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suffer politically or (as in some cases) see his nominee rejected by the

Senate outright. In recent years internal strife and factionalism within the

executive branch have only further complicated what was already a deli­

cate undertaking. . . .

A central question remains: why were these particular candidates chos­

en over others possessing similar—and in some cases superior—qualifi­
cations? The classic “textbook” portrayal of the Supreme Court nomina­
tion process depicts presidents as choosing Supreme Court justices more

for their judicial politics than for their judicial talents. By this version of

events, presidents, by nominating justices whose political views appear

compatible with their own, try to gain increased influence over the Su­

preme Court. Once on the Court, a justice may then satisfy or disappoint

the appointing president by his decisions. Such an oversimplified view of

nomination politics usually ignores the more complex political environ­

ment in which modern presidents must act, including the various intricacies

and nuances of executive branch politics.

... I contend that modern presidents are often forced to arbitrate

among factions within their own administrations, each pursuing its own

interests and agendas in the selection process. At first glance, presidential

reliance on numerous high-level officials equipped with a variety of per­
spectives might seem a logical response to the often hostile and unpre­
dictable political environment that surrounds modern appointments to

the Court. Yet conflicts within the administration itself may have a debili­
tating effect on that president’s overall interests. High-level advisors may

become buried in their own conceptions of what supports the adminis­

tration’s best interests; but to achieve their own maximum preferred

outcomes, they may feel compelled to skew the presentation of critical

information, if not leave it out altogether. In recent administrations the

final choice of a nominee has usually reflected one advisor’s hard-won

victory over his rivals, without necessarily accounting for the president’s

other political interests. . . .

The New Deal marked the beginning of a fundamental transforma­
tion in American politics. A national economic crisis demanded national

solutions, and the government in Washington grew exponentially to meet

these new demands. Beginning in the 1930s, the federal government en­
tered one policy area after another that had previously been the exclusive

province of state governments. Emergency conditions required quick in­
utational responses, and the executive branch in particular was drawn

into critical aspects of national policymaking. Just as the character of na­
tional politics changed dramatically, the Supreme Court was undergoing a

transformation of its own. Fundamental changes in the political landscape

On JUNE 27, 1992, the Supreme Court inserted itself once

again into the national debate over abortion, with its surprising decision

in Planned Parenthood v. Casey. Specifically, five of the nine justices refused
to cast aside Roe v. Wade, the Court’s controversial 1973 opinion establish­
ing a constitutional right to abortion. Included among Roe’s saviors that
day were Sandra Day O’Connor and Anthony Kennedy, both appointed
of former President Ronald Reagan. As a candidate for the presidency in
1980 and 1984, Reagan had supported a constitutional amendment to
overturn Roe, a ruling considered to be among the most vilified of public
targets for social conservatives in his party. As president, Reagan had pub­
lcly promised to appoint justices to the Supreme Court willing to revere
Roe v. Wade. Yet just the opposite occurred in Casey: a majority of the
Court reaffirmed the core right to privacy first discovered in Roe. And in
a touch of irony, two of President Reagan’s own nominees had played
significant roles in safeguarding the decision from the Court’s conserva­

tives. Obviously the selection of Supreme Court nominees is among the
president’s most significant duties. Yet as the outcome in Casey demon­
strates, it is a task beset with difficulties and potential frustrations. On one
hand, a president ordinarily tries to choose a nominee whose influence
will reach beyond the current political environment. As a beneficiary of
life tenure, a justice may well extend that president’s legacy on judicial
matters long into the future. Yet in selecting a nominee the president must
also successfully maneuver through that immediate environment, lest he

From Pursuit of Justices

DAVID YALOF

In selecting nominees to the Supreme Court, the president faces a daunting

task. Legal scholar David Yalof takes readers inside the process, pointing out
the many factions in the nation, in the branches of government, and even
within the president’s own circle that must be considered when making a
nomination. The president today has access to large amounts of information
about a potential justice, but so does everyone else in the political process.
After all, remember that a Supreme Court justice is often the most signifi­
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ships has steadily multiplied the president’s opportunities to place his imprint on lower court policymaking. The total number of district and circuit judgeships rose from under two hundred in 1930 to well over seven hundred by the late 1980s. Thus between thirty and forty vacancies may occur annually on the federal bench. These federal judges must be counted on to interpret, enforce, and in some cases limit the expansion of federal governmental authority. At times federal courts have even fashioned national law and policy, serving as key facilitators of social, economic, and political growth.

