's conflict of interest over a Lloyd's of London investment and his role in the construction of a new federal judiciary building in Boston, first raised during his confirmation hearings, continued to be an issue during his first year on the Court.[48]

The prospect of public exposure endured by recent nominees may have become a significant factor in the withdrawal of likely candidates for vacancies.[49] It has become almost conventional wisdom that nominees possess some character flaw that will emerge in the process and seriously jeopardize, if not fatally damage, their chances of earning confirmation. The nominee's opponents search for it while supporters steel themselves against its appearance. But private character is not alone as an object of group, press, and public scrutiny. The ideology of the nominee has acquired a greater public role in the nomination process. Interest groups scour the nominee's record to determine whether the justice-to-be heeds or strays from their own agendas. As well, some senators openly admit the significance of a nominee's ideological leanings in their eventual vote.

One by-product of this examination procedure has been the nomination of stealth candidates—nominees who have a short public record, particularly on issues of concern to interest groups. During the Reagan and first Bush administrations, successful nominees were those lacking any previous public position on abortion. Similarly, during the Clinton administration, scrutiny focused on the nominee's ties to extreme liberal groups and stances. However, the two Clinton Supreme Court nominees had somewhat mixed pub-

lic records in terms of ideological direction on high-profile current public issues.

The nomination process has become an exhaustive journey for nominees. It means running through a maze of press and interest group scrutiny and public disclosure. It is almost a wonder anyone chooses to endure it. One legal scholar predicted that the legacy of the Robert Bork nomination would be to "treat a confirmation as if it were an election campaign, a media event complete with an avalanche of stump speeches and a bombardment of negative advertising, all accompanied by extensive direct mail advertising, campaign buttons, and solicitation of funds."[50]

As this process has emerged in recent years, criticism naturally has accompanied it. Deriding the direction of some of the confirmation processes of Supreme Court nominees during his Senate career, Senator Biden argued that "the nation is enriched when we explore their jurisprudential views; it is debased when we plow through their private lives for dirt."[51]

Not surprisingly, these developments have produced an intense debate over the role of the confirmation process itself. Critics charge that the confirmation process fails to serve its intended purpose. Rather than achieve the result of placing on the nation's highest court the most qualified individuals, the process has become a political donnybrook. To a great extent, the nomination process always has been a political exercise because political players dominate the process. But the business of appointing justices more recently has become blatantly so. On the heels of the Bork nomination, David P. Bryden wrote: "The battle over Bork was fought and won on political grounds. No one with even a modicum of political experience supposes that jurisprudential arguments were as influential as calls from constituents."[52]

The general public and the elites involved in the process expect at least the image of the process to be one of propriety and sobriety rather than naked power grabs by factions. Some of the recent nomination struggles have appeared more like the latter than the former.

Who's to Blame and What Is the Solution?

Much of the blame for the degeneration of the process has been placed on the Senate's investigation of nominees. The Senate's role is targeted precisely because it is the most public stage of the Supreme Court appointment process. But the criticism of the Senate's role is bifurcated.

Some critics, especially conservatives, have charged the senators on the Judiciary Committee with asking inappropriate questions of nominees—questions designed to elicit indications of future votes and even promises to vote in certain ways favored by the senator.[53] Another criticism, again generally made by conservatives, accuses senators of seeking specific legal outcomes rather than examining legal reasoning. President George H. W. Bush asserted that the Senate hearings in the Thomas nomination "bore little resemblance to the tidy legislative process that we all studied in school. . . . And the process seemed unreal—more like a satire . . . ; more like a burlesque show than a civics class."[54]

These critics favor a more limited role for the Senate—as a check only on those singularly unqualified to sit on the bench. Conservative commentator Bruce Fein argues the purpose of the confirmation process "is not to educate the Senate and the public at large: it is to screen out unfit characters."[55]

However, other critics have suggested the Senate has hardly done enough.[56] According to this camp, the Senate has failed to aggressively question nominees who slipped through without fully revealing their tendencies, and not enough emphasis is placed on the nominee's moral philosophy.[57] One news reporter argued that the Bork nomination was the kind of public process that should be followed in all confirmations.[58]

Liberals direct their attack on presidents Reagan and George H. W. Bush, who, they charge, politicized the process by proposing highly ideological nominees. They argue that when presidents require litmus tests of nominees—such as holding a certain position on abortion—the process has been corrupted well before the Senate receives

the nomination. Conservatives respond that the blame rests squarely with leftist groups, including abortion rights and women's groups, who have adopted a strictly ideological approach to Supreme Court nominees.

With criticism often comes a plethora of suggested reforms. Many have emerged since Robert Bork's failed confirmation process. One scholar suggested allowing the president to initiate constitutional amendments in order to give the president more power to change constitutional law without having to resort primarily to judicial appointments.[59] Another suggested president-based reform is a requirement of consultation with the Senate prior to a nomination.[60] Some proposals deal with the Senate's role in the process in a formal way, such as requiring a two-thirds majority for confirmation, whereas others focus on the behavior of senators, such as no longer questioning nominees on their views on issues or not even questioning them at all.[61] Other recommendations involve the Senate's relationship with external groups, such as the banning of televised coverage of Senate Judiciary Committee hearings. Still others propose changes by both the president and the Senate.[62] But these solutions have also been critiqued as inadequate and perhaps even likely to do more damage.[63]

Public or Private?

These proposed reforms fall short because they ignore the origins of the dilemma—that is, the expanded roles of external players in the process. The direction of much of the proposed reform of the nomination process is toward reprivatizing the process by placing it once again in the hands of elites and outside the realm of the public. In some ways, it is a desire to depoliticize the process by draining it of its political component. But such an effort, according to William G. Ross, is likely "to promote hypocrisy and erode accountability."[64]

Depoliticizing and reprivatizing are simply not possible. The genie cannot be put back into the bottle. Once made public, the nomination process cannot then be transformed back to an elite-dominated proce-

dure, any more than the public will stand for state legislative selection of U.S. senators or elimination of a linkage between the selection of state electors and the popular vote for president.

A more pragmatic approach is first to understand the part played by these external players and then to address the excesses emanating from such roles. Second, one must devise a process that recognizes, legitimizes, and regulates the position of external players, particularly the electorate.

The process of nominating a Supreme Court justice irrevocably has become public rather than private. And there it will stay. Any reform must acknowledge that fact rather than attempt to disregard it. Understanding the role of external forces and then adapting to it should be the goal of reform. That is the only practical solution.

But before we can explain how external forces affect Supreme Court nominations, we must understand why they care to do so. In other words, how and why are Supreme Court appointments so political?