

FOCUS *on Law Studies*

Teaching
about law
in the
liberal arts

SPRING 2005
Volume XX, Number 2

PUBLISHED BY THE DIVISION FOR PUBLIC EDUCATION OF THE AMERICAN BAR ASSOCIATION



Selecting Supreme Court Justices: A Dialogue

PART I: Why Justices Matter

EDITOR (John Paul Ryan): *As a society, we seem to care more today about appointments to the U.S. Supreme Court (indeed, to all federal courts) than 50 or 100 years ago. Is this actually true? If so, why?*

JOHN MALTESE (University of Georgia/Political Science): Court appointments have always mattered. Although the issues before the court in the earliest days of our republic involved federalism, commerce, and taxation rather than individual liberties or civil rights, the consequences of those rulings were profound. They shaped the balance of power between states and the federal government



Editor's Note: *Nine social science and legal scholars discuss the process of selecting Supreme Court justices, including historical and contemporary perspectives, the role of the Senate, president, and interest groups in identifying and confirming justices, what we can learn about Supreme Court appointments from lower federal court appointments, and potential reforms. They conclude by offering some speculation about possible appointments to the Supreme Court for the next vacancies. Resources, which include works cited in the dialogue, can be found in the back. To view or download copies of this dialogue from the ABA's website, go to www.abanet.org/published/focus/home.html*

and helped to define the scope of governmental power.

The polarized politics of recent years, coupled with the Court's involvement in such controversial issues as school desegregation, separation of church and state, affirmative action, and gay rights, have brought the Court to the fore of public debate and led to contentious confirmation battles. While rulings may directly affect more people these days, neither contentious confirmation battles nor public outcry about Court decisions are new.

Look, for example, at John Rutledge, who was nominated by President George Washington to be chief justice in 1795. His nomination proved to be highly controversial, and he suffered the fate of a very public confirmation battle. Opponents decried him in the press as at best mediocre, and at worst insane. In the end, the Senate defeated his nomination for political reasons—his opposition to the Jay Treaty. In many ways, his treatment was not so different from the modern-day “Borking” of nominees. Nor was the Rutledge defeat an isolated occurrence. From 1835 to 1885, there were 16 failed Supreme Court nominations—a number unmatched in any 50-year period since.

Clearly, the participants in the process thought that the makeup of federal courts made a difference. Witness the Federalist court packing in the wake of the election of 1800 and the Jeffersonian-Republican repeal of that legislation (not to mention the efforts to impeach Federalist judges). Nor was the public disinterested. States' rights advocates decried many of the Marshall Court rulings. At least seven states challenged section 25 of the Judiciary Act of 1789, which allowed the Supreme Court to review actions of state courts.

Sectional and partisan rivalries in the aftermath of the Civil War fueled a highly politicized Supreme Court appointment process, complete with Congress altering the size of the Court and four failed nominations between 1866 and 1874. The 1881 nomination of Stanley Matthews spurred widespread interest group opposition and heated editorials predicting that Matthews' confirmation would threaten the constitutionality of Granger laws and solidify the power of the pro-business bloc on the Supreme Court.

DAVID YALOF (University of Connecticut/Political Science): The public is far more sophisticated today than ever before about how and why courts matter. In the early nineteenth century it took a real jolt from the Court (such as *Marbury v. Madison* or *Dred Scott*) to remind the public that the courts exist and are occasionally able to wreak havoc with the majority's otherwise firm hold



IN THIS ISSUE

Why Justices Matter	1
President versus Senate	5
Interest Groups	8
Reforms Needed?	12
Future Appointments	15
Contributors	18
Resources	19

over the political system. Even when the Court presented an obstacle to the New Deal in the mid-1930s, much of society at first remained in denial. FDR astutely waited until after he was safely reelected to respond to the constitutional crisis.

In recent times it's been much more difficult for the public to dismiss the Court as only an occasional player in modern politics. In fact, by all appearances, whenever the Court articulates its own bold vision on an issue, the rest of the political system is forced to get aboard. The two most controversial judicial pronouncements of the mid-twentieth century—*Brown v. Board* and *Roe v. Wade*—may have been actively resisted, but they were never overruled. One could say the same about *Bush v. Gore*. As Tom Keck's recent book, *The Most Activist Supreme Court in History*, points out, the Rehnquist Court has exercised judicial review at a pace that exceeds any other Court in American history. Statutes passed by political majorities are routinely set aside by the Court. Courts matter today: even the most casual observers of American politics would be hard-pressed to deny their relevance.

TIMOTHY R. JOHNSON & JASON M. ROBERTS (University of Minnesota/Political Science): The public cares more



about Supreme Court appointments today than 50 or 100 years ago. From our perspective of studying presidential behavior during the nomination process, combined with historical evidence of presidential and Senate behavior, it is evident that the level of interest has grown over this time period. Indeed, whereas President Truman refused to comment publicly about any of his nominees, Presidents Reagan, Bush I, and Clinton all spoke on many occasions about their nominees. We find it compelling that the level of public attention to nominees

has grown almost exponentially from 1949 to 1994.

Explaining why nominations have become so much more salient is more difficult. On one hand, an argument can be made that scholars and the public care much more about appointments today because, post-Haynsworth and Carswell (and more recently, post-Bork), the process has become increasingly mired in politics and controversy. Additionally, as the Court's role in setting public policy grew over the latter half of the twentieth century, the Senate and the president have viewed nominations as having greater policy implications. Therefore, the increasingly public battle between the president and the Senate has made this process

In the 1930s, the antimajoritarian character of courts seemed to protect against fascism.

[MARY DUDZIAK]

much more salient for scholars and the public alike.

On the other hand, it is possible that this process has become controversial because of the great interest that recent confirmation battles have generated. For instance, the level of public scrutiny of the Bork and Thomas proceedings far outweigh any public reaction to those held earlier in the twentieth century or before. This has much to do with the instantaneous and perpetual media attention that this process receives. However, it is possible, and even likely, that because the public has become more intimately involved in the process, both the president and the Senate have sought to make nominations more contentious in order to secure public backing for their respective positions. While both explanations are viable, scholarly evidence suggests that it is the controversial nature of the process, combined with the political power of the Supreme Court (and federal courts more generally), that has made this issue salient.

MARY DUDZIAK (University of Southern California Law School): Popular



concern about courts, judges, and appointments is not a new phenomenon. During the Progressive Era, concerns that the courts sided with big business and against the interests of the people were raised not only in political circles but in plays and novels. Although FDR did not run against the Court in the 1936 campaign, popular concerns about courts were an important part of political discourse well before the court-packing plan was announced. One interesting feature of the 1930s was that many supported judicial independence, and opposed the court-packing plan, out of concerns that courts played a role in reigning in the excesses of majoritarianism, which were thought to be reflected in Germany's slide into fascism. In this context, the anti-

concern about courts, judges, and appointments is not a new phenomenon. During the Progressive Era, concerns that the courts sided with big business and against the interests of the people were raised not only in political circles but in plays and novels. Although FDR did not run against the Court in the 1936 campaign, popular concerns about courts were an important part of political discourse well before the court-packing plan was announced. One interesting feature of the 1930s was that many supported judicial independence, and opposed the court-packing plan, out of concerns that courts played a role in reigning in the excesses of majoritarianism, which were thought to be reflected in Germany's slide into fascism. In this context, the anti-

FOCUS
on Law Studies

Teaching about law in the liberal arts

ALAN S. KOPIT

Chair, Standing Committee on
Public Education

MABEL MCKINNEY-BROWNING

Director, Division for Public Education

JOHN PAUL RYAN

Consulting Editor

The Education, Public Policy, and Marketing
Group, Inc.

Focus on Law Studies (circulation: 5,451), a twice-annual publication of the American Bar Association Division for Public Education, examines the intersection of law and the liberal arts. Through the articles, essays, dialogues, debates, and book reviews published in *Focus*, scholars and teachers explore such subjects as voting rights, law and the family, law and religion, human rights, and constitutional interpretation, as well as such legal policy issues as school desegregation, gun control, capital punishment, and affirmative action. By examining the law from a variety of disciplinary and interdisciplinary viewpoints, *Focus* seeks both to document and nourish the community of law and liberal arts faculty who teach about law, the legal system, and the role of law in society at the undergraduate collegiate level. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the American Bar Association.

© 2005, American Bar Association Division for
Public Education, 321 N. Clark St., 20.2, Chicago,
IL 60610-4714.

majoritarian character of courts was seen as a protection against fascism.

Perhaps what is newer since the 1960s is the role of court-bashing in electoral politics and the role of the media. George Wallace and Richard Nixon ran against the Warren Court, criticizing especially the politically unpopular criminal procedure decisions such as *Miranda v. Arizona*. Opposition to desegregation meant that Southern politicians could gain political mileage by moving to the right and bashing *Brown*, as did Arkansas Governor Orval Faubus, a pre-*Brown* moderate on race. After *Roe v. Wade*, the Court became both a rallying cry of opponents to abortion and also a fundraising tool, with mass marches to the Court organized for *Roe's* anniversary. The case continues to be an effective tool for mobilizing the right, even in the wake of the evisceration of *Roe* itself in *Planned Parenthood v. Casey* in 1992. This illustrates that the popular conception of judicial action can be more important than the actual substance of the Court's rulings.

In recent years the media has focused not just on the role of the Court as an institution but on particular justices. Swing justices have been a focus of attention, informing the public of the importance of individual members of the Court and potentially raising interest in the appointments process. While some justices in the past have had followers—for example, women would attend Supreme Court arguments to get a glimpse of the 1940s “bachelor” on the Court, Frank Murphy—it is rare for a justice to achieve the celebrity status of Scalia (see, for example, the “Cult of Scalia” website). This illustrates popular interest—not simply in the courts but in individual judicial personalities, reinforcing public interest in retirements and appointments.

MICHAEL GERHARDT (William & Mary Law School): I only partially agree



that Supreme Court appointments are more important today than they were 50 to 100 years ago. Presidents and senators have always regarded Supreme Court ap-

pointments as important. Every president has cared about the impact of his Supreme Court appointments on constitutional law and his presidential legacy. Those with the most impact have been, not surprisingly, the presidents who had the opportunities to make multiple appointments, including George Washington, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt. And senators have never hesitated to aggressively assert (and defend) their prerogatives to suggest possible nominees to the president (as an exercise of the “Advice” half of their “Advice and Consent” power) and to block nominees with unacceptable constitutional ideologies. Overall, the Senate has blocked 1 in 5 Supreme Court nominations. Statistically, it appears the Senate blocked more nominations in the nineteenth than the twentieth century—rejecting, for instance, five of President Tyler's six nominations.

The decline in the number of blocked Supreme Court nominations does not mean, however, that the Senate has become more deferential to Supreme Court nominations. Several factors have changed the process. First, consider the greater visibility and transparency of the process. Every phase of Supreme Court selection gets more coverage these days. Moreover, the Senate decided to begin holding open sessions (including open committee hearings) shortly after the contentious fight over Louis Brandeis' nomination to the Court. With radio, television, the print media, and the Internet, there are numerous outlets for commentary and reports on the significance of Supreme Court selection. These outlets provide increased opportunities for national leaders and interest groups to opine on Supreme Court nominations. These outlets also make it easier for presidents to wage campaigns against the Court. The greater coverage and openness of the process has helped to intensify the stakes.

A second factor is the increase in the extent of the Court's exercise of judicial review. The more extensively the Court has become involved in deciding socially divisive questions of constitutional law, the greater likelihood its decisions will provide motivation for presidents, senators, and interest groups to campaign against the Court.

