

**Developments in the Supreme Court Nomination Process  
from Richard Nixon to George W. Bush**



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## 1. Introduction

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The more active role the U. S. Supreme Court has taken in American society and the increased ideological polarization in Washington have led to sharply contested Supreme Court nominations in the last four decades. Looking at developments starting with President Richard Nixon's nominations, it is possible to identify some major trends. The later nominations have involved more interests groups with increased influence, more scrutiny of the candidates' personalities and backgrounds, more news media coverage, and Senate hearings with tougher questions. These factors in turn influence the president when he is considering possible candidates and how they might fare. Contrary to what one might expect, nominees who have clear records of an ideological affiliation are still nominated and often confirmed, defying factors like fierce rhetoric from opponents, threats of filibuster, and news media digging into their track record. This thesis will trace developments through the twenty nominations starting with Richard Nixon's presidency to document the major changes in the nomination process and the factors that seem to decide whether a nomination will succeed or not.

When Richard Nixon became president in 1969 he had a clear philosophy of the kind of justices he wanted, and he was not hesitant about nominating ideological candidates and promoting his conservative view of how the Supreme Court should act. Nixon appointed a total of four justices and had the opportunity to shape a Court which was dominated by liberal justices. Nixon's rhetoric, which called for justices who were "strict constructionists," was adopted by future Republican presidents. During the period covered in this thesis, there were only two Democratic presidents: Jimmy Carter and Bill Clinton. Only Clinton had vacancies on the Court, and his two nominations are the only of these twenty that were put forth by a Democratic president. The two parties have used different judicial strategies. Republicans have to a large extent been able to shape the federal judiciary because they have controlled the presidency for most of the period. Federal court appointments have also been a greater priority for them. Later in the period Democrats started to put more efforts into resisting judicial appointments both regarding the Supreme Court and lower courts.

The conflict between conservatives and liberals is framing the public debate about the Supreme Court. Issues like abortion, gay rights, affirmative action, the death penalty, and the role of religion in public life are likely to get media attention and to cause interest groups to get involved. During nomination hearings in the Senate these issues are frequently presented to the nominee in various ways with the hope of getting a hint about his or her philosophy. Justices are usually labeled as conservative, liberal, or moderate. The labels will be used when appropriate since the literature is largely in agreement about which justices fits them.

In order to get an overview of the nominations, several types of sources will be used. The most useful primary sources are the transcripts of the hearings in the Senate Judiciary Committee, where the nominee testifies. Transcripts of the president's nomination speech will show how he chose to present the nominee. These are usually made available online by the Library of Congress or newspapers.

News articles and opinion pieces written at the time of the nomination will give an insight into the reactions to events from various players. Most frequently used is *The New York Times*. It has a vast online archive that has been used for quotations as well as facts and numbers. Although *The New York Times* usually supports liberal candidates and opposes conservative candidates, quotes and factual information are presumed to be reliable. Various opinion pieces are attributed to the author with some information of his or her political affiliation.

The academic literature about the Supreme Court is greatly varied. Works like *Storm Center* by David M. O'Brien offers a useful overview of the Court's functions and history while not arguing any political views and has a great number of sources. Other general works about the Court with important insights are *God Save This Honorable Court* by Laurence Tribe and *The Supreme Court* by Jeffrey Rosen. These provide general perspectives about the developments on the Court.

There are several academic works that look into the topic of nominations specifically. Some are general in their approach and present original research and statistics, like *Advice and Consent* by Lee Epstein and Jeffrey A. Segal, *A Political History of Appointments to the Supreme Court* by Henry J. Abraham, *Strategic Selection* by Christine L. Nemacheck, and *The Selling of Supreme Court Nominees* by John

Anthony Maltese. Others have more specific arguments, like Richard Davis' *Electing Justice*, which argues that the nomination process is broken and should be replaced by a better system, Mark Silverstein's *Judicious Choices*, which describes what he considers the intense partisan nature of nominations, and Herman Schwartz' *Right Wing Justice*, which argues that conservatives have been successful in taking over the courts by questionable methods. These three works, and several others like them, are relatively recent and offer interesting perspectives since their research has not yet been integrated into the general literature about the Court.

Popular literature about the Court, for lack of a better term, can also prove very useful. In this category I place works like *The Brethren* by Bob Woodward and Scott Armstrong, *The Nine* by Jeffrey Toobin, *Supreme Conflict* by Jan Crawford Greenburg, and various biographies of presidents and justices. Several of these works have few sources, since they are mostly based on anonymous interviews with justices, their clerks, and people in the White House. Yet they provide a very interesting, and some times the only, insight into the decision-making process by the president and his staff and the life at the Supreme Court.

I plan to address several developments in the nomination process during this period. Qualifications and the amount of controversy would appear to be obvious factors in predicting whether a nomination will succeed or not. But presidents have nominated several candidates with questionable qualifications and with controversial backgrounds, and the motivations that led to those nominations are also valuable to investigate. As public debate and news media coverage have increased, several ideological candidates have still been confirmed. I will discuss both failed and successful nominations in order to find out to what extent qualifications and controversies decide how a nomination turns out compared to other factors.

### **1.1 The Structure of the Thesis**

To set the stage for the discussion of individual nominations, a background section is needed. That section will explain how the Supreme Court works and give a brief history of the Court. The main part of the thesis is the discussions of each nomination. All

nominations have their own section and will be discussed in chronological order, categorized and summarized for each president. This approach will make it easier to observe trends as they have emerged. Each nomination will be considered for its importance, and comparisons will be drawn to earlier and future nominations when relevant. At the end of the thesis a concluding section will analyze trends across the nominations that are covered.

I will cover twenty nominations in the period from the start of Nixon's presidency in 1969 to the end of George W. Bush's presidency in 2009. Technically, there were twenty-one nominations in this period. John Roberts was nominated for Sandra Day O'Connor's seat, but when Chief Justice Rehnquist died, Robert's nomination was withdrawn and he was re-nominated for Rehnquist's seat. Since this withdrawal occurred for practical reasons and Roberts was immediately re-nominated, the number of nominations will be referred to as twenty for analytical purposes. Twenty is a small sample and makes it necessary to be cautious when drawing conclusions. Each nomination will be summarized covering factors such as the timing of the nomination, political circumstances, diversity and ideology concerns on the Court, presidential approach, the Senate hearings, news media and interest groups, qualifications of the nominee, and controversies.