Senatorial courtesy, to be sure, remains the dominant factor in lower court selections, but the steady increase in the number of judgeships has provided presidents with more than an occasional opportunity to nominate candidates of their own choosing after the preferences of individual senators have been satisfied. The growing size and prestige of the D.C. Circuit have given presidents additional opportunities to hand out plum assignments: because senatorial courtesy does not apply to those seats, presidents may freely nominate ideologically compatible law professors, former administration officials, and others to positions of considerable prestige in the federal judicial system. Thus more than ever before, the president well before a vacancy on the Court even arises ....

4. Divided party government has become a recurring theme in American government since World War II. Between 1896 and 1946, opposing parties controlled the White House and the Senate during just two sessions of Congress. By contrast, split party conditions now seem almost routine ...
strain on senators, many of whom may be reluctant to spend their time and political capital on an arduous process that will only create enemies back home. Meanwhile, the president must now find nominees who, aside from meeting ideological or professional criteria, will fare well in front of television cameras when facing a barrage of senators’ questions.

6. The rise in power of the organized bar has figured significantly in recent Supreme Court selections. The American Bar Association’s Special Committee on the (federal) Judiciary (later renamed the “Standing Committee on Federal Judiciary”) was founded in 1947 to “promote the nomination of competent persons and to oppose the nomination of unfit persons” to the federal courts. During the past half-century that committee has played a significant role in confirming nominees for federal court judges. Not surprisingly, the ABA has taken an especially strong interest in the nomination of Supreme Court justices as well. Beginning with Eisenhower’s nomination of Harlan in 1954, the ABA has formally reviewed all Supreme Court nominees for the Senate Judiciary Committee. Thus in selecting nominees, presidents must incorporate into their calculations the possibility that a less-than-exceptional rating from the ABA could serve as a rallying point for opposition during the subsequent confirmation process. Still, the bar’s actual influence over the choice of nominees has varied largely depending upon the administration in power. In 1956, the Eisenhower administration began to submit names of potential Supreme Court nominees to the ABA at the same time that the FBI began its background check. During this period the ABA exerted little direct influence during initial deliberations over prospective candidates. By contrast, subsequent administrations have often enlisted the committee’s services at earlier stages of the process. High-ranking FBI officials in the Justice Department have consulted with committee members to gauge potential support for and opposition to a prospective candidate.

7. Increased participation by interest groups has also altered the character of the Supreme Court nomination process. This is not an entirely new phenomenon. Organized interests (including the National Grange and the Anti-Monopoly League) figured significantly in defeating Stanley Matthews’s nomination to the Court in 1881. Almost fifty years later, an unlikely coalition of labor interests and civil rights groups joined together to defeat the nomination of John Parker. Since World War II, interest groups have extended their influence into the early stages of nominee selection by virtue of their increased numbers and political power. Groups such as the Alliance for Justice, People for the American Way, and the Leadership Conference on Civil Rights have made Supreme Court appointments a high priority in their respective organizations. Many interest groups now conduct their own research into the backgrounds of prospective nominees and inundate the administration with information and analysis about various individual candidates.

8. Increased media attention has further transformed nominee selection politics. Presidents in the nineteenth and early twentieth centuries, working outside the media’s glare, could often delay the selection of a nominee for many months while suffering few political repercussions. By contrast, contemporary presidents must contend with daily coverage of their aides’ ruminations concerning a Supreme Court vacancy. Reporters assigned to the “Supreme Court beat” often provide their readership with the most recent “shortlists” of candidates under consideration by the president. A long delay in naming a replacement may be viewed by the press as a sign of indecision and uncertainty on the part of the president. Delay may also work to an administration’s benefit, especially if media outlets expend their own resources investigating prospective candidates and airing potential political liabilities prior to any formal commitment by the administration.