There is one last factor we ought not to discount—we are in the midst of the second longest period in our history without a vacancy arising on the Court. Anxiety over the next vacancy is arguably at an all-time high. Republicans' fury over the filibuster stems in part from their concern that Democrats may use the filibuster to thwart President George W. Bush's Supreme Court nominations. Democrats worry that without the filibuster they will be steamrolled in the selection process. Both sides care about the balance on the Court. And with the press reporting that President Bush is compiling a short list of nominees to replace the ailing chief justice, the wait has become excruciating.

JOYCE BAUGH (Central Michigan University/Political Science): Controversial



Supreme Court nominations are not a new phenomenon. Despite the confirmation battles over the Bork, Souter, and Thomas nominations, the process is not inevitably contentious.

President Clinton's nominations of Justices Ginsburg and Breyer did not generate much controversy at all. While Clinton had been encouraged by some of his supporters to appoint liberal justices to the Court, he chose to nominate moderates after being warned that he would have to use a great deal of political capital to get liberals confirmed. As a result, there was limited involvement by interest groups in the confirmation hearings. The Ginsburg and Breyer hearings included testimony from fewer than 10 interest groups each, compared to 150 in the Bork hearings and nearly 25 and 50 in the Souter and Thomas hearings. This is not to suggest that some groups were not working behind the scenes to influence senators, but they did not have the degree of public presence as in the three previous nominations.

It is also important to remember that the context in which vacancies occur matters. There was little controversy when President Reagan elevated Rehnquist to chief justice and nominated Scalia to fill the vacancy created by Rehnquist's pro-

motion. Just a year later, however, the Bork fiasco occurred upon the retirement of Justice Powell. Why the controversy at that point? Because Powell had been perceived as a “swing” vote on an evenly divided Court, his successor could tip the ideological balance. That was not the case a year earlier and was one of the main factors that pushed interest groups on both sides of the ideological spectrum to focus so much attention on the confirmation process.



MARK MOLLER (Cato Institute): I’m a humble lawyer, not a political scientist or historian, and so it’s hard for me to say that we care more about the Court than in yesteryear. But the air is certainly thick with doomsday scenarios about the upcoming round of Court picks. Bruce Ackerman, for example, recently warned we are on the verge of a “great transformation” in American government, one that could “revolutionize the relationships between the presidency and Congress, between the federal government and the states, and between the individual and the state.” He calls for Democrats in the Senate to man the barricades.

What is the cause of this anxiety? The answer, at least in part, is suggested by behavioral economics, which tells us we’re inclined to overrate the importance of changes to the status quo and our own little moment in history. That’s surely true of the judicial status quo. People assume that a president’s control over selection of new justices will have much more impact on the Court’s future philosophy than experience suggests.

Take the trajectory of the Rehnquist Court—the product of increasingly ideological judicial selection. It’s been celebrated (or excoriated, as the case may be) as the prime mover in a constitutional “revolution,” but it’s not as revolutionary as many commentators suggest. Sure, cases like *United States v. Lopez* (1995) have given some bite to judicial limits on the reach of the federal government, but it’s not looking to be a very ferocious bite. Last term, the Court—in an 8-0 decision in *Sabri v. United*

States (2004)—rebuffed arguments urging the Court to beef up its scrutiny of federal regulation under the Necessary and Proper Clause. Even Justice Thomas—who favors more robust restraints on federal power than the Court has been willing to impose—concurred on *stare decisis* grounds. This term, if the Court rules as expected in *Ashcroft v. Raich* (No. 03-1454)—the case that challenges federal power to regulate intrastate drug transactions under the Commerce Clause—it may well put to bed a robust vision of the constitutional limits on federal power.

Looking further back, consider that a number of post-war “liberal” justices were appointed by Republican presidents—including Justices Warren, Brennan,

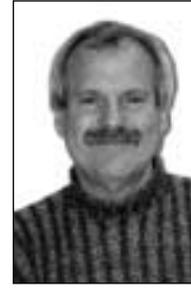
*Partisan alarmism
can poison
the atmosphere
in which judges
are selected.*

[MARK MOLLER]

Stevens, Souter, and Blackmun. Five of the seven justices who joined the majority opinion in *Roe v. Wade* were appointed by Eisenhower and Nixon. And over the last 50 years—which have seen huge swings in the Court’s makeup and ideology—only six of 21 justices put on the bench were appointed by Democratic presidents.

This isn’t to say that changes on the bench don’t matter. They do, and there are some reasons to think that they matter much more now than they used to. But there’s also a danger posed by unnecessarily overrating the stakes in judicial selection: namely, that partisan alarmism will poison the atmosphere in which judges are selected, turning nominations into ever more bruising partisan political battles. That’s a problem for us, today, because it enhances the risk that judges who survive these fights will feel at least some emotional attachment to a particular political team—the one that protected and defended them, thereby compromising their duty to interpret the law independently.

ELLIOT SLOTNICK (Ohio State University/Political Science):



Appointments to the Court have always had great policy importance, but their widespread public importance, for the most part, is a more recent phenomenon. With the unprecedented attention placed on lower court appointment processes, in the Clinton and Bush II administrations, we have also witnessed a spillover effect of the politicization of Supreme Court appointment processes to include the lower courts. This can be traced to several complementary factors, including the nature of the issues before the courts, the more blatant focus on ideology by appointing presidents and, frankly, the critical role of interest groups in fanning the flames of contentiousness and debate over judicial nominees to both the Supreme Court and lower federal courts.

The “issues” phenomenon is straightforward. The Court’s decisions of the past 50 years relate much more directly and personally to the lives of all Americans. Cases about property rights and/or arcane financial transactions on the Court’s docket have not disappeared, but media, public attention, and the consequences of cases focusing on controversial rights and liberties all add to the broad societal importance of judicial appointments. Looking ahead, were a vacancy to arise on the Court from among those justices supporting freedom of choice in the abortion arena or narrowly tailored affirmative action programs in educational admissions policies, we would witness the primacy of public concern over issues and Court appointees. And presidents have amply utilized the Court as a campaign issue. Many of us can remember Nixon’s promise to appoint justices with a respect for “law and order” who were “strict constructionists.” President Carter, in his lower court nominations, openly sought those with “a demonstrated commitment to equal justice,” which became viewed, by some, as a code phrase for liberal activists. In this past election campaign, while Supreme Court appointments did not take the center stage one might have expected because of the domination of

Iraq in presidential politics, it remains clear that the consequences of who was in the White House for the Court's makeup were important factors in voting choices.

Finally, I wish to emphasize the role of interest groups. While the Bork nomination battle was not the first instance of interest groups broadly participating in judicial selection politics, it was one of the most public displays of such activity and set the stage for what followed. As Nancy Scherer argues and documents in her new book, *Scoring Points: Politicians, Activists and the Lower Federal Court Appointment Process*, interest group activists have learned well the "electoral connection" buttons to push with senators as they take their position on judicial nominees. Indeed, what were in the past relatively "invisible" Senate votes on lower court nominees, particularly when they did not involve seating a judge in a senator's home state, have now sometimes become critical roll call votes on which senators know they can be held accountable by their constituents.

MARK MOLLER: It's hard to test hypotheses about why the nomination process has grown more contentious. I speculate that one cause, which hasn't been discussed in detail, is the peculiar dynamics of a uniquely divided government. Even in the wake of the last election, Republicans hold a razor-thin margin in the Senate. The result is a highly competitive political environment in which even the loss of a few seats can cause a tectonic shift in power. Under these conditions, passage of legislation is at a premium for the majority party, which risks being charged with "drift" and lack of an agenda if it fails to pass legislation, while the minority party risks a backlash if it is seen to be "obstructionist." As a result, it's difficult for either party to score telling political points with their base, since most legislative battles end in compromise with each side claiming victory.

Nominations, on the other hand, are a different kind of "good" in the political market. Take nominations to intermediate courts: There is an impression in the legislative branch that the public is uninterested in the composition of the various circuits, and with some reason. During the filibusters of Miguel Estrada and Priscilla Owen, the Bush administration tried without success to rally middle-of-the-road swing voters' interest in the fates of both

judicial candidates. However, even if the average voter doesn't pay attention to nominations, the ideological base unquestionably does care about them. That gives the leadership of the party out of power reason to believe that fighting court nominations is a cost-free avenue for rallying a demoralized base in advance of the next election cycle. And that may explain why the filibuster of U.S. Court of Appeals nominee Miguel Estrada followed hard on the shocking Republican sweep of the midterm elections in 2002. Prior to that sweep, press reports indicated that Democrats planned to approve him.

At the Supreme Court level, there is greater public interest in nominations, but the issue still doesn't win elections. For example, polling in 2004 suggests that concerns about national security proved overwhelmingly decisive in Bush's victory. In the three presidential debates, Bush and Kerry allocated little time for discussion of judicial nominations, suggesting that they didn't see the issue as a significant vote-getter among the general public.

Because the debate over judicial nominations involves dueling appeals to each party's base, there is some reason to doubt whether the Senate's "advice and consent" process is particularly responsive to actual substantive differences between nominees. For example, as states become incubators for many policies that work to the advantage of liberals—drug policy, gay marriage, stem-cell research, and global warming, for example—will some Democrats rethink opposition to Bush nominees devoted to a robust protection of federalism? My guess is, no—and not because politicians are principled opponents of the Rehnquist Court's federalism jurisprudence. Rather, a politician's decision to support or oppose a given nominee is driven by factors other than legal substance—namely, the need to satisfy the expectations of an often ill-informed party base.

PART II: The President versus the Senate

EDITOR: Under the Constitution, presidents nominate justices "by and with the advice and consent of the Senate." Has the balance of power between the president and the Senate changed on judicial nominees? When? How?

JOHN MALTESE: At the Supreme Court level, the balance has ebbed and flowed. Historically, presidents have been weaker when they are unelected, in their terminal year in office, or face a Senate controlled by the opposition party. Judicial selection has been particularly contentious of late because of "polarized politics" and the long periods of divided government since the 1960s.

But perhaps there are broader trends. If one looks just at the numbers, there were 20 failed nominations in the nineteenth century and only six in the twentieth century. Why? One could argue that in the nineteenth century the Senate was relatively unaccountable for its actions and thus more powerful. Two factors led to that unaccountability. First, senators were not popularly elected but were chosen by state legislatures. This undermined the threat of electoral retaliation against senators. Second, Senate consideration of Supreme Court nominees took place in almost absolute secrecy. There were no public hearings on nominees, floor debate usually took place in executive session, and there were seldom roll call votes on nominees. Thus, even if the public could retaliate, it often did not know whom to retaliate against.

All of this changed in the twentieth century. The 1913 passage of the Seventeenth Amendment to the Constitution provided for the direct election of senators, and Senate rules changes in 1929 opened floor debate on nominations. Likewise, the Senate Judiciary Committee began to open its hearings to the public on a regular basis. These changes made the Senate more accountable to public opinion and, therefore, increased the power of interest groups in the process. Had it not been for the threat of electoral retaliation, the nomination of Louis Brandeis in 1916 might have been defeated.

The twentieth century also brought the rise of the modern presidency and the development of institutional staff units to further presidential policy. Presidents began to speak out about nominees and use their offices of communications, congressional liaison, and public liaison to win support for their nominees. All of this suggests a shift in the balance of power from the Senate to the president, although one might also argue that the balance of power really shifted away from both the Senate and the president—to interest groups.

A shift in power from the Senate to the president also occurred at the lower federal court level. By and large, the Senate retained the upper hand until the late 1970s. That was because of the tradition of senatorial courtesy, which gave home-state senators great power to suggest whom the president should nominate (and virtual veto power over nominations they disapproved of). This meant that judgeships had become a form of patronage for senators. President Carter undermined senatorial courtesy through an executive order in 1977, as part of an effort to institute merit selection of federal judges. This paved the way for President Reagan, who revoked Carter's executive order, to take unprecedented control of the initial selection of federal judges. Critics argued that the White House carefully screened nominees for ideological purity. Once again, the balance of power seemed to shift to the president.