These factors are broad and encompassing, and their purpose is simply to provide a framework that will ensure that nominations are covered in a similar way for easier comparison. Not all of them are equally relevant for all nominations, and the amount of discussion will vary for individual nominations.

In the concluding section each of these factors will be discussed with the whole period in mind to explain how and why the playing field of the nomination game has changed and what seems to decide whether a nomination will succeed or not.



## 2. Background

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Controversy regarding judicial appointments is not a new phenomenon. The structure of the federal judiciary was loosely outlined in the Constitution, but presidents and senators have since sought to fill vacancies with their political or ideological allies. The role of the Supreme Court, the number of justices, and the practices of Senate Judiciary Committee hearings have also changed over time. The Supreme Court has always had an important role in politics, but during the 20<sup>th</sup> century its power increased as it involved itself to a larger degree in controversial issues and thereby raised the stakes for appointments.

There are three branches of government: The judicial branch, the executive branch, and the legislative branch. The Supreme Court is at the top of the judicial branch and the highest court in the country. The Court can be a check on the powers of the other branches, by deciding whether a law passed by Congress or an action by the president is constitutional.

The federal system in the United States consists of two parallel court systems. State courts rule on state laws and matters that are within state jurisdiction. Some crimes and some matters are federal by statute or by the Constitution and are dealt with in the federal system. There are three levels of federal courts for general jurisdiction: the district courts, the circuit courts of appeals, and the Supreme Court. The Supreme Court is the ultimate court of appeal for both systems, and it can review cases from both federal and state courts as long as the cases deal with constitutional issues and represent substantial federal questions. Several thousand cases are appealed to the Supreme Court each year, but less than a hundred are currently heard.

The nine justices and their clerks review the petitions, and to hear a case a minimum of four justices must vote in favor of accepting it. When a case is accepted by the Court, it is granted *certiorari*. The parties in the case prepare briefs that the justices read. Then an oral argument is scheduled where they argue their case before the Court. After the argument the justices meet in conference and discuss the case and take a preliminary vote. It takes a minimum of five justices to decide a case, after which an opinion of the Court is written. The justices might disagree about the reasoning but still agree on the outcome, and several concurring opinions might be announced. The justices

in the minority may write their dissenting opinions. During the writing process justices might still change their views and opinions are not final until announced by the Court. During this period justices write drafts and may exchange them and discuss possible changes with a hope of convincing others.

Supreme Court justices do not have fixed tenures but serve “during good Behavior” (US Constitution, Article III). Unless a justice acts in a way that could justify impeachment, he or she has a lifetime appointment and will likely be on the Court for several decades. The majority of justices are in their late forties to early sixties when appointed to the Court, and it is not uncommon that they serve into their eighties before they retire. They will often time their retirements to occur at the end of a term, and avoid simultaneous retirements. There is often speculation about justices retiring after the election of a president that shares their ideology. One term in the Supreme Court lasts from October to June (US Supreme Court, “The Court”). Some times, usually because of illness or death, there are retirements or nominations occurring simultaneously. That was the case when Justice O’Connor retired in 2005, and Chief Justice Rehnquist died a few months later. Rehnquist had planned to stay another year, which was why O’Connor chose to retire at that time. Some justices inform the president beforehand that they plan to retire, while others do not offer any prior notice. A planned retirement at the end of the term gives the president and the Senate several months during the summer to nominate and confirm a replacement.

The leader of the Court is called the Chief Justice, and the other eight members are Associate Justices. Justices hire up to four clerks each; these are usually graduates from top law schools, and they usually serve for one term. The Chief Justice’s vote does not count more than that of any other justice, but his position is still important as the public face of the Court. The most senior justice assigns the opinion writing on his or her side. The Chief is always the most senior justice, and always assigns the writing of the opinion for his side. The power of assignment gives the Chief power to influence the outcome. If a moderate justice appears to agree with the Chief, it might be strategic to assign him or her to write the opinion and hope that it will convince him or her as well as other undecided justices. Another concern is to assign opinions in such a way that all justices get similar shares of important and less important opinions. Some Chiefs have

mastered this game, while others have failed and created tensions within the Court. The Chief also has some additional administrative duties, such as keeping records of conferences and how justices indicate they will vote.

Chief Justice nominations usually receive more attention than other nominations. If a current justice is promoted to Chief, another person will have to be nominated for his or her seat. There will then be two nominations and a possibility for more controversy and political games. But it can also be beneficial to the president since the attention and controversy is split between the two, and a candidate that would otherwise have been thoroughly scrutinized might be overshadowed by the other candidate.

When there is a vacancy on the Court, the president nominates a candidate. Presidential advisors usually research and vet a number of candidates first to be certain that the candidate to some extent shares the president's political views. In many cases, and especially in recent years, the president's team has investigated possible candidates even before a vacancy is known. The candidate needs to have relevant experience for the job, or opponents will bring that up during the hearings. Any scandals or unfavorable revelations about the candidate's past are likely to greatly reduce the chances of confirmation.

The president usually interviews a couple of candidates before he decides on the nominee. This is a more recent phenomenon and shows that presidents now pay more attention to Court appointments. He then usually holds a press conference with the nominee. Prior to the announcement there is often an attempt to keep the name of the nominee secret. This way the announcement will dominate the news and critics will have to spend some time to prepare their reactions against the nominee. In some cases the president and the nominee know each other, and the presidents who have stayed close with justices after their appointments have probably benefited from having more insight into what is going on at the Court. Lyndon B. Johnson appointed Abe Fortas, his close friend and advisor, to the Court, and Richard Nixon knew Chief Justice Burger well.

Interest groups try to influence the president and the public about what kind of person should be chosen and how the eventual nominee should be perceived. The president has to convince interest groups that normally support him that the candidate is credible and will live up to their expectations. There is also a concern to try to avoid

heavy criticism from interest groups that oppose the president's agenda. These groups have considerable power to influence the public through advertising campaigns and letter-writing campaigns to senators. Richard Davis argues in *Electing Justice* that with the interest group involvement and pressuring of senators the nomination process is similar to an election except for the lack of a vote by the people. On the liberal side some important players are: The National Organization for Women (NOW), the National Association for the Advancement of Colored People (NAACP), the American Civil Liberties Union (ACLU), and People for the American Way. Some important conservative players are the Federalist Society, the American Center for Law and Justice, and various religious groups.