9. Advances in legal research technology have had a pronounced effect on the selection process. All modern participants in the appointment process, including officials within the White House and the Justice Department, enjoy access to sophisticated tools for researching the backgrounds of prospective Supreme Court candidates. Legal software programs such as LEXIS/NEXIS and WESTLAW allow officials to quickly gather all of a prospective candidate’s past judicial opinions, scholarship, and other public commentary as part of an increasingly elaborate screening process. Computer searches may be either tailored around narrow subject issues or they may be comprehensive in scope. The prevalence of C-SPAN and other cable and video outlets has made it possible to analyze prospective candidates’ speeches and activities that would have otherwise gone unnoticed. Of course, advanced research technology is a double-edged sword: media outlets and interest groups may just as effectively publicize negative information about prospective candidates, undermining the president’s carefully laid plans for a particular vacancy.

10. Finally, the more visible role the Supreme Court has assumed in American political life has increased the perceived stakes of the nomination process for everyone involved. Several of the critical developments listed above, including increased media attention and interest group influence in the nominee selection process, stem from a larger political development involving the Court itself: during this century the Supreme Court has enhanced itself at the forefront of American politics. Prior to the New
Deal, the Court only occasionally tried to compete with other governmental institutions for national influence. For example, the Taney Court inserted itself into the debate over slavery with its decision in *Dred Scott v. Sanford* (1857). The Court's aggressive protection of property rights in the late nineteenth century pitted it first against state governments, and then later against Congress and the president during the early part of the twentieth century. In each instance the judiciary usually represented a political ideology in decline; after a period of time the Court eventually returned to its role as an essentially reaffirming institution.

Since the early 1940s, however, the Supreme Court has positioned itself at the center of major political controversies on a nearly continuous basis. Driven by a primarily rights-based agenda, the Court has found itself wrestling with matters embedded in the American psyche: desegregation, privacy rights, affirmative action, and law enforcement. With the Court's continuously high visibility in the American political system, each appointment of a new justice now draws the attention of nearly all segments of society. The stakes of Supreme Court appointments may only seem higher than before, but that perception alone has caused a veritable sea change in the way presidents ... must treat the selection of Supreme Court nominees.

Richard Fallon

From *The Dynamic Constitution*

The Supreme Court always gets a lot of public attention when vacancies occur and a new president nominates replacements whom the Senate must confirm. Yet behind the media spotlight accorded to Court nominees lie several basic principles necessary to understand the role of the Supreme Court in American government. Constitutional law professor Richard Fallon raises the issue of interpreting "a very old constitution." He discusses the importance of precedent, in terms of the tension between maintaining and overturning past decisions. Giving guidance to lower courts by creating "rules and tests" is another responsibility of the Supreme Court. By selecting the cases it will hear, the Court determines what areas of the law it will influence. Fallon explores several controversial topics in constitutional law today: the Court's relationship to the majority of Americans and to elected officials, the philosophy of "originalism" held by some Supreme Court justices, and the "moral rights" approach to jurisprudence. Cases mentioned in the excerpt such as *Brown v. Board of Education* and *Roe v. Wade* are familiar to students of American government. Ultimately, Fallon writes, the resolution of the complicated set of controversies that swirl around the Supreme Court comes from a less lofty, more practical consideration: decisions need to "produce good results overall," results that the American people endorse.

Writing in 1936, in an important case invalidating the centerpiece of the New Deal's farm program, justice Owen Roberts tried to blunt criticism by saying that the Supreme Court's job was not to exercise any independent judgment about the wisdom or even the possibly urgent necessity of challenged legislation, but simply "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." The Constitution's meaning, he implied, was almost invariably plain. In cases of doubt, others have suggested, research into the "original understanding" will ordinarily resolve any uncertainty.

... Roberts' portrait of the judicial role was more fanciful than realistic. (One wonders whether Roberts himself would not have acknowledged as much in less defensive moments—if not in 1936, then surely a