But that is not the end of the story. Democrats were unhappy with Reagan's control of federal judicial selection—as the minority party in the Senate, they waged a fierce (but unsuccessful) battle against Reagan's nomination of Daniel Manion to the 7th U.S. Circuit Court of Appeals. With the return of divided government when Republicans lost control of the Senate in 1986, the Senate defeated Reagan's nomination of Robert Bork to the Supreme Court in 1987. Republicans cried foul. That set the stage for Republicans to stall and block President Clinton's lower court judicial nominees during another stretch of divided government, and for Democrats to do the same to the current President Bush.

Does the ensuing “confirmation gridlock” mark another major shift in the balance of power? Certainly in the short run, senators have used a variety of means (from strategic use of the blue slip to filibuster) to thwart presidents. I suspect, though, that this reflects current exigencies: polarized politics, the “culture wars,” and recent periods of divided government—factors that have always affected the ebb and flow of power between the branches.

MARK MOLLER: On a legal level, I find it interesting that the Constitution deeds to the Senate nearly unilateral authority to regulate the balance of power between the political branches over the appointment process. It does this by virtue of Article I, Section 5, which gives each house of Con-

gress unqualified power to set rules regulating how its “consent” is given legal effect. That's how the Senate derives its power to change committee structure, for example. And it gives the Senate—and the Senate alone—almost unilateral authority to dictate how many hurdles the president must jump to get judges confirmed.

The Rules Power is central to the debate over filibustering judges. Filibusters are a tactic that forces a supermajority vote to confirm a president's court pick. They're controversial. From time to time, Republicans and Democrats even claim they're unconstitutional, depending on whose ox is being gored. This argument is, however, very weak. There's simply nothing in the Constitution that qualifies the breadth of the Rules Power in this way, and the filibuster is of very old vintage.

The real question is whether a transient group of senators can “entrench” the filibuster—and therefore entrench the hurdles that presidents face in the appointment process. Consider for example, the Senate's current Rule 22. It mandates that two-thirds of any Senate must agree before the filibuster device is removed from the available parliamentary tactics. Some, however, say the Rule can be revisited by a simple majority after each new election. In a 1997 *Stanford Law Review* article, Catherine Fisk and Erwin Chemerinsky argued that while the filibuster isn't unconstitutional, attempts by one Senate to immunize the filibuster procedure from revision in a future session of Congress, by a majority of future senators, is. It's inherent in a democratic system, they argued, that each new Congress possesses just as much power as the last. Therefore, an old expired Congress can't put its dead hand on today's living Congress. Instead, each new popular election resets the clock, giving a new legislature a chance to revisit past agreements on how to internally distribute members' voting rights (to be sure, Chemerinsky appears to have since changed his position).

If this is right, in the wake of the 2004 election, the Senate may have an opportunity to change existing rules on filibusters by a simple majority vote, limiting their application to judicial nominations. If so, it's the democratic process itself that ultimately “checks” the Senate's vast power to regulate executive appointments.

TIMOTHY R. JOHNSON & JASON M. ROBERTS: As John Maltese notes, the nineteenth and twentieth centuries are

quite different with regard to rate of rejection of judicial nominees by the Senate. Part of this may be attributed to better anticipation by the president, rather than a shift in the balance of power. However, it does seem that the process has changed fundamentally in the wake of the Bork nomination. Presidents are simply less willing to make risky nominations. Justices Souter, Breyer, and Ginsburg were all considered moderate and noncontroversial, and all had bipartisan support in the Senate. Presidents Bush I and Clinton did not have to expend much capital on behalf of their nominees (though Bush had to do so on Thomas) and seem to have chosen nominees whom they would not need to sell. This indicates a shift in power towards the Senate but, in most instances, senators are also not eager for a protracted nomination battle. Public opinion polling during the Bork and Thomas hearings suggested that the public generally disapproved of the contentious nature of the hearings. Our view is that, post-Bork, both the Senate and presidents have sought to avoid battles over Supreme Court nominees. However, it is unlikely that this “truce” will hold should the current President Bush be given the opportunity to nominate a new justice. He has stated publicly that he will spend his political capital, and Senate Democrats have given no indication that they will back down on judicial nominees if they are ideologically extreme.

JOYCE BAUGH: I agree with Timothy Johnson and Jason Roberts that for the Ginsburg, Breyer, and Souter nominations, presidents sought to avoid conflicts with the Senate. But the Thomas nomination is quite the opposite. Rather than attempting to sidestep controversy, President Bush I rushed headlong into it. In nominating Thomas to succeed Thurgood Marshall, Bush was replacing the sole African American justice who had spent his entire career as an advocate of civil rights and racial equality with an outspoken conservative who had worked during the Reagan and Bush administrations to undermine much of what Marshall had helped to achieve. Bush administration officials knew that this nomination would generate opposition from liberal interest groups, but they calculated that liberal Democratic senators who relied on significant black constituencies for reelection would be reluctant to oppose the confirmation of an African American justice.

Well aware of the brewing controversy, Bush administration officials attempted to recast Thomas as moderate and nonideological during the confirmation hearings. This was disingenuous, given that a primary reason for appointing him was precisely because he held ideological positions that would bolster the conservative wing of the Court. Knowledge of the controversial nature of the appointment also led administration officials to work with conservative interest groups to bring a busload of African Americans from Thomas's hometown to the confirmation hearings. Although Thomas enjoyed limited support in the black community, this media event with "hometown supporters" made it appear that he actually had substantial grassroots support.

ELLIOT SLOTNICK: While I'm not comfortable with assertions about changes in the balance of power in "advice and consent" in judicial selection, there have been some fundamental changes in the nature of the presidential/Senate relationship in this arena—particularly when the focus is on lower federal court recruitment and, most pointedly, in appointments to the Courts of Appeals. Multiple factors have led to such changes.

Historically, lower federal court selection was a patronage affair, in which home-state senators of the president's party identified potential nominees for appointment. A stirring of that traditional pot and added tensions in this domain can be traced back to the presidency of Jimmy Carter. The Omnibus Judgeship Act of 1979 created an unprecedented number of lower court vacancies, including 35 at the all-important circuit level. By then, Carter had already begun to curb the traditional role that home-state Democratic senators could expect to play in judicial selection in a Democratic administration. Through an executive order in 1977, Carter declared that he would nominate only individuals with a "demonstrated commitment to equal justice." This putatively ideological criterion ruffled some senatorial feathers. Shortly thereafter, by executive order Carter established the U.S. Circuit Judge Nominating Commission, comprised of panels in all federal judicial circuits. These panels were directed to generate multiple names for vacancies, from which the president would choose a nominee, thereby intruding into what many senators saw as their role in the process. Carter also suggested that sena-

tors create similar "merit" panels in their states for federal district court vacancies—an even greater intrusion into what senators saw as their prerogative in judicial appointments. To this suggestion, Senator Lloyd Bentsen (D-Texas) reportedly replied, "I am the Judicial Nominating Commission from Texas."

Coupled with such efforts to increase the executive's role in generating the names of lower court nominees—and, in this instance, with the "demonstrated commitment to equal justice" stamp on them, subsequent presidents increased the focus on lower court judgeships as a mechanism to pursue their domestic policy agendas. Clearly, the ideology of potential nominees and policy concerns began to

*After Carter,
"advice and consent"
was transformed
for lower court
appointees.*

[ELLIOT SLOTNICK]

equal the role played by more traditional patronage motivations. Once ideologically vetted nominations became the norm in appointment behavior, and interest groups began to make their views known on nominees, the nature of "advice and consent" was transformed dramatically at the lower court level. What had been relatively routine matters of interest virtually exclusively to home-state senators morphed, under the circumstances of arguably controversial nominees out of the mainstream, to matters of national scope and importance. As we look back at the past four years and confirmation battles over lower court judicial nominees, primarily at the appellate level—e.g., Miguel Estrada and Charles Pickering, among others—and see the utilization of filibusters as a mechanism to obstruct and delay the filling of lower federal court judgeships, we see just how contentious the formerly routine matters of "advice and consent" have become and how substantially presidential/Senate relationships have changed.

MICHAEL GERHARDT: This question about the balance of power on judicial nominations implies that the Constitution estab-

lished a stable distribution of powers with respect to appointments. I am not sure that it did. The Appointments Clause invites both conflict and accommodation over judicial selection. Several factors influence which exists at any particular moment.

The first is political parties. The pressures for presidents to pick nominees from within their parties were especially strong in the nineteenth century. The costs of presidents' bucking their parties were often severe. But in the twentieth century eight presidents appointed 11 Supreme Court justices who were not members of their political parties, while there were only three such appointments in the nineteenth century. In some cases, party affiliation gave way to nominees' "real politics," while in other cases a majority within the Senate disposed to oppose or resist presidential dominance of the process encouraged presidents to compromise.

A second factor is the remarkable expansion of the federal government. As the range of responsibilities for the national government has grown, Congress has created more offices requiring presidential nomination and Senate confirmation. A similar pattern holds with respect to judicial appointments. As the scope of judicial review has expanded, so too have the number of judicial offices. The greater number of offices increases the bargaining chips that senators have to negotiate with presidents on appointments and other matters.

Third, the Senate's role in judicial selection has evolved with the direct election of senators (the 17th Amendment) and the Senate's internal operations, as John Maltese ably described. It is worth reiterating that, during the early part of the twentieth century, the Senate opened its proceedings to the public, delegated substantial authority to committees and their chairs, and required judicial nominees to appear in person before the Senate.

Two other changes have helped to influence the dynamics of judicial selection—the increase in interest group participation and media coverage of the process. Both of these developments have shaped public opinion about the process, though most polling shows that the general public has little interest in, or awareness of, confirmation contests over judicial nominations.

Senate rules also changed in important ways in the twentieth century, including the entrenchment of the filibuster. First, unlike Mark, I believe Erwin Chemer-

sky has not changed his position on the “nuclear option.” He has always thought it was permissible. But he also thinks it is a bad idea, especially when it will only come about as a result of a straight party-line vote. He has said as much in a letter to the Judiciary Committee. Second, the Constitution does not prohibit the Senate from entrenching its rules. To the contrary, it empowers each house to adopt rules for its respective proceedings. The entrenchment of the filibuster is one such rule. The Senate is a continuing body, and thus it is unclear which senators are injured by the entrenchment of the filibuster. The Senate is not comparable to other legislative bodies, including the House where all of its members have either been elected or reelected to begin new terms. Staggered election of senators precludes the possibility of a new majority being sworn into office at the outset of a new congressional session. Within the Senate, there can only be a “new” majority if one were to take into account some combination of the members carrying over their terms with those being sworn into new terms. The problem is that the case against the filibuster depends on the need to vindicate the “rights” of new members to vote on Senate rules, not of those continuing their terms. Finally, there are no precedents for a majority’s entitlement to change the rules in the Senate. In a Rules Committee hearing in 2003, the Republicans’ own witnesses testified there were no precedents for the “nuclear option.” It is unprecedented, and the Senate has never amended its rules without following its rules.

MARK MOLLER: I’d like to venture a couple of responses to Michael, who makes some good points. First, I agree Senate B can *choose* to maintain a supermajority requirement adopted by Senate A. But the question isn’t whether Senate B has a choice. It’s whether Senate B is required to abide by Senate A’s supermajority requirement.

Second, the crux of the problem, as Michael points out, is whether the Senate is a “continuing” body. In other words, does it even make sense to talk about “Senate A” and “Senate B?” I’m not terribly convinced by the contention that an election—one that changes the composition of and can shift the balance of power in the Senate—doesn’t “change” the iden-

tity of the Senate in a legally relevant way. Every two years, with each election, there is a functional change in composition of the Senate. Treating it as the same “body”—in spite of these periodic changes—smacks of legal fiction.