A nominee is likely to fare better in the Senate if the president's party is in the majority, though in several cases nominees do not have support from all senators from the president's party. The reason can be either that the candidate perceived as too extreme as in the case of Robert Bork, or not sufficiently ideological as in the case of Harriet Miers. Senators have concerns that may change with the election cycle as well as other individual agendas, which makes it hard for the president to predict how they will vote.

The Senate Judiciary Committee conducts hearings in which the nominee is asked about his or her judicial philosophy. The hearings usually last from two to five days and include the nominee as well as witnesses from various organizations. At the end of these hearings, the committee votes on the nominee before sending the nomination to the full Senate. The result of the Judiciary Committee vote is only advisory, but it carries a lot of weight. The full Senate has the final say as to whether the nominee is confirmed or rejected, by a simple majority vote. Complicating the voting process is the possibility of a filibuster, where a minority might block the nominee unless the majority can get 60% to vote for confirmation. This option is very rarely used in Supreme Court nominations, but is often mentioned as a possibility.

Justices who have served for a while will usually get categorized in the media and academic literature as liberals, centrists, or conservatives. Conservative justices usually oppose business regulation and affirmative action and are in favor of limiting the reach of the federal government in relation to the states. There is also a strong social conservatism and willingness to allow public expression of religion, in some cases sponsored by the

state, and fierce opposition to abortion. These concerns sometimes override the idea of restricting government intervention. Liberals are more positive towards social policies and reforms initiated by the federal government, as well as affirmative action and privacy rights. They want to uphold the right of a woman to have an abortion, which in *Roe v. Wade* in 1973 was ruled as a matter of the right to privacy.

Some terms should be clarified as they are important to the public debate about the Supreme Court and for this thesis. The terms “strict constructionist” or “originalist” describe someone who claims to hold firm to the literal text of the Constitution and who does not believe in significant evolution of meaning since the Founding Fathers wrote the document. The term is usually used by conservatives to signal that they want someone who is not an “activist,” implying that a “strict constructionist” would simply look to the Constitution and determine if the matter at hand squares with the text or not. Seemingly this would make the job of a justice rather easy. The “strict constructionist” view has been challenged as an impossible exercise by several scholars, among them Harvard Law Professor Laurence Tribe (Tribe 50).

Liberals, on the other hand, now tend to focus on terms like “precedent” and “rights.” They believe that several rights, including the right to privacy, are implied in the Constitution even if they are not specifically mentioned. Liberals are usually in favor of interpreting the Constitution more broadly, which means rights should extend to more people than what the Founding Fathers expressed and that these rights can evolve over time. The expansion of the 14<sup>th</sup> Amendment to apply to states and the right to privacy have gradually been implemented by the Court, and liberals are now to a large extent in favor of upholding such precedents. The Warren Court, which made many of these decisions, had less regard for the previous precedent. Terms like these are frequently used to signal to constituencies whether a nominee is acceptable or not. The judicial term for precedence is “stare decisis” and it is respected to some degree by both liberals and conservatives, though often depending on the specific matter that is before the Court.

Several justices have turned out to be different from what was expected of them. Presidents are eager to avoid a nominee that will drift toward the other side of the political spectrum. In some situations, often when the president has other important concerns or a low approval rating, he will nominate a candidate not particularly to his

liking but who will be approved easily in the Senate. Several of the candidates that have been labeled “moderate” have ended up on the other side of the spectrum compared to the president who appointed them. Moving toward the liberal side is more common than a move in the other direction, which has led conservative activists to be very suspicious of candidates who do not have clear conservative records.

## **2.1 History of the Supreme Court**

During the constitutional convention in Philadelphia in 1787, there was conflict over the extent of the power of the president compared to that of Congress. Those who favored a strong executive wanted the president to appoint judges, while those who were in favor of a strong legislative branch wanted Congress to do it. The result was a compromise, where the president nominates a candidate, and the Senate provides “advice and consent,” which today means confirming or rejecting the nominee by a simple majority vote. The questions of qualifications and tenure were adopted from the British tradition, where judges served “during good behavior” (Epstein 7). Alexander Hamilton argued in the *Federalist Papers* that the federal judiciary should stay above politics and ideological influence (Ibid. 10). Since the “good behavior” requirement in practice means life tenure, judges have a great deal of independence from the other branches and need not worry too much about day-to-day politics, reelection, or being unpopular with the ruling party. To remove a justice, he or she would either have to be persuaded to resign or be impeached.

The Supreme Court defined its role and increased its power decisively in 1803, when in *Marbury v. Madison* it ruled that it had the authority to decide the constitutionality of laws. The case dealt with the appointment of Judge William Marbury as a Justice of the Peace by outgoing president John Adams. Adams had appointed a large number of judges during his last days in office, and it was considered a political move to assure that Adams’ ideological allies could dominate the judiciary when his opponent Thomas Jefferson took over the presidency. Marbury sued when Jefferson’s Secretary of State, James Madison, refused to deliver the commission so he could begin to work. Chief Justice John Marshall, an appointee of Adams, ruled with a unanimous court that “Marbury did indeed have a right to his commission, but the Supreme Court could not

order Madison to deliver it because the federal statute that authorized the Court to issue orders of that kind was itself unconstitutional” (Rosen 31). Thereby, the Court had established its power of judicial review, meaning it had the final say in whether laws were constitutional or not. The Jefferson administration did not protest the outcome, as it did not have to put Adams’ judge in office. This changed the Court’s role, as its main role in the future would be to consider the constitutionality of laws and practices.

The judiciary and the executive branches have had several conflicts over the years. In 1832, President Andrew Jackson famously stated “John Marshall has made his decision, now let him enforce it” when the Supreme Court denied state courts jurisdiction over crimes in Indian territory (Rosen 67). During the Civil War, President Abraham Lincoln defied writs of habeas corpus issued by Chief Justice Roger Taney (O’Brien 335). The Court cannot do much if there is no willingness by the executive to enforce its rulings.