Failing to give legal effect to that change also leads to absurd results. To crib an example from legal scholar Ronald Rotunda, can a prior Senate pass a rule barring future reorganization of the Senate, except by a unanimous vote? If a Senate had passed that rule before the Senator Jim Jeffords (Vermont) switch, would it permit the minority to continue to control committee assignments and power sharing rules unchanged?

Looming over this debate is the \$64,000 question: Is the ongoing procedural stale-

*Senate rules
have changed,
including the
entrenchment of
the filibuster.*

[MICHAEL GERHARDT]

mate, rooted in Senate process and driven by the ideological base of the Republican and Democratic parties, good for the judicial branch and for the law? I’m a skeptic.

TIMOTHY R. JOHNSON & JASON M. ROBERTS: Mark and Michael both make good points about how treating the Senate as a continuous body has affected filibuster reform efforts (see Binder and Smith, 1997). However, that is usually not the argument used in favor of the “nuclear” or “constitutional” argument. Much of this debate in the popular press fails to distinguish between the act of a filibuster and the effect of a filibuster. Some Senate Republicans argue that filibustering judicial nominees is unconstitutional because it imposes a supermajority requirement on the confirmation of nominees. If this were true, they would perhaps have a point, but the distinction between *debate rules* and *voting rules* gets lost in most accounts of the controversy. Having a supermajority requirement for ending debate is clearly within the Senate’s constitutional powers

to adopt its own rules of procedure. Technically, none of Bush’s lower court nominees have failed due to a filibuster in the real sense of the term. For a filibuster to be the proximate cause of a failed nomination, it would have to extend all the way to the legally mandated end of a Congress. Thus far, Majority Leader Bill Frist and the rest of the Senate have chosen to use “tracking” on these nominees (a procedure whereby the Senate moves on to other agenda items without resolving the item being filibustered). As a result, most of the filibustered nominees have been debated on the Senate floor for only a short period of time. The Republican Senate leadership has decided that it would rather use the available floor time to pursue other legislative priorities or use the obstruction as an electoral issue.

PART III: Interest Groups

EDITOR: How and why have interest groups become more influential in the selection of Supreme Court justices? Which interest groups are most influential today? Are “conservative” interest groups more or less effective than “liberal” interest groups?

MARY DUDZIAK: The Thomas nomination is a good example that informs our understanding of the role of interest groups in the confirmation process. But for the sexual harassment allegations, Thomas’ confirmation would have been relatively smooth, in spite of liberal opposition. After Bork, Bush I’s strategy was to choose a safe conservative without a paper record that would make the person subject to attack. David Souter fit this profile (although Souter turned out to be a Blackmun, more moderate than expected). Thomas, in contrast, had a record, making him both more of a target but also more of a predictable conservative. The Bush administration effectively calculated that African Americans and some liberals would find it more difficult to attack an African American nominee for Thurgood Marshall’s seat. Identity politics split the liberal coalition. Both the Souter and Thomas nominations help us to see that presidents select nominees in part with interest group mobilization in mind. In both examples, Bush I was effective in anticipating the way particular nominees would undermine the ability of liberals to mobilize.

Presidents also use the nomination process to court particular constituencies, and a successful nominee isn't always needed for that. For example, with two openings to fill on the Supreme Court in 1971, and in the midst of a reinvigorated feminist movement, President Nixon was under pressure to nominate a woman. He floated the name of Judge Mildred L. Lillie. The American Bar Association, however, rated Lillie as unqualified in a report that suggested that no women were yet qualified to serve on the Court. Nixon made sure that the ABA report was leaked to the press, allowing him to get credit for considering a woman, while the ABA could take the heat for knocking down Lillie's nomination.

Since I'm an historian, I always like the details of the story, so here's a snippet from a transcript of Nixon's (RN) conversation about this with Attorney General John Mitchell (JM):

RN: The woman thing, that's got to get out [to the press] some way. I mean, naturally the [ABA] vote will get out, won't it? Everything else has leaked out of there. Now believe me, we're going to leak this out if they don't.

JM: You can rest assured we'll get it out one way or the other.

RN: And I think the eleven to one [vote] is brilliant, because it's a stacked jury. All men. Huh?

JM: Absolutely.

RN: And [the committee said] she's the best qualified woman but she's not qualified for the Supreme Court. Jesus, that's great...

Source: Nixon telephone conversation with John Mitchell, October 20, 1971 (American Radio-Works website).

MICHAEL GERHARDT: Interest groups hope to influence outcomes and implement their particular agendas. Moreover, the pressure that interest groups exert on presidential and senatorial decisions about judicial nominations derives partly from the expectations among the parties that presidents will bestow some favors, including nominations, or that senators will exchange votes for the support of some groups. In addition, interest groups supply information to sympathetic senators, presidents, and staffers. Indeed, they sometimes suggest or even draft questions for senators and assist senators or presidents to clothe their transparently partisan posi-

tions. Interest group activity also signals to national leaders the likely costs of opposing the groups' favored candidates. Interest groups will use contested nominations (or the prospect of such battles) to raise money and to cultivate public sentiment. Ultimately, the degree of interest groups' influence over the selection process has turned on how successfully they have signaled the costs of noncompliance with their objectives and succeeded in exchanging their support for or against particular nominations for presidential or senatorial favors.

Why do interest groups become involved in the process at all? It is clear that many groups are aware that particular issues important to their core members will come before the federal courts. These groups use confirmation hearings to bring attention to issues that are especially salient for their members or supporters. Other groups hope to implement their agendas by creating catalyzing events. The support of particular groups further signals to leaders and to the public the likely ideologies of judicial nominees. Even when nominees do not tell us, we can infer their likely positions on contentious issues from which groups support or oppose them.

We ought to think about who or what qualifies as an interest group within the judicial selection process. For example, President Bush and most (if not all) Republican senators have long viewed the American Bar Association as just another "liberal" interest group. During Clinton's presidency, Senator Orrin Hatch—then-chair of the Judiciary Committee—removed the ABA from its formal role in evaluating judicial nominations. There is no indication that Senator Specter will undo that decision, and President Bush has not included a role for the ABA in identifying or evaluating nominees.

Democrats often point to the growing influence of the Federalist Society on the choice of nominations, particularly after barring the ABA from any formal pre-nomination vetting role. But it is unclear how the Federalist Society is exercising this influence. While a number of President Bush's advisers and judicial nominees are members of the Federalist Society, the White House denies that the Federalist Society performs any formal role in vetting or approving judicial nominees. The question remains, however, whether or to what extent networking and activity with-

in the Federalist Society is important for selection purposes.

ELLIOT SLOTNICK: Interest groups have often played a role in the Supreme Court nomination process, and the aborted Bork nomination is always trotted out as Exhibit A in gauging group activity and its impact. But group activity in Supreme Court nomination processes has been episodic, in the sense that different groups have been activated in different nomination settings as they are motivated by and respond to the issues of the moment surrounding a particular nomination. If the issue is salient to the group, it enters the nomination arena.

Group activity generically, however, is most aggressive and broadly policy oriented at the lower court level, dating back to the Carter administration. Recall that in the Omnibus Judgeship Act of 1979, Congress created 152 new federal judgeships, including 35 at the court of appeals level. This environment created an impetus for interest groups to focus on the important role these judges would play in affecting their domestic policy priorities, and we began to see systematic group activity as a result. Indeed, a nascent group called the Judicial Selection Project was quite active in trying to facilitate the appointment of a diverse cohort of judges with a "demonstrated commitment to equal justice," President Carter's avowed recruitment goal.

In more recent judicial selection environments, a number of groups have played a systematic role in monitoring lower court nominations and trying to have an impact through their active support or opposition to specific candidacies. The Judicial Selection Project of the Carter years was transformed into one facet of the work of the Alliance for Justice, a coalition of groups acting to seek and support diverse, progressive judicial candidacies. On the same side of the political spectrum, People for the American Way has also been very active. On the political right, the Judicial Selection Monitoring Project of the Free Congress Foundation has paralleled the work of the Alliance for Justice, while the Committee for Justice, associated with Boyden Gray (a former counsel to President Bush I), has been prominent through its public pronouncements and advertisements regarding specific candidates it seeks to have confirmed.

JOYCE BAUGH: Another factor contributing to the rise in interest group activity may be the dramatic decline in the number of cases decided by the Supreme Court, which has dropped from roughly 150 cases per term to 80–85. As a result, the courts of appeal increasingly have become the courts of last resort for most litigants. For interest groups, since their policy concerns will be dealt with primarily in these lower tribunals, they have a strong interest in who fills those seats. As the stakes continue to grow with nominations to the lower federal courts and the prospect of retirements from the Supreme Court, new groups may enter the fray. For example, MoveOn.org, one of the “527” groups that mobilized in the 2004 elections, recently issued a call urging its supporters to encourage senators to vote against several candidates that Bush II has renominated to the courts of appeal, after their nominations were stalled in the previous Congress. In addition, the National Association of Manufacturers (NAM), led by former Michigan governor John Engler, recently announced that it will work openly in support of Bush II’s nominees to the federal courts. Unlike MoveOn and other groups on the left and right that are concerned primarily with social issues, NAM’s focus is on economic issues generally, tort reform in particular.

MARK MOLLER: I take some issue with the question, because it assumes that what’s at stake in the judicial nomination process is the promotion of either a “conservative” or “liberal” agenda. I don’t agree. It is true that many ideological interest groups think that is what’s at stake. But they are mistaken—these ideological labels are not coherent when applied to the law.

Here’s an example. Often, “liberal” interest groups contend that “conservative” judges favor “big corporations” instead of “consumers.” The reality is not so clear. Look at the 11th Circuit, often called a “conservative” circuit. It takes a strict textualist approach to interpreting the federal racketeering statute, RICO. As a result, the 11th Circuit tends to read RICO, which is broadly written, expansively. RICO is a vehicle for many federal consumer lawsuits, making the “conservative” 11th Circuit a favorable circuit for these plaintiffs. The 7th Circuit, also said to be “conservative,” takes a policy-based approach, influenced by Law and Eco-

nomics thinking, to interpreting RICO and restrains it. Its rulings are defendant-friendly. In each case, the label “conservative” doesn’t tell us anything useful about these courts’ distinctive approaches to “consumer protection.”

Poll any random assortment of “conservative” lawyers and academics on *Lawrence v. Texas*. Reactions will range from enthusiastic (Randy Barnett) to highly critical (Nelson Lund); who is “moderate” and who is the “extreme conservative”? What is the “extreme conservative’s” position on last term’s enemy combatant cases (*Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*)? In these cases, “conservative” Justice Scalia and “liberal” legal scholar Neal Katyal are in more agreement than dis-

*Interest groups
are strategic,
well-informed,
and use money to
advance their cause.*

*[TIMOTHY R. JOHNSON &
JASON M. ROBERTS]*

agreement: Both oppose President Bush’s assertion of broad executive power to detain enemy combatants without a judicial hearing.

In reality, judicial philosophies defy traditional partisan labels. And that’s the problem with asking if a “liberal” group, like the Alliance for Justice, is more “effective” than a “conservative” partisan group. In reality, both kinds of groups—confused about how to meaningfully assess nominees—have at best an arbitrary effect on the nomination process.

JOHN MALTESE: It is worth remembering that public charges of “judicial activism” are not new. Liberals decried judicial activism in the early part of the twentieth century. For example, Herbert Hoover’s 1930 nomination of Charles Evans Hughes for chief justice sparked an intense four-day Senate floor debate over the nomination, led opponents to consider the use of a filibuster against the nomination, provoked widespread media coverage, and led some liberals in the Senate to

suggest a constitutional amendment to end “judge-made law” by curbing the power of the Supreme Court (liberals accused Hughes of “looking through glasses contaminated by the influence of monopoly” and predicted that he would put property rights ahead of individual rights through the broad stroke of judicial activism).

TIMOTHY R. JOHNSON & JASON M. ROBERTS: In her 2002 book, *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation*, Lauren Cohen Bell documents the growth of interest group involvement in the confirmation of lower court nominees. She presents persuasive anecdotal and statistical evidence that the increased involvement of conservative interest groups in the 1990s was a primary cause of the delay and obstruction of many of President Clinton’s nominees. It seems implausible to us that these groups are “confused,” as Mark suggests. Interest groups are strategic, well-informed, and put their money and influence to use in areas that will help advance their cause. Conservative groups felt threatened by Clinton’s nominees, and liberal groups certainly feel threatened by many of Bush’s nominees. Certainly, their strategies reflect these concerns.

Interest groups themselves have come to believe that the judicial nomination process at all levels is about liberal and conservative values. It is, in fact, not a stretch to argue that they have a specific ideological agenda to push. Consider, for example, the Bork nomination. It is clear from Bork’s own account, as well as those written by historians and political scientists, that liberal groups quashed his confirmation because of their ideological problems with Bork’s views on a range of issues. One only needs to look at the massive mobilization of groups to see that they did not want someone as conservative as Bork on the Court.

Conservative interest groups have mobilized today to much the same extent as the liberal groups in the 1980s. Indeed, in late February an hour-long infomercial by the Christian Coalition appeared in our television market. It featured Edwin Meese, Robert Bork, and a host of other conservative voices calling on the public to support President Bush’s nomination of conservative restraintist judges. This program suggested that only liberals are activists and only conservatives are restrain-

tists. These labels are, however, largely euphemisms for the policy consequences of placing specific types of judges on the bench. Indeed, the infomercial sought to sway public attitudes (and thus senatorial votes), so that judges could be put on the bench who oppose abortion rights, favor no separation of church and state, etc. All of these are unmistakably conservative policy positions.

The question Mark takes issue with is whether one can label judges as ideological. He points to some interesting cases that are difficult to classify as liberal or conservative, but these are exceptions rather than the rule. A large body of political science research presents overwhelming statistical evidence that judicial decisions and the votes of the justices are predictable and fall along a liberal/conservative ideological dimension (see, e.g., Segal and Spaeth, 2002). Judges are actors in the political process, and they have policy preferences that are reflected in their decisions. No doubt many legal scholars (and Mark) find this troubling, but the empirical support for it is undeniably strong.

DAVID YALOF: Many of these interest groups may themselves be confused about their role in the appointment process. Recall that in 1991 the NAACP actually split internally over the Thomas nomination. Some local chapters openly defied the national NAACP's opposition to Thomas, and as a result the organization lost much of its ability to influence the process and the outcome.

During the Bork nomination, liberal interest groups concerned with judicial appointments were well organized and able to work together quite effectively. Many have forgotten that one of the most important strategies these interest groups employed was their decision to be absent from the confirmation hearings; almost all of these groups withdrew their requests to testify before the Senate Judiciary Committee. That allowed their message to stay coherent in the minds of senators, without being muddled by all the histrionics that would have no doubt accompanied live testimony. It also undercut the claims made by some of Bork's supporters that these objections had been manufactured by a handful of liberal interest groups and were not coming from the public at large. It's difficult to imagine that all these interest groups, after waiting so long for a vacancy, will be so restrained at the next opportunity.

JOYCE BAUGH: To follow up on David's point about internal divisions within interest groups, such as the NAACP, consider the responses of various Hispanic groups to the Miguel Estrada nomination to the D.C. Circuit Court of Appeals. The Congressional Hispanic Caucus officially opposed Estrada's nomination. In its announcement, the Caucus said that it would look for "Hispanic judicial nominees who have demonstrated a commitment to protecting the rights of Latinos in their professional work and volunteer activities, and who have worked to expand civil rights and economic opportunities for Latinos." Although the Mexican American Legal Defense and Educational Fund (MALDEF) did not of-

*In 1991,
the NAACP
split internally
over the Thomas
nomination.*

[DAVID YALOF]

ficially oppose Estrada, it reportedly expressed "grave concerns" about the nomination. Other Hispanic groups such as the Hispanic Chamber of Commerce and the Mexican-American Growers Association supported Estrada. Finally, although the Hispanic Bar Association endorsed Estrada's nomination, several of its former presidents disagreed with the group's action.

MARK MOLLER: I agree with Tim and Jason that partisan groups involved in the nomination process aim to "advance their cause"—or, more accurately, the cause of one of the major political parties. Second, I agree they have a lot—I'd say a near monopoly—of influence on the process. I'm just not convinced these actors are translating their intent and influence into a straightforward political payoff.

There are a number of reasons this may be so. Some, even many, judges are actually principled. A principled textualist does not vote according to the 2004 Republican Party platform, even if their interest group boosters expect them to.

Some groups focus on "hot-button" issues—like abortion—that are not at the center of live debates in the law. The Court has had three or four opportunities to overturn *Roe*. It hasn't. Many commentators think it is here to stay, no matter the composition of the Court. Others direct their fire based on the accidental politics of a given nomination. For example, at the lower court level, some say that the nominations of Roger Gregory and Miguel Estrada became controversial after politicians made race an issue in each. In my view, the heightened controversy, in turn, may have inflated and distorted the substantive labels "watchdog groups" assigned to both nominees. Both Estrada and Gregory were declared to be "extreme" by interest groups, but with little concrete foundation. As a result, there's substantial reason to think these groups inject more static than substance into the nomination debates. More ominously, I fear that a divisive, partisan confirmation process is encouraging the next generation of judges to think of themselves as affirmative partisans.

In addition, I'm not sure the jury is in with respect to empirical research findings on judicial voting patterns. Some studies face methodological problems. For example, Frank Easterbrook criticizes the work of Cass Sunstein *et al.* (2004) because their data set included many unanimous panel decisions. Unanimous decisions may reflect that the case is easy, perhaps because it's governed by clear controlling precedent. A good study should focus on hard, divided cases with vigorous dissents, since hard cases open the door to partisan judging. I'm not sure how pervasive this methodological problem may be in the literature. Easterbrook's critique also suggests why the surprising positions of "conservatives" in controversial cases—be it support for judicial review in *Hamdi* or for equal protection in *Lawrence*—deserve our attention. If Easterbrook is right, these cases aren't, as Tim and Jason suggest, outliers to be ignored. Instead, they open a window on the complexity of the law—and the stubborn, encouraging independence of many who devote their careers to it.

MARY DUDZIAK: I take issue with Mark's comment that the Court has not overturned *Roe v. Wade* despite opportunities to do so. The Court overturned *Roe*

sub silentio in *Planned Parenthood v. Casey* (1992). Usually, when the Court overturns a test and replaces it with a completely different test that changes the nature of the right at stake, that's called overruling. In this case, the Court overturned *Roe's* trimester framework, which protected a strong right to abortion in the first trimester, allowed greater government regulation in the second trimester, and allowed a broad role for regulation and restriction in the third trimester, and replaced it with the highly deferential "undue burden" test that allows much more intrusive government regulation from conception on, and allows to stand regulations that would have been unconstitutional under *Roe*. By overturning *Roe* without saying so, the Court had an important impact on abortion rights politics: The political right is still inflamed, because *Roe* (in name) is still on the books, while the left is pacified because it believes that *Roe* is still the law. The *Roe* example helps us to see that interest groups are often affected more by the popular perceptions of Court action. The intricacies of Court holdings often don't trickle down to the general public.

TIMOTHY R. JOHNSON & JASON M. ROBERTS: We do not disagree with Mark that many, maybe even most, judges are principled decision makers. Indeed, they were trained in the law to think in a particular way about making decisions and to base decisions as much as possible on legal authority. But the literature that Mark cites pales in comparison to the empirical literature political scientists have brought to bear on the questions of how legal and extralegal factors affect judges' decisions.

Here is what we know. The overwhelming empirical evidence spanning many decades (see, e.g., Pritchett, 1948; Schubert, 1965; Segal and Spaeth, 2002) suggests that Supreme Court justices are very consistent in how they vote. Thus, with exceptions like Justices White and Blackmun, most other justices vote overwhelmingly in a liberal or conservative manner. Another line within this literature demonstrates quite clearly that justices take into account factors other than the law when they make decisions (see, e.g., Epstein and Knight, 1998). The social scientific models show that ideology, the preferences of other actors (Congress, the president, the public), and institutional

rules and norms all affect how judges decide. We do not disagree that the law matters, but ideology plays a key role in the process. Scholars know that judges—Supreme Court justices in particular—have ideologies; presidents know it (Reagan followed a particular strategy of putting political conservatives on the Court); and senators know it (Senate Democrats are filibustering nominations today because of the ideological positions of some nominees). This is exactly why we have a nomination and confirmation process that is highly partisan and ideological.

PART IV: Are Reforms in the Confirmation Process Needed?

EDITOR: Is the contemporary process of nominating and confirming Supreme Court justices a good one? Why (not)? How would you improve or reform this process?

MICHAEL GERHARDT: The system is not broken, but it is not working well. Even if we discount for some posturing, relations among senators from opposing parties are not good. More than one senator has told me that he believes relations between the parties have never been worse. Whether or not this is true, relations among the senators are fraught with tension and bad blood, in large part because of differences over judicial nominations. Part of the problem is that each side believes the other is at fault. I am sure neither Democrats nor Republicans would agree with my belief that the parties are probably equally to blame. Republicans point to the Senate's rejection of Robert Bork and unseemly contest over Justice Thomas's nomination as watershed events, while Democrats point to the filibuster against Abe Fortas's nomination as chief justice (and particularly President Nixon's involvement in getting Fortas off the Court) and the Republicans' efforts to thwart a number of President Carter's judicial nominees. Many Democrats believe that Republican efforts to obstruct a number of President Clinton's judicial nominations were a new low.

Another part of the problem is that neither side seems genuinely interested in finding a peaceful resolution of their differences. Republican senators argue that a

president's judicial nominees deserve some deference and floor votes. They call upon Democrats to put the filibuster aside and give the president and his nominees their constitutional due. For Democrats, the problem is that they are uncomfortable in unilaterally disarming themselves. They have no reason to believe that Republicans would show Democratic presidents the same respect; indeed, Republicans found all sorts of ways to obstruct President Clinton's judicial nominees. And so Democrats resist making peace.

Under these circumstances, it is hard to know what could be done to inject more civility and cooperation into the process. Walter Dellinger suggests one solution to the impasse within the Senate—that the parties ought to reach an agreement under which the president and Republican senators pick three out of four nominees to a particular circuit court of appeals, while the Democrats pick the fourth. As Walter points out, his suggestion has died "for want of a second." But it is illuminating to think about why no one has yet supported his proposition. It seems that the leaders of both political parties seek to control the ideological composition of the courts, and this explains much of the current impasse in the Senate.

JOYCE BAUGH: In the aftermath of the Bork controversy, a task force was convened to examine the Supreme Court appointment process. In 1988, the Twentieth Century Fund Task Force on Judicial Selection published its report, suggesting several reforms to "depoliticize" the process: (1) limit the number of participants in confirmation hearings, (2) prevent nominees from testifying at confirmation hearings, (3) prevent senators from asking nominees' questions about how they would deal with specific issues (if testimony continued), and (4) base confirmation decisions solely on nominees' written records and testimony from legal experts. Other prominent legal experts offered additional proposals for reform, including having the nominees' testify immediately after being nominated and delaying testimony from other groups, prohibiting interest groups from testifying at all, ending public hearings on the nominations, and doing away with confirmation hearings altogether.