There has never been any formal limit on the number of justices on the court. When the court was established in 1789, the number of justices was six. As the nation grew, additional Justices were added for each new circuit. In 1863, Abraham Lincoln added a tenth justice, with the creation of the 10<sup>th</sup> circuit in the West, and secured a pro-Union court at the same time (O’Brien 348). President Andrew Johnson was prohibited from appointing new justices because Congress had passed a law that ensured the next three retirements would not be replaced. Two justices retired and no new ones were named until President Ulysses S. Grant was elected president and Congress authorized nine Justices (Ibid. 349). The number has stayed the same since 1869, despite an attempt by Franklin D. Roosevelt to add more justices in 1937.

Diversity on the Court has been a concern from the beginning. President George Washington wrote in 1799: “It would be inexpedient to take two of the Associate Judges from the same state. The practice has been to disseminate them through the United States” (Epstein 58). Geographical diversity has continued to be a goal, but religion and ethnicity have also become valid concerns. Roger B. Taney, who was confirmed as Chief Justice in 1836, was the first Catholic on the Court. The next Catholic was not appointed until 1894 (Ibid. 58). In 1916, Louis Brandeis was the first Jew to be appointed, and there was a “Jewish seat” until 1969, when Abe Fortas resigned. Thurgood Marshall was the

first African-American to serve on the court, and when he retired in 1991, President George H. W. Bush appointed another African-American, Clarence Thomas, to succeed him. Sandra Day O'Connor, appointed by President Ronald Reagan in 1981, was the first woman on the Supreme Court. When she retired in 2005, George W. Bush was under pressure to nominate a woman, and even his own wife argued for it (Nemacheck 50). He nominated Harriet Miers, but when her nomination failed, he chose Samuel Alito. Alito is the 5th Catholic on the current court, marking a clear shift from the Protestant-dominated court in the first 200 years.

Louis Brandeis' nomination in 1916 was the first in which the Senate conducted hearings. Brandeis was Jewish and a well known liberal activist at the time, and Republicans in the Senate created a subcommittee to investigate whether he was fit to serve on the Court (Parry-Giles 28). Brandeis did not appear to testify himself, but the politicizing of his nomination, the news media attention, and the underlying issue of his religious and ethnic affiliation ensured increased attention in future nominations. There were thorough Senate debates on most of the following nominations. The first time the Senate Judiciary Committee conducted hearings on a nominee was when Harlan Fisk Stone was nominated by Calvin Coolidge in 1925. Stone testified before the committee and with only a few exceptions, this has been the practice since (Nemacheck 93).

Through the 20<sup>th</sup> century, the Supreme Court gradually took a more active role in American society. During the presidency of Democrat Franklin D. Roosevelt from 1933 to 1945, the Court changed its views drastically. It allowed the federal government to grow and seize more power from the states. After Roosevelt began his New Deal legislation, the Court ruled that several parts of it were unconstitutional. Roosevelt threatened to introduce legislation to add one more justice to the court for each sitting justice above age 70, trying to change the majority's view. Congress also introduced legislation to let justices over 70 with 10 years of experience retire with full salary (O'Brien 348). The "court-packing plan" was very unpopular, but eventually several justices chose to retire and from 1937 it changed its views fundamentally. One of many examples of the switch was the Agricultural Adjustment Act. It put quotas on production to stabilize the agricultural market, and had been ruled unconstitutional in 1936 as it intruded on states' rights. But in 1938, Congress introduced a new and even more



comprehensive Agricultural Adjustment Act, and in 1942 the Court found it constitutional in *Wickard v. Filburn* (Chen 121). This allowed the federal government to impose detailed regulation of what and how much one farmer could produce. The rationale was founded on an expanded view of Article 1, Section 8 of the Constitution which allows Congress to regulate commerce “among the several states.”

Franklin D. Roosevelt’s court-packing attempt marked a change in the role of the Supreme Court in American Society. Roosevelt’s far-reaching reforms could not have been put into place without the support of the Court. The New Deal policies allowed the federal government to increase its size and reach. Big federal programs like the depression-era efforts to put people to work on a federal payroll were put in place by Roosevelt. Social Security was also introduced, marking a huge undertaking of social programs by the federal government. By allowing increased federal powers and more regulation, the Court injected itself into the public debate in a new role.

Earl Warren was appointed Chief Justice by President Dwight Eisenhower in 1953. During his tenure, which lasted until 1969, the Court took on several civil rights issues and defied the concept of “states’ rights” which was often used as an excuse to discriminate against minorities. The earlier practice had been based on the 10<sup>th</sup> Amendment’s which says that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (US Constitution). The Court ordered desegregation of public schools in 1954, and in 1966 it established the famous Miranda warning by which people are informed of their rights to remain silent and to receive counsel when apprehended by police. The Court pursued a progressive agenda and gave criminals more rights and ensured that the one-man-one-vote principle was applied to state legislative districts (Abraham 257). The 14<sup>th</sup> Amendment, originally passed after the Civil War, was now being actively used in a wide variety of cases to force individual states to ensure “equal representation.”

Warren’s activism was unexpected since he had been a moderate Republican governor of California. President Eisenhower, a Republican, had expected him to be more restrained and was disappointed by the activist direction the Court had taken. He once called the Warren appointment “the biggest damn-fooled mistake” (sic) he had ever

made (O'Brien 69). There were also conservatives who argued for impeachment of Warren, and although unsuccessful, it shows the amount of controversy the Court created. Although Eisenhower expressed regret about that appointment, he also appointed William Brennan, who would become a liberal authority on the Court for more than thirty years. Eisenhower paid less attention to the ideologies of his candidates than to practical political concerns. This would change with later Republican presidents. The Court continued to be controversial into the 1970s, and *Roe v. Wade*, the controversial decision that prohibited states from outlawing abortion, was announced in 1973 and is still a very important part of the national debate.