Stephen Carter's *The Confirmation Mess* (1994) examined several high-profile nom-

inations to federal office, including the Bork and Thomas confirmation events. Like the Twentieth Century Fund Task Force, Carter decried the current process, but he rejected that group's proposals for reform, insisting that they would be ineffective in depoliticizing the process. Carter advocated changing the vote necessary for confirmation from a simple majority to a two-thirds vote, imposing term limits for Supreme Court justices, and electing rather than appointing Supreme Court justices. Interestingly, the idea of term limits may be gaining some traction—the question of life tenure for Supreme Court justices was addressed at a conference held at Duke University Law School in April 2005.

Each of the proposals recommended by the Twentieth Century Fund Task Force has major disadvantages. For example, if we limit testimony from interest groups, who determines which groups will be permitted to testify and what will be the criteria for deciding this? It is doubtful that there would be widespread agreement on the rules. Similarly, public hearings have provided citizens with the appearance of a more open, transparent process, which is preferable to the previous practice of a process controlled by a few political actors. Furthermore, given the federal judiciary's increased role in deciding major issues of public policy that affect millions of people, it seems appropriate to hold public hearings on their backgrounds and qualifications.

Rather than depoliticizing the judicial selection process, Stephen Carter's proposals to elect justices and to impose term limits would move us in the opposite direction. As we have learned in recent election cycles, state judicial elections have become costly, nasty affairs that resemble the elections for legislative and executive offices. Incumbent justices have been attacked (from the right and left) for their decisions in previous cases, and large sums of money have been spent on misleading advertisements that play a major role in influencing voters' choices. Is this the model that we should follow for the federal courts? Finally, it is difficult to imagine in the current climate that any Supreme Court nominee would receive a two-thirds vote for confirmation, unless he or she were in the mold of a Ginsburg or Breyer.

The current system may have "warts," but it is still the best system we have for at-

tempting to achieve judicial independence as well as executive and legislative accountability. I don't think that the process is overpoliticized, but even if it were, the proposals for reform are unlikely to alleviate the perceived problems.

ELLIOT SLOTNICK: The processes that we have in place, both at the Supreme Court and lower court levels, work, because judges are seated and, by and large, they are at least as good at what they do as the people we place in offices in nonjudicial positions. At the Supreme Court level, appointments are so few and far between that it is difficult to make generalizations about the process working or not. Each appointment opportunity should be

*Proposals for
reform would
not alleviate
the perceived
problems.*

[JOYCE BAUGH]

judged on its own merits, and we could find many who would say the process has failed because Bork was not confirmed or because Thomas was confirmed.

Beyond such case studies, I think it is somewhat easier to make generalizations about lower court federal selection. Here, the answer may still run both ways. The process is a good one because the numbers, even in a divisive setting like the one we have witnessed in the past four years, document that an overwhelming proportion of vacancies get filled and they are usually occupied by individuals whose appointments are credible and whose judicial service will be praiseworthy. While there continues to be much ado about a dozen lower court nominees whose confirmations have been obstructed or delayed by senatorial practices involving hearings, floor votes and, now, filibusters, it is hard for me to be exercised about that. Such obstruction and delay occurs for arguably sound reasons, and the tactics utilized can have costs for those who are using them. When red flags are being waved about candidates that widen the scope of public input and debate in nomination processes

and require senators to take stances for which they can be held accountable, I think this is an appropriate use of the advice and consent process. In a setting where nominees are getting timely hearings, votes are being held in the Judiciary Committee, and names are being sent to the Senate floor, the process is working. If filibusters occur that derail specific candidates that, too, is a valid part of senatorial consent.

The system gets off track where there is a blunting of advice and consent processes in invisible ways with "anonymous" holds placed on nominees that keeps them from having Judiciary Committee hearings or, after a hearing, when the Committee simply doesn't act on a nomination. One might argue that the process went awry for some nominees during the Clinton years, who went four years without receiving Judiciary Committee hearings, but it is working for present nominees whose efforts to be seated on the bench flow all the way to the point where they are denied that seat, at least until now, through the mounting of a filibuster.

I do fear the potential chilling effect that the process may have on the willingness of good judgeship prospects to put themselves through the process of becoming a judge. I can easily envision many potentially good candidates, secure and happy in their present employment, earning hefty salaries, simply not being willing to endure the selection process, if they can imagine themselves as controversial in any sense and recognize that the confirmation process will disrupt their livelihoods and their lives in unacceptable ways. But this is a "problem" that we may have to live with, as the pool of potentially excellent candidates greatly exceeds the supply of available judgeships.

TIMOTHY R. JOHNSON & JASON M. ROBERTS: The process of nominating and confirming judges to the federal bench is not an easy one, and the framers did not intend for it to be easy. That the process has become more contentious in recent years does not mean the system is broken. In fact, one could argue that the framers intended this particular check to be a cornerstone of the separation of powers.

The most troubling procedural aspect of the process today is tracking the filibuster in the Senate, which has made it

much easier for the minority party to bring the confirmation process to a halt without having to shut down the entire Senate. As such, the filibusters of Bush nominees have run in the background, while Senate business goes on as usual. This tracking procedure means that the filibusters do not force compromise, and as such, some Senate scholars have labeled this a “filibuster light.” Tracking helps keep meaningful debate over nominees largely out of the public eye. The public discourse is about obstruction, not the rationale for being for or against particular nominees.

The most disappointing aspect of this controversy is the rampant hypocrisy in the rhetoric of both parties. Republicans blocked many of Clinton’s nominees, while Democrats have blocked several of Bush’s nominees. Both parties try to claim the high ground on this debate, but the truth is that both have used obstruction to secure political ends. If, as Chief Justice Rehnquist has asked many times, all nominees were given an up or down vote, then the process would be more open, senators would be held more accountable, and the debate would be about judicial qualifications rather than about which senators are obstructing which judicial nominees.

MARK MOLLER: I’m a fan of an active judiciary, one that protects individual autonomy and political pluralism from central, majoritarian incursion. An active judiciary depends on traits that don’t necessarily come naturally to lawyers—boldness, imagination, rhetorical flair, and a propensity for risk taking.

Yet, there’s some evidence our nomination system is biased against these traits. Stephen Choi and Mitu Gulati (2005), for example, suggest the use of metrics to quantify judicial quality—including productivity (measured by opinions authored), influence (citations to a judge’s opinions outside her circuit) and independence (whether a judge votes like other judges nominated by the same party). Arguably, the Choi-Gulati criteria are proxies for judges with a propensity toward vigor and independence—the characteristics that a countermajoritarian system needs. Yet, according to John Lott (2005), judges who rate highly under these measures have become rarer since the Reagan administration. This suggests that the nomination system seems to favor inert,

quiescent judges, who are the least likely to step outside the path set by the political branches.

One source of the problem, but by no means the only source, may be the filibuster. It is typically defended as a countermajoritarian check, and its defenders assume it produces countermajoritarian judges. I disagree. Just because a parliamentary tactic checks majorities in Congress doesn’t mean that it creates incentives for countermajoritarian decision making in the judicial branch. Legislative and judicial decision making are separate, and their effects on one another are at best indirect.

Here’s another way to think about the filibuster. The judiciary is a multitude of voices engaged in a conversation about

*Judicial
independence is
a value that
other nations see
in the U.S. system.*

[MARY DUDZIAK]

the law. Congress sits on the sideline. It doesn’t directly participate in the conversation. Instead, it exercises a heckler’s veto—that is, it can shout down some voices. The filibuster is a tactic that makes it easier for small groups within Congress to shout down voices they don’t like. In aggregate, when more small groups can shout down those who don’t jibe with their views, that raises the volume of Congress’s “heckler’s veto.” Those who win out are the Milquetoast voices that don’t offend anyone. That’s no way to promote judging against the grain.

Of course, the irony is that many Republicans advocating the “nuclear option” claim to favor inactive judges (judges who show “restraint”). On a long view, that’s shortsighted. Exercising the nuclear option may nudge toward an environment where more, not less, active, countermajoritarian judges slip through the cracks, improving the health of our system of checks and balances.

JOHN MALTESE: If the current system does not always work as well as we would

like, that is not because the selection process itself is fundamentally broken or in need of some major reform. Rather, it is a reflection of the broader strains in our current political climate. Chief among these are the long stretches of divided government since 1968 and the rise of “polarized politics,” which has not only resulted in a wider ideological gap between the two parties, but has also—as Michael noted—led to particularly strained relations among senators. Support for the two major political parties is almost evenly divided. None of this makes for consensus in the confirmation of judges.

MARY DUDZIAK: It’s helpful to compare our judicial selection system with the alternatives. The possible reforms discussed by Joyce and others stay within the basic confines of the appointment and confirmation process provided for in the U.S. Constitution. But if we were starting from scratch, we could find other models in the practices of other countries.

Judicial selection in other nations varies. In civil law countries, the judiciary is commonly a long-term career. Individuals are appointed as lower court judges shortly after they complete their legal education. They then move up the ranks, so that appointment to a high court is a form of promotion. This doesn’t lend itself to the sort of vision that Mark eloquently describes as a feature of an ideal justice. It was in part to bring in new perspectives that some nations, at transitional moments, created constitutional courts. This meant that judges from the prior regime would not be the ones to interpret the country’s new constitution; instead, that role would go to a new set of constitutional court judges. Appointment processes vary, but constitutional court judges are often appointed by a nation’s president, sometimes from a list prepared by a commission composed of judges and leaders in the nation’s legislative body. While judges in other nations do not always have life tenure, high court judges often serve for a single, long term of 8–12 years. A principal goal underlying selection processes and length of terms is judicial independence, particularly insulation of the judiciary from the executive and/or the party in power.

Compared to other models, the U.S. system looks pretty good. It enables the president to select independent thinkers rather than simply promote technocrats.

While the degree of politicization may sometimes be unseemly, it does not fundamentally undermine judicial independence. Instead, judicial independence is a value that other nations often see in the American system. I believe it is protected not only by insulating justices from electoral politics, but also by maintaining a role for the minority party through the filibuster. That check on majoritarian politics limits the president's ability to pack the Court with justices who will support his agenda, thereby protecting the Court's independence vis-à-vis the president.

PART V: Future Appointments

EDITOR: Which individuals are among the most likely to be nominated by President Bush, when/if vacancies occur? Would they be confirmed? What impact would one or several such appointments have on Supreme Court doctrines?

ELLIOT SLOTNICK: Two questions seem critical in discussing future vacancies. Where does the vacancy come from—the chief justice or an associate justice? Is the Bush administration itching for a fight? One can almost play out different scenarios in a two-by-two matrix following these two dimensions, though the possibilities are still wide ranging.

If we are speaking about Rehnquist's center seat, and given what we've seen in recent lower courts nominations, the White House cares little about creating a firestorm. The choices here, then, could be Scalia or Thomas. Both would set off a confirmation struggle of Borkian magnitude or greater. The aftermath of such a battle would be long lasting. I hope the Bush administration doesn't initiate such an engagement, but I fear that it will. The only way to make the fight a bit less of a struggle for the nation's soul would be through a package of nominees, thereby giving the Democrats somebody much better than they could hope for in the vacated associate justice's seat. I have no idea who that could be, since such names have not been in play the past four years. We can be sure that the names would not be Tribe, Dellinger, or Chemerinsky!

On the other hand, if the White House wants to get this done smoothly, then

O'Connor or Kennedy would be the obvious choices for the chief justice position. But selecting O'Connor would deny the Bush team a long-term chief justiceship legacy and would certainly irk Bush's right-to-life base. Kennedy seemed to make a bit more sense, until the recent decision ending the death penalty for juveniles where he supplied the swing (and turnaround) vote. I think that vote ended his prospects for the chief justiceship. The one factor in O'Connor and Kennedy's favor is that it would give the Bush administration more freedom to do what it wants with the vacated associate's seat—another packaging possibility. Still, the Scalia/Thomas pool seems more likely than the O'Connor/Kennedy one. Looking outside for a chief, I would think that

*President Bush
has identified
Justice Scalia
as one of his
ideal justices.*

[JOHN MALTESE]

two judges from the 4th Circuit would be possibilities. J. Michael Luttig could be a confrontational choice, while J. Harvie Wilkinson would be a bit more accommodationist. Former solicitor general Ted Olson could be the proverbial grand slam; he would give the Bush administration everything it wants ideologically, and I think that Olson would be more readily confirmable than either Scalia or Thomas.

Moving away from the chief justiceship and stipulating that the names above would all remain in play, who might be nominated to other vacancies? Again, situational factors and the White House's willingness to fight come into play, but a number of possibilities strike me as interesting. For one, it would not surprise me to see the Bush administration take to the Supreme Court level some people that they have not been able to confirm on the circuit courts. Thus, the names of Texas Supreme Court justice Priscilla Owen, California Supreme Court justice Janice Brown, and Miguel Estrada could ride again. Other Hispanic possibilities (and I think Bush would like to name the first

Hispanic to the Court) would be Alberto Gonzales (particularly if he puts in some time in the attorney general position first) and the always-mentioned Emilio Garza from the 5th Circuit. Another ethnic card I think the Bush administration would like to play is naming the first Asian American to the Court. Viet Dinh and John Yoo, both law professors with prior experience in the Justice Department, strike me as interesting and ideologically correct possibilities here. From the Senate, it might be relatively easy to confirm Jon Kyl (R-Arizona) and perhaps Orrin Hatch (R-Utah), though at 71, Hatch is probably too old. Furthermore, if neither Luttig nor Wilkinson becomes chief justice, they would be on my final short list for an associate's seat.

JOHN MALTESE: I do not think that Bush will shy away from a fight. I also think that Alberto Gonzales is very much in the running—especially in another two or three years. Coincidentally, I recently read a news report by Tom Curry of MSNBC, "Is Scalia Campaigning for Chief Justice?" (March 14, 2005). After years of barring journalists from covering his speeches, he is now allowing C-SPAN to air them live. Curry suggests that this might be part of a campaign for chief justice. Who knows? Bush has identified Scalia as one of his ideal justices.

JOYCE BAUGH: As for the chief justice seat, we have heard some claims that Scalia's nomination would not raise major problems, given how easily he was confirmed to his associate's seat in 1986. Others have suggested that it would be difficult for Scalia to be an effective leader of the Court, given his cantankerous temperament, seen in so many of his opinions and at oral argument. Supporters of Scalia have dismissed this claim, noting that questions were raised about Rehnquist's ability to lead the Court, because he had spent so many years writing solo dissents. I would suggest, however, that a major difference between the two is that Rehnquist did not have a reputation for berating his colleagues in the caustic and sometimes sarcastic language that Scalia is known for (seen very recently in *Roper v. Simmons*, for example). It is interesting, as John points out, that Scalia appears to be working to improve his image in recent months. In addition to the MSNBC story, a recent *Washington Post* article reporting on

Scalia's speech at the Woodrow Wilson Center is titled "Scalia Showing His Softer Side" (March 15, 2005). If Bush does choose Scalia to be Rehnquist's successor, the likelihood is that he would be confirmed, but I expect that Senate Democrats will not make the process an easy one. Indeed, Senate Minority Leader Harry Reid was rebuked by his Democratic colleagues for indicating in a television interview his possible support for Scalia as Rehnquist's successor.

A Thomas nomination for chief justice is also intriguing, but I fail to see what Bush would gain politically that he could not also achieve with Scalia, if the overall goal is to appoint a strong conservative. And the bloodbath that would ensue with a Thomas nomination would be much worse. While it is certainly true that with Thomas, he could appoint the first African American chief justice, I think Bush's higher priority is to appoint the first Latino justice or the first woman as chief. Also, there is no longer any need to "court the black vote" for a reelection campaign. Bush is, nonetheless, being encouraged by some to choose Thomas to succeed Rehnquist. While the strategy of paralyzing Senate Democrats through a cynical use of race may have worked in the earlier Thomas confirmation, I have serious doubts that it would be effective again. This is not to suggest that Thomas would be rejected; it just wouldn't be as painless as some observers seem to believe.

MARK MOLLER: The caprice of the nomination system makes spot predictions difficult. But I'll make some general observations. First, unlike some of my dialogue colleagues, I'm not convinced that Bush is poised to make startling changes to the Court. In 2002, in advance of the Estrada nomination to the D.C. Circuit, sources in the Bush administration suggested strongly that Alberto Gonzales, who had a fairly quiet record as a Texas Supreme Court justice, would be Bush's first choice. While the ground has clearly shifted—Gonzales is no longer on the list—Bush is susceptible to choices less bold than many are predicting. Second, I expect that the opposition will overreact to Bush's picks—labels are assigned arbitrarily, the opposition party has powerful strategic reasons (rallying its base) to manufacture a fight, and an inattentive public degrades accountability.

Looking forward, I hope for the unexpected. The Court can surprise—for good and for ill. My hope is that Bush's picks will prove good surprises, by making tough stands against the political branches when the Constitution requires. There are so-called "conservative" judges who might fit the bill, including some who are in the running, against the odds, for a nomination.

DAVID YALOF: I take issue with Mark's suggestion that Alberto Gonzales is "no longer on the list." To the contrary, I believe that the attorney general is very much still in the running for a Supreme Court seat, although probably not the center seat because it may be coming up soon. The Bush administration is well aware of

*I'm not convinced
that President
Bush will make
startling changes
to the Court.*

[MARK MOLLER]

the perception that Gonzales is a moderate. Won't some time spent in the Justice Department striking a more conservative balance between national security interests and civil liberties effectively turn him into a darling of the neoconservatives? No current member of the Justice Department has been appointed to the Court since Rehnquist himself in 1971, and no sitting attorney general has made the jump since Tom Clark in the late 1940s. But if it's true that Bush actually wants a fight for the Court, who better than the attorney general to create such fireworks?

MARY DUDZIAK: With the appointment of President Bush's close advisor Karen Hughes to a new State Department position on public diplomacy, the Bush administration appears to be putting more of a focus on managing international perceptions of the U.S. than has happened since the mid-Cold War years. What does this have to do with Supreme Court nominees? It may mean that Alberto Gonzales and others potentially implicated in Bush administration policies on torture are less likely to be nominated. Abu Ghraib and

other allegations of torture of detainees have harmed the image of the U.S. around the world, and Hughes is in a position to understand that other nations will closely follow discussions in confirmation hearings regarding nominees' involvement in U.S. policies on torture. Worldwide news coverage examining a nominee's position on torture would highlight a damaging issue that Hughes needs to counter. From this perspective, sitting federal judges and others who have not recently served in the executive branch will be safer nominees. So while there may be domestic political gains from nominating Gonzales, the public diplomacy consequences provide a counterweight. It's impossible to know whether this issue would tip the scales, but Hughes' role guarantees that public diplomacy—even as it relates to domestic U.S. law and politics—is back on the agenda.

MICHAEL GERHARDT: Most people who talk about possible nominees probably do not know what they are talking about, and most people with inside knowledge are probably not talking. We do not know the credibility of the people presently floating names in the public arena. In some cases, we can expect that possible nominees' supporters are trying to increase their chances, while attempting to diminish others. And some reliable sources may be floating realistic prospects to gauge possible conflicts.

We are in unusual circumstances in several respects. The chief justice's serious illness has allowed President Bush and others considerable opportunity to position themselves. Moreover, we know that in nominating a chief justice, a president is both signaling his intentions for the future of the Court as well as his opinions about the Court over which the retiring chief justice has presided. President Bush's potential chance to replace the chief justice gives him an opportunity to comment on the work of the Rehnquist Court. I suspect that President Bush and others close to him feel that the Rehnquist Court has not fulfilled their objectives. In addition, many conservatives and Republicans are not pleased with the "liberal" decisions of the Rehnquist Court. Replacing the chief justice would not effectuate a sharp shift to the right on the Court, but Rehnquist has surprised many people by his votes to reaffirm *Miranda* and to uphold heightened

scrutiny for gender discrimination (*Nevada v. Hibbs*, 2003; *United States v. Virginia*, 1996). Replacing the chief provides an opportunity to maintain the Court's course, perhaps even to move it further to the right. Interestingly, the chief justice position has not been occupied by a Democratic appointee since Fred Vinson. And it is no accident, I think, that the succeeding chief justices—Warren, Burger, and Rehnquist—have been moving increasingly to the right.

Regarding potential vacancies, it's fun to speculate, but I wonder about the possible significance of the fact that we are now hearing slightly different names than when President Bush was first elected or even reelected. Many had supposed he was disposed to name the first Hispanic to the Court, perhaps to the chief justiceship. The silence on this front strikes me as possibly significant. Does it signal that President Bush has shifted his priorities in naming a Supreme Court justice or is this a possibility that remains likely, given that it has not been foreclosed as a result of a public, prenomination vetting process?

TIMOTHY R. JOHNSON & JASON M. ROBERTS: We think the nomination for any first vacancy will provoke a long and difficult battle. Some believe that the Democrats do not have the wherewithal to mount a filibuster on a Supreme Court nominee. To the contrary, we think they have already done so in the case of Miguel Estrada. Indeed, many scholars viewed the Estrada circuit court nomination as a trial run for his eventual nomination to the Supreme Court. Given the filibuster that forced Estrada to withdraw his name, we believe the Democratic minority in the Senate was able to thwart his nomination to the nation's highest court. Today, the Democrats have nothing to lose. They don't control the House, the Senate, or the White House. Their one last hope is to maintain a judiciary that is no worse than moderate on the most important legal issues of our day. As such, a difficult battle in the Senate, with at least the threat of a filibuster, is not out of the question.

Regarding a vacancy in the chief justice position, it may seem intuitive that the Democrats will not fight a conservative nomination to replace Rehnquist, as they did not vehemently fight to replace Burger with Rehnquist in 1986. However, the Bush administration would be picking a

difficult fight if it decided to nominate Thomas or Scalia. If there is a fight over replacing the chief, then the battle that will ensue when either a swing justice or a member of the liberal coalition on the Court leaves will be even greater. This is just speculation, of course, and the models we have employed in the past suggest that presidents do have the ability to get a controversial nominee confirmed even in the face of a hostile Senate.

DAVID YALOF: There's actually good reason to believe that Bush will attempt to pick a fight with the next vacancy by "shooting for the moon" with an extreme conservative. President Reagan and his advisors knew they were picking a fight with the nomination of Bork, but they did it anyway during his second term. It did not cost the Republicans much at the polls in 1988 (Bush did, after all, win); it fired up the conservative base; and if certain Republican senators had voted differently (e.g., Warner and Specter), there might have been enough momentum to pull it off. In the end President Reagan got a nominee (Kennedy) who was on his original short list anyway. Did his administration really lose anything by not playing it safe?

Similarly, President Bush has no incentive to play it safe with a stealth nominee or a moderate. By aiming high, his administration still enjoys a fallback position with more confirmable nominees such as legal scholar Michael McConnell (now on the 10th Circuit) and John Roberts of the D.C. Circuit, neither of whom is really moderate at all. The Ginsburg and Breyer appointments should not be interpreted as a sign of Senate reassertion in the appointment process; President Clinton had higher priorities than the Court in his first term. President Bush won't have to make a similar choice, at least not early on.