President Lyndon B. Johnson, a Democrat, announced Earl Warren's retirement on June 26, 1968. He also announced that he would promote Associate Justice Abe Fortas, a friend and advisor, to Chief Justice. This was only five months before the election, and the Republicans in the Senate put up a fight. There was a lot to win for them. Republicans thought they would be able to delay the nomination until after the presidential election, and they would be able to pander to their conservative constituencies which could help them in the election. For the first time, the filibuster technique was used against a judicial nominee (Epstein 24). A filibuster prevents the Senate debate on a certain matter from being closed, which makes it impossible to vote on the issue. The necessary amount of votes required to break a filibuster is 60 which means that 41 votes are needed to filibuster in the Senate. During the Fortas nomination it was only 34, since cloture required a two-thirds majority back then. Fortas eventually withdrew his name, and Warren stayed on the Court for another year. The filibuster was rarely used again for judicial nominations until the Democrats used it to block some of George W. Bush's lower court nominees. However, during Bill Clinton's presidency, the Republicans in the Senate had used the tactic of delaying hearings indefinitely on his lower court nominees which produced the exact same result of hindering their appointments.

Earl Warren presumably wanted his successor to continue his liberal legacy on the Court. His retirement came too late in the embattled Johnson's term for that to be possible. When Warren finally retired in 1969, Richard Nixon had become president and was able to name Warren's successor. In addition, Abe Fortas had become burdened with

questions regarding his acceptance of money from powerful donors. He resigned in 1969, and Nixon, who had just taken the oath of office, was able to replace two of the liberal members of the Warren Court. This marked the gradual ending of the activist Warren era. Republican presidents, beginning with Nixon, had a clear idea of the kind of justices they wanted on the Court.

### **3. Richard Nixon**

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The controversies surrounding Richard Nixon's nominations were a sign of things to come. Nixon named a total of six nominees, of which two were rejected. At the beginning of his presidency, Nixon made it publicly known that he wanted justices with a "strict constructionist" judicial philosophy on the Court (Abraham 18). Justice Rehnquist, who would become Chief Justice during Reagan's presidency, is considered to have followed that ideology. Nixon's two failed nominees, Clement F. Haynsworth and G. Harrold Carswell, were also considered very conservative. The record is more complicated for Chief Justice Warren Earl Burger, Justice Lewis Powell, and Justice Harry Blackmun. What was new about Nixon was his public advocacy of a very conservative judicial philosophy and the behind-the-scenes work of his aides to promote candidates and even bring down sitting justices.

Nixon was elected President in 1968, after a period of racial riots, assassinations, and anti-war protests. He pursued a "Southern strategy" which played on the skepticism toward the radical movements at the time. The strategy was designed to bring Southerners, especially white, conservative Democrats in the South into the Republican Party. He used his first Supreme Court nominations to appease these groups, saying that he would appoint a Justice "who would see himself as a 'caretaker' of the Constitution and not as a 'super-legislator' with a free hand to impose ... social and political view points upon the American people" (Abraham 14). This statement referred to the activism of the Warren Court, which was widely unpopular in the South, in addition to playing on people's insecurities during a turbulent period in America's history. His usage of terms like "law and order" was likely an attempt to criticize the radical movements at the time. Nixon wanted a "strict constructionist," which has since been the preferred ideal for conservative activists. But he also learned that while his nominees might have been popular with his conservative constituencies, some of them would not be acceptable to the Senate and the public.

### 3.1 Warren Earl Burger – Chief Justice (1969)

After the long and eventful reign of Chief Justice Earl Warren, the tenure of his replacement Warren E. Burger would be slightly less eventful in the legal sense, but still controversial. Nixon had inherited the Chief Justice nomination from Lyndon B. Johnson, who failed to replace Earl Warren with Justice Abe Fortas before Nixon took over. The Fortas Chief Justice nomination failed in October 1968, and Nixon had had ample time to consider candidates. The first nomination was important as a way of showing leadership and conservative merit. According to Washington Post journalist Bob Woodward, who detailed the first years of Burger's tenure in *The Brethren*, Nixon wanted "someone whose views were fully predictable, not a crony or political friend, someone with integrity and administrative ability. Someone young enough to serve at least ten years" (Woodward 19). Nixon was aware of the Chief's influence, and his statements reflect that he wanted someone who could stay in that position long enough to influence the Court significantly.

In February 1969, just two weeks after Nixon's inauguration, Warren Earl Burger was invited to a swearing-in ceremony of a government official at the White House. Burger was an associate judge on the D.C. Circuit Court of Appeals, where he often wrote spirited dissents attacking the liberal majority (Woodward 6). After the ceremony, Nixon invited him to the Oval Office, where he praised Burger for his judicial views. They talked about the need for reigning in the judiciary and the meeting lasted for more than an hour. Nixon wanted Burger to supply him with recommendations for judicial nominations, which Burger was happy to do. Nixon and Burger had met before, the first time in 1948 when they both were working on Republican campaigns (Woodward 6). Burger had made a good impression on Nixon, and he was invited to a dinner to honor outgoing Chief Justice Earl Warren on April 23. Burger was the only lower court judge there, which added to the media speculation about a possible nomination.

Justice Potter Stewart, an appointee of President Eisenhower, was considered the frontrunner for the Chief Justice position. Stewart was widely respected, relatively young at 54, and was considered a conservative (Woodward 11). On April 30, he asked for a meeting with the President. He had given a lot of thought to a possible nomination, and had decided against being considered for Chief Justice. Nixon brought up the subject, and

Stewart quickly responded that he had decided against it. He was worried about his own privacy, he did not want his life to be scrutinized, nor for his family to be put through the process. He was also aware of the past problems and internal conflicts on the Court that had arisen from promoting a sitting Justice.

Nixon instructed his Attorney General John Mitchell to look into the affairs of several liberal Justices for possible embarrassing stories or conflicts of interest (Woodward 14). William O. Douglas, William Brennan, and Abe Fortas were targeted. In early May 1969 it was disclosed in a Life Magazine article that Justice Fortas had received a \$20,000 fee from a foundation run by a friend who was investigated by the Securities and Exchange Commission and later convicted. Mitchell had provided material for the article, and Nixon thought this was a good opportunity to alter the balance of the court by pressuring a justice to resign (Woodward 15). Fortas eventually submitted a resignation letter on May 14, and Nixon now had the opportunity to appoint two justices, replacing liberals Warren and Fortas. Justice Brennan eventually withdrew all his public speaking engagements, memberships and investments to avoid further trouble after some critical articles in the news media (Woodward 17).

Burger's nomination was announced on May 21, at the end of Warren's last term on the Court (Greenhouse, "Burger"). Nixon had been very careful in keeping the nomination a secret, as he was eager to "beat" the press in making a surprise announcement (Woodward 19). Burger had been offered the job two days earlier, and Mitchell had run the FBI background check two days before that. Burger was smuggled into the White House before the announcement. The Burger nomination was very well received by southern Senators and leaders, which might have encouraged Nixon to find an even more conservative candidate for his next nomination (Hoff 46).

Although Democrats had the majority in the Senate, they realized that their influence was limited. The 1968 election of Nixon was a backlash against the liberalism that had been championed by Democratic presidents from FDR to Johnson. The Warren Court's activism had been controversial, and Democrats understood that a relatively qualified conservative nominee from Nixon would be very hard to stop.

Nixon had established the Office of Communications as a part of the White House, and it served as a public relations instrument. The Office engaged direct mail

services to distribute 30,000 fact sheets about Burger to local newspapers across the country (Maltese 129). They also had people sending letters to the editor to newspapers favoring the nomination. Nixon knew he might not be supported by the larger newspapers, but his Office of Communications and the direct mail outreach to local news media were early signs of what would become a very good campaign apparatus for conservatives in the future.

The Senate Judiciary Committee hearings were uneventful. Burger's testimony lasted for only two hours, and Senator Edward Kennedy, one of the most prominent liberals on the committee, did not even ask any questions of him (Woodward 22). Burger's service was commended by senators of both parties. Southern Democrat Robert Byrd, who only five years earlier had personally filibustered the Civil Rights Act, praised Burger for his focus on law and order (Silverstein 131). The committee recommended him unanimously. The final Senate vote came down 74-3 in favor of his confirmation on June 9, only 19 days after the nomination.

Although the Court took a turn toward the right after the Burger appointment, it did not become distinctively conservative. There were several liberal victories and controversial decisions, like *Roe v. Wade* in 1973. Burger had a leadership style that was often unpopular with his fellow Justices, and in Bob Woodward's 1979 book *The Brethren*, Burger came across as someone who would change his vote to be able assign himself or a conservative to write an important decision. This way he could make sure that the majority opinion was not excessively liberal and could avoid what he considered dangerous precedents that could lead to more liberal decisions. Woodward also describes how Burger would surprise his colleagues with "niggling and arbitrary" changes in opinions that were hard to decipher even in an ideological light (Woodward 436). Several clerks and justices shared their frustrations with Woodward, which led to much controversy when the book was released. Burger's tenure is not considered to have made the Court as conservative as he probably would have liked. He stayed conservative throughout his tenure, but he was also a realist who sometimes switched to the majority with the intention of compromise when he saw what the vote count was. Some examples of his centrist achievements are *Roe v. Wade*, and *United States v. Nixon*. In the latter, the

Court forced Nixon to turn over the White House tapes, which eventually resulted in his resignation from the presidency.

### **3.2 Clement F. Haynsworth, Jr. (1969)**

On August 18, 1969, Nixon nominated Clement F. Haynsworth, Jr. to fill the seat that Abe Fortas had left open. The nomination was a continuation of Nixon's "Southern Strategy." Haynsworth was from South Carolina and a judge on the Fourth Circuit Court of Appeals.

Although Haynsworth's philosophy was conservative and broke with the direction of the Warren Court, the nomination was initially perceived to be safe, because of support from some southern Democrats and the presence of no big scandals. But the Democrats had recovered from the blows of the Fortas resignation and the Warren retirement and intended to put up a fight (Woodward 63). The memory of how Republicans had delayed the Fortas nomination the year before and effectively turned the Chief Justice nomination over to Nixon further motivated them. The Democrats had a majority in both houses of Congress. Civil rights groups and labor unions quickly voiced their opposition to the nomination (Maltese 72). Haynsworth had ruled against several laws aimed to protect minorities and workers, including desegregation (Epstein 95).

Senate Republican leader Everett Dirksen's death in September 1969 delayed the Senate Judiciary Committee hearings and gave Democrats extra time to prepare (Maltese 73). During the hearings, it was revealed that Haynsworth while a judge on lower courts had ruled in several cases where he had financial interests. Although experts who testified said it did not represent a major conflict of interest, it became very difficult to let it pass, considering that he was replacing Fortas who had received very strict scrutiny.

Haynsworth was a shy man, and during the hearings he some times stuttered and appeared evasive (Maltese 74). Considering the charges against him, this did not help him. Haynsworth was asked whether he agreed with the direction of the Warren Court, but would not address a general question like that, and was skeptical to enter into discussion with Senator Kennedy about the reasons why there was disillusionment and unrest among many young people at the time (Haynsworth hearings 76, 79). One of the



most prominent Democratic critics was Senator Birch Bayh. The White House had helped a newspaper prepare conflict of interest charges against Bayh because of union contributions to his campaign (Maltese 79). The article was conveniently published before the Senate vote but it did not change the outcome. Eleven organizations were called to testify in the hearings, more than for any other nominee up to that point (Maltese 90). On November 21, the Senate voted Haynsworth down by 55 to 45 votes. Several prominent Republicans voted against him, which infuriated Nixon (Maltese 73).

Nixon aide John Erlichman blamed the defeat on a “highly expert, expensive and intensive lobbying campaign by organized labor and civil rights groups” (Epstein 95). However, there was a detailed strategy in promoting Haynsworth as well. Nixon and the White House launched a letter writing campaign where local Republican chairmen pressured their senators, as well as working closely with “friendly” newspapers to make sure that opponents were labeled as anti-South (Maltese 78). Nixon also pushed senators to promote the nomination, with limited success. Republican John J. Williams of Delaware voted against Haynsworth after the “strong-arm” tactics was used against him. He had received a visit by Attorney General Mitchell who only pushed the argument of ideology and not qualifications, and that had put Williams off (Maltese 79). Republican Senator Roman Hruska of Nebraska eagerly used the arguments that the White House provided him with in the Senate and on television appearances, but he was one of very few senators who were willing to be publicly supportive of the nominee (Maltese 80).

Nixon considered the rejection completely unwarranted (Hoff 46). After the easy confirmation of Burger, who was considered highly respected, Nixon might have been justified in expecting Haynsworth to be confirmed. The unlucky combination of his financial dealings and his somewhat controversial record on the bench sank the nomination. In retrospect, it can be argued that the nomination was not as well prepared as the Burger nomination, and according to Nixon biographer Joan Hoff, Nixon disengaged himself from the nomination of Haynsworth and let his most conservative aides oversee the vetting process (Hoff 46). Nixon was, however, very much involved in the promotion process.

Haynsworth continued to serve on the circuit court and was a reliable conservative vote there. Since his qualifications were never considered severely lacking, it left open

the opportunity for Republicans to paint the rejection as partisan. Nixon immediately wrote a memo on how to punish the senators who voted against Haynsworth by holding back information normally provided by the White House to senators (Maltese 83). He was not planning to let the rejection stop his agenda.

### **3.3 G. Harrold Carswell (1970)**

Nixon moved quickly with the next nomination. On January 19 1970, G. Harrold Carswell was presented as the nominee. Carswell was a Floridian who had just been confirmed to the Fifth Circuit Court of Appeals. Since Carswell was a conservative Southerner, the nomination was intended to send a signal that Nixon would not back down from his southern strategy.

The nomination was rushed by Nixon's demand for a quick announcement of another Southerner. White House advisors Charles Colson and Egil "Bud" Krogh confirmed that they were taken by surprise by the announcement, and that they only finished checking Carswell's background after the announcement (Maltese 14). A few days after the nomination, a Florida newspaper ran an article about something that neither the White House nor the Justice Department had been able to find out. In 1948, as a candidate for a seat in the Georgia legislature, Carswell had given a speech where he had announced: "I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed." His record as a judge confirmed that he consistently ruled against minorities (Maltese 15).

Several Nixon advisors realized that Carswell had been a mistake, and saw the possible damage that a new failed nomination could cause. Adding to this, it came to light that Carswell's opinions were of mediocre quality, and that his qualifications could be questioned to a larger degree than those of Haynsworth. Nixon discussed a tactic of pointing to how senators who opposed Carswell had failed exams, but was advised that senators would not level such attacks against each other (Maltese 16). Senator Hruska was encouraged to speak out for Carswell, and in doing so committed one of the most famous gaffes in recent Supreme Court nominations. In an interview he responded:

“Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they?”

Colson came up with the idea of letting Nixon publicly stand firm on the executive power to appoint judges. He arranged that Nixon would answer an inquiring Senator to make it appear as advice rather than an announcement. Against the advice of several advisors, they found a willing senator, William Saxbe of Ohio, and Colson crafted a letter from Nixon where he warned against the Senate interfering with his powers to appoint. The letter was not well received by senators because it could be interpreted to question the “advice and consent” that is believed to justify an appointment as a shared responsibility between the president and the Senate (Maltese 12). The White House Office of Communications continued its letter-writing strategy to newspapers around the country, but this time it was hard to turn around the public impression of Carswell (Maltese 130).

During the Senate hearings, Nixon’s pressuring of Republican senators proved to have some effect. Republican Senator Hugh Scott of Pennsylvania supported Carswell and was, according to Democratic Senator Paul Simon, “eager to show his GOP credentials” after voting down Haynsworth (Simon 292). Clarence Mitchell testified for the NAACP (National Association for the Advancement of Colored People) and stated bluntly that the Senate would be voting on whether to “ratify racism” (Simon 292). Professor John Lowenthal of Rutgers Law School testified on Carswell’s attempts to hinder cases against voter suppression while on a federal district court in Tallahassee, Florida (Carswell hearings, 140). Carswell’s own testimony was rather uneventful. He claimed not to have attended an all-white country club that he was a member of in the 1960s, and he distanced himself from some decisions that appeared negative toward minorities and women by saying he could not re-argue those cases before the Senate, and that he deferred to the Constitution (Ibid. 41).

The Senate vote was held on April 8, rejecting him 51-45. Although it was closer than the Haynsworth nomination, the White House had much earlier in the process realized it would be difficult. Nixon was again angry, and his counsel John Dean stated that Nixon considered a quick nomination of Democratic Senator Robert Byrd, who was anti-civil rights at the time, just out of spite (Epstein 135).

Only 5 days after the Carswell defeat Republican House Minority Leader Gerald Ford, who had been supplied with unconfirmed information from Attorney General Mitchell, argued for impeachment of liberal Justice William O. Douglas (Woodward 87). This was part of Nixon's revenge, but it had little chance of success because of Democratic majorities in both houses. The information about Douglas' statements and involvements might have been controversial, but it was neither unexpected nor damning from a professed liberal like him.

Nixon later admitted that Carswell was nominated out of anger because of Haynsworth's defeat (Hoff 46). Dean also blamed the failure of the hurried nomination and the inability of FBI to uncover both the racist remarks and Carswell's affairs with men while he was married (Epstein 71). The latter did not come up during the nomination, but both facts would probably have caused Nixon not to nominate Carswell had they been known.

### **3.4 Harry A. Blackmun (1970)**

On April 9, 1970, the day after the Carswell defeat, Nixon stated: "I will not nominate another Southerner and let him be subjected to the kind of malicious character assassination accorded both Judges Haynsworth and Carswell" (Woodward 87). It had been 11 months since Fortas resigned, and the seat was still open. On the Supreme Court, the justices had put aside many cert petitions that had 3 votes and cases where the conference vote had been 4-4, awaiting a ninth justice. There was a real need to fill the last seat. Nixon had realized that he would be unable to appoint a conservative Southerner, and while trying to make a point about his efforts to score points with Southerners for the upcoming midterm elections, he had begun searching for another nominee.

Harry A. Blackmun, a judge on the Eight Circuit Court of Appeals, was contacted by Attorney General Mitchell the morning after Carswell's defeat and told to come to Washington (Woodward 100). Blackmun had grown up in Minnesota and was a childhood friend of Chief Justice Burger. Nixon saw no problem in that fact, and most likely he thought it an advantage considering the conversations he used to have with the

Chief, who had recommended Blackmun (Woodward 101). Mitchell's staff, headed by Assistant Attorney General William Rehnquist, questioned Blackmun on his past, his associations and his earlier decisions. They found that he had held stock in companies that were indirectly affected by his rulings, but did not consider it problematic. Nixon sat down with Blackmun, something he had not done with Haynsworth and Carswell. He liked Blackmun's "levelheaded strict-constructionist philosophy" and considered him modest and predictable (Woodward 101). He also asked about his family, and Blackmun assured Nixon that his daughters were not "hippie types."

The closest thing to a scandal was an interview Nina Totenberg of the National Observer did with Blackmun's 85-year old mother. Blackmun's mother confided how Burger and Blackmun talked to each other every week on the phone. Although Blackmun was "enraged" at the revelation, it had little effect on his nomination (Woodward 102). The Senate hearings went without incident. Some Southern senators pointed out that Blackmun's financial involvements were similar to Haynsworth's, but Blackmun was confirmed easily by a vote of 94-0 on May 12, 1970 (Woodward 102).

Blackmun's easy confirmation was to a large degree the result of Nixon catering to the Senate's will. Its rejection of his first two nominees had sent a strong signal that conservative Southerners were not acceptable, and although Nixon was resilient and stubborn, he had to give in at last.

Blackmun started out as a conservative vote, but after a couple of years on the Court he began moving toward the left, and took increasingly critical stances toward the death penalty, and increasingly favored women's and minorities' rights. Blackmun is remembered mainly for his majority opinion in *Roe v. Wade* which prohibited states from outlawing abortions, and for his announcement toward the end of his career in a dissent to refusing cert in *Callins v. Collins* that he would "no longer tinker with the machinery of death" (*Callins v. Collins*). Blackmun was thorough and conscious in his research and Woodward even describes how he agonized over details. He spent longer time on writing opinions than his colleagues. This led to some frustration on the Court, but his thorough research also gave him authority on facts, which helped convince other justices in *Roe v. Wade*.

Nixon, who initially seemed favorable to Blackmun, had been unable to predict the turnaround. Considering that Blackmun replaced the liberal Fortas, the Court was only tilted slightly toward the conservative side by Blackmun, at least after he stopped consistently siding with the conservatives after the first couple of years. The major reason for Blackmun's appointment was that Nixon, although firm about the kind of justices he wanted, was unable to get them confirmed and had to settle on a candidate that appeared more moderate.

### **3.5 Lewis F. Powell, Jr. (1971)**

During the summer of 1971, justices Hugo Black and John Marshall Harlan became gravely ill. They both retired in September, within a week of one another, Black on 17 September and Harlan on 23 September. Neither Black nor Harlan can be viewed as extremely liberal or conservative. They had been appointed by Franklin D. Roosevelt and Dwight Eisenhower. Both had held an adherence to textual interpretation of the Constitution, although neither could be labeled as strict constructionists by today's standards. Black had originally been a supporter of Roosevelt's New Deal reforms, but grown more careful and conservative over time.

Nixon, who now had two vacancies to fill, immediately began circulating names, and even purposely leaking information to measure what kind of candidates he would be able to get through. This time the justices he was replacing were more conservative than Fortas and Warren, and more than a year had passed since the battles over Haynsworth and Carswell. Nixon first sent the name of conservative Republican Congressman Richard Poff from Virginia to the American Bar Association committee for a rating. Poff quickly withdrew his name when it appeared he would not get a favorable rating (Woodward 190). Then Nixon leaked Senator Byrd's name, and as expected, it created uproar in Washington. Two more names followed quickly, Mildred Lillie and Herschel Friday. These were both interviewed by Mitchell and Rehnquist, who concluded that they were not experienced enough and not likely to perform well at the hearings. Nixon's reasons for nominating them were likely to be that Lillie could make history as the first woman on the Court, and that Friday was an Alabaman, and Nixon had not given up on

getting another Southerner appointed. According to Woodward, most of the justices on the Court were very skeptical about the names that were floated in the media.

Chief Justice Burger was worried about the reputation of the Court if even more unqualified persons were nominated, and he contacted Mitchell with some suggestions, among them Lewis Powell (Woodward 192). Lewis Powell was a former president of the A.B.A. and a highly respected private attorney. He came from a distinguished Virginia family but had gained great respect for his moderate attitude and leadership skills on several legal organizations and corporations (Greenhouse, "Powell"). On October 18, Nixon received an indication from the A.B.A. that they were not likely to rate Lillie or Friday well, and the next day he told Mitchell to offer Powell the job. Powell, who was 64, had been considered when Carswell was rejected, and he had decided not to accept an offer. He first declined Mitchell's offer twice; then Nixon called him later in the day and said he had a "duty to the South, the Court, the President and the Country" (Woodward 193). Powell was not able to turn down the President's request. Nixon had settled on Rehnquist for the other seat.

On October 21, Nixon scheduled a televised address where he announced two nominations; Powell for Black's seat, and Rehnquist for Harlan's seat. The handling of the announcement was similar to the very successful Burger announcement, and Nixon made headlines again with two nominees he appeared to be very happy with.

Powell received the highest rating from the A.B.A. and had no trouble in the Senate. The Judiciary Committee chairman, conservative Democrat James Eastland, told Powell bluntly that he was going to be confirmed regardless because the senators thought he was "going to die" soon (Woodward 194). His age made him less controversial as he was not expected to influence the Court for as long as a younger candidate would. Powell's moderate record, having worked to provide legal help to low income people, helped him compared to Rehnquist, the more conservative nominee.

The hearings were mostly focused on his stock holdings, his views on the Warren Court and on executive privilege and surveillance. Powell was praised for his achievements, and there was little controversy compared to what Rehnquist would be asked about. Conservative senators asked him about statements that were perceived to praise the Warren Court, and Powell moderated himself by saying that he did not agree

with everything, but still had a high respect for the Court's decisions (Powell and Rehnquist hearings, 258). The Senate Judiciary Committee reported Powell to the Senate by a favorable 16-0 vote, which was quite unusual at the time. The final Senate vote on December 6 was 89-1.

Powell continued his moderate record on the Court and was considered a centrist until he retired in 1987. He sided with conservatives in many cases regarding criminal law. But he joined the majority in *Roe v. Wade* and related it to an experience where he early in his career was asked for help by a co-worker whose girlfriend had died trying to abort her pregnancy. He later expressed regret for his vote in *Bowers v. Hardwick* where he in a 5-4 decision in 1986 had voted to uphold a Georgia law against homosexual conduct. While voting in favor of the death penalty on the Court, he in 1991 told a biographer