MICHAEL GERHARDT: President Bush approaches the prospect of filling a vacancy on the Court from a position of real strength. Based on what we have seen in the past, he also does not seem disposed to avoid a fight. To the contrary, he appreciates that fights define people's positions and beliefs. While many Republicans are genuinely fearful that Democrats may try to filibuster a Supreme Court nominee they do not like, I am not so sure. Democrats are able to filibuster lower court nominees in part because they are relatively

low-profile events. A Supreme Court nomination will be a high-profile event, and I think it will put immense pressure on the Democrats to allow a floor vote to occur. We should not forget that one check on the use of the filibuster is the electoral process. President Bush has deployed that check much to his advantage thus far.

ELLIOT SLOTNICK: I agree with Michael—I sense that Bush and his advisors are itching for a fight and are quite willing to have one. For one, they have not demonstrated a desire to be conciliatory at all on the lower court front. Perhaps more to the point, with a war that continues to go badly and difficult domestic policy battles ahead that may not be winnable, this is an issue that can at least aid President Bush with his electoral base. True, he cannot be elected again, but without the support of that political base, what does he have left?

TIMOTHY R. JOHNSON & JASON M. ROBERTS: A Supreme Court nomination changes the calculus for both sides. It seems unlikely that the Senate would "track" a Supreme Court nominee as it has for lower court nominees. If the Democrats choose to filibuster, it would be a traditional (i.e., on the floor) filibuster. This would be certain to attract public attention and could bring considerable public pressure on the filibusterers. It is unclear how much this would hurt Senate Democrats electorally, however. The departure of moderate Democratic senators, such as Daschle, Breaux, and others, has left a core group of liberals who would have little to lose electorally from standing up to President Bush. Thus, we disagree with David, Michael, and Elliot who say that President Bush has no incentive to play it safe. A protracted and perhaps "nuclear" battle over a nominee would significantly inhibit most of Bush's second term agenda. Social Security reform, tax reform, and most all other elements of Bush's "ownership society" program would not survive the "fallout." Like Clinton, Bush likely has higher priorities.

Editor**JOHN PAUL RYAN**

(johnpryan@ameritech.net) is President of The Education, Public Policy, and Marketing Group, which provides program, editorial, and outreach services to non-profit organizations. He served as director of college and university programs and, later, school programs for the American Bar Association Division for Public Education from 1984 to 2000. He is coauthor of *American Trial Judges* (Free Press, 1980), and his articles on courts and criminal justice have appeared in numerous journals. He has edited online dialogues for *Focus* on a wide range of public policy topics. He currently serves on the advisory board of the Virginia Law-Related Education Center and on a publications committee for the National Council for the Social Studies.

Contributors**JOYCE BAUGH**

(joyce.baugh@cmich.edu) is Professor of Political Science at Central Michigan University, where she served as department chair from 1995–2001. She is the author of *Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance* (Peter Lang, 2002) and coauthor of *The Real Clarence Thomas* (Peter Lang, 2000).

MARY DUDZIAK

(mdudziak@law.usc.edu) is the Judge Edward J. and Ruey L. Guirado Professor of Law and History at the University of Southern California Law School. She is the author of *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, 2002). She serves on the managing board for *American Quarterly* and the board of trustees for the Law and Society Association and is a distinguished lecturer for the Organization of American Historians.

MICHAEL GERHARDT

(mjgerh@wm.edu) is Hanson Professor of Law at the William & Mary School of Law. He served as special consultant to the White House Counsel's Office for the confirmation of Justice Stephen Breyer. In 2003, he testified before both the Senate Rules and Judiciary Committees on the constitutionality of the filibuster. He is the author of *The Federal Appointments Process* (Duke, 2000) and *The Federal Impeachment Process* (Princeton, 1996).

TIMOTHY R. JOHNSON

(tjohnson@polisci.umn.edu) is Assistant Professor of Political Science at the University of Minnesota. He is the author of *Oral Arguments and Decision Making on the U.S. Supreme Court* (SUNY, 2004) and has published articles in a variety of journals on judicial politics, executive-judicial relations, and the Supreme Court.

JOHN ANTHONY MALTESE

(jmaltese@uga.edu) is Associate Professor of Political Science at the University of Georgia. A recipient of teaching awards from the University of Georgia and the Carnegie Foundation for the Advancement of Teaching (2004), he is the author of *The Selling of Supreme Court Nominees* (Johns Hopkins, 1995) and coauthor of *The Politics of the Presidency* (CQ, 2004).

MARK MOLLER

(mmoller@cato.org) is Senior Fellow in Constitutional Studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*. An experienced appellate lawyer, he has engaged in a number of high-profile representations, including as a member of the team that successfully litigated *Bush v. Gore* before the Supreme Court, and as an advisor to judicial nominee Miguel A. Estrada during his Senate confirmation hearings.

JASON M. ROBERTS

(jmr@umn.edu) is Assistant Professor of Political Science at the University of Minnesota. He has published articles on the politics of Supreme Court nominations and on Congress in a variety of political science journals.

ELLIOT SLOTNICK

(slotnick.1@osu.edu) is Professor of Political Science and associate dean of the graduate school at the Ohio State University. He is coauthor of *Television News and the Supreme Court* (Cambridge, 1998). An expert on judicial selection in the lower federal courts, he has collaborated with Sheldon Goldman on a series of articles in political science journals and law reviews on judicial selection during the Clinton and Bush administrations.

DAVID YALOF

(david.yalof@uconn.edu) is Associate Professor of Political Science at the University of Connecticut. He is the author of *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (University of Chicago, 1999; recipient of the American Political Science Association's Richard E. Neustadt Prize for the best book on the presidency) and the coauthor of *The First Amendment and the Media in the Court of Public Opinion* (Cambridge, 2002).

Books & Articles

- Abraham, Henry J. *Justices, Presidents and Senators, Revised: A History of the U.S. Supreme Court Appointments from Washington to Clinton*. Lanham, MD: Rowman & Littlefield, 2001.
- Ackerman, Bruce. "The Art of Stealth." 27:4 *London Review of Books*, February 17, 2005.
- Baugh, Joyce A. *Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance*. New York: Peter Lang, 2002.
- Bell, Lauren Cohen. *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation*. Columbus, OH: Ohio State University Press, 2002.
- Binder, Sarah A., and Steven S. Smith. *Politics or Principle? Filibustering in the United States Senate*. Washington, D.C.: Brookings Institution, 1996.
- Carter, Stephen. *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. New York: Basic Books, 1994.
- Choi, Stephen J., and G. Mitu Gulati. "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance." UC Berkeley Public Law Research Paper No. 141 (2005). <http://ssrn.com/abstract=473281>.
- Comiskey, Michael. *Seeking Justices: The Judging of Supreme Court Nominees*. Wichita, KS: University Press of Kansas, 2004.
- Davis, Richard. *Electing Justice: Fixing the Supreme Court Nomination Process*. New York: Oxford University Press, 2005.
- Dudziak, Mary. *Cold War Civil Rights: Race and the Image of American Democracy*. Princeton, NJ: Princeton University Press, 2000.
- Dudziak, Mary. "The Supreme Court and Racial Equality During World War II." 1996 *Journal of Supreme Court History* 35.
- Epstein, Lee, and Jack Knight. *The Choices Justices Make*. Congressional Quarterly Press, 1998.
- Fisk, Catherine, and Erwin Chemerinsky. "The Filibuster." 49 *Stanford Law Review* 181 (1997).
- Gerhardt, Michael. "The Constitutionality of the Filibuster." *Constitutional Commentary* (2005).
- Gold, Martin, and Dimple Gupta. "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster." 28 *Harvard Journal of Law and Public Policy* 205 (2004).
- Goldman, Sheldon, Elliot Slotnick, Gerard Gryski, and Gary Zuk. "Clinton's Judges: Summing Up the Legacy." 84 *Judicature* 228 (2001).
- Goldman, Sheldon, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni. "W. Bush's Judiciary: The First Term Record." 88 *Judicature* (2005).
- Gerhardt, Michael. *The Federal Appointments Process: A Constitutional and Historical Analysis*. Durham, NC: Duke University Press, 2001.
- Johnson, Timothy R. *Oral Arguments and Decision Making on the U.S. Supreme Court*. Albany, NY: SUNY Press, 2004.
- Johnson, Timothy R., and Jason M. Roberts. "Presidential Capital and the Supreme Court Confirmation Process." 66 *Journal of Politics* 663 (2004).
- Johnson, Timothy R., and Jason M. Roberts. "Choosing Wisely: Reassessing the Politics of Supreme Court Nominations." 32 *Congress and the Presidency* (2005).
- Keck, Thomas M. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. Chicago: The University of Chicago Press, 2004.
- Lott, John R., Jr. "The Judicial Confirmation Process: The Difficulty in Being Smart." American Enterprise Institute, 2005. <http://ssrn.com/abstract=664006>.
- Maltese, John Anthony. "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush." 5 *Journal of Appellate Practice and Process* 1 (2003).
- Maltese, John Anthony. *The Selling of Supreme Court Nominees*. Baltimore, MD: Johns Hopkins University Press, 1995.
- Moller, Mark (ed). *Cato Supreme Court Review: An Annual Journal of Law*. Washington, D.C.: Cato Institute. <http://www.cato.org/pubs/scr>.
- Pritchett, Herman. *The Roosevelt Court*. New York: Macmillan, 1948.
- Rosen, Jeffrey. "The Unregulated Offensive." *New York Times Magazine* (April 17, 2005).
- Scherer, Nancy. *Scoring Points: Politicians, Activists and the Lower Federal Court Appointment Process*. Stanford, CA: Stanford University Press, 2005.
- Schubert, Glendon. *The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices*. Evanston: Northwestern University Press, 1965.
- Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press, 2002.
- Slotnick, Elliot E. "Prologue: Federal Judicial Selection in the New Millennium." 36 *University of California Davis Law Review* 587 (2003).
- Slotnick, Elliot E., and Jennifer A. Segal. *Television News and the Supreme Court: All the News that's Fit to Air?* New York: Cambridge University Press, 1998.

Smith, Christopher E., and Joyce A. Baugh. *The Real Clarence Thomas: Confirmation Veracity Meets Performance Reality*. New York: Peter Lang, 2000.

Sunstein, Cass R., David Schkade, and Lisa Ellman. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." 90 *Virginia Law Review* 301 (2004).

Yalof, David. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. Chicago: University of Chicago Press, 1999.

Websites

American RadioWorks website http://americanradioworks.publicradio.org/features/prestapes/rmn_jm_102071_617.html

Cult of Scalia website <http://members.aol.com/schwenkler/scalia/>

List of Supreme Court Cases Cited

Ashcroft v. Raich No. 03-1454 (2005)
Brown v. Board of Education 347 U.S. 483 (1954)
Bush v. Gore 531 U.S. 98 (2000)
Hamdi v. Rumsfeld No. 03-6696 (2004)

Lawrence v. Texas 539 U.S. 558 (2003)
Marbury v. Madison 5 U.S. 137 (1803)
Miranda v. Arizona 384 U.S. 436 (1966)
Nevada v. Hibbs 538 U.S. 721 (2003)
Planned Parenthood v. Casey 505 U.S. 833 (1992)
Roe v. Wade 410 U.S. 113 (1973)
Roper v. Simmons No. 03-633 (2004)
Rumsfeld v. Padilla No. 03-1027 (2004)
Sabri v. United States 541 U.S. 600 (2004)
Scott v. Sandford (Dred Scott) 60 U.S. 393 (1857)
United States v. Lopez 514 U.S. 149 (1995)
United States v. Virginia 518 U.S. 515 (1996)



321 N. Clark Street, 20.2,
Chicago, IL 60610-4714
312.988.5735

www.abanet.org/publiced

NONPROFIT ORG.
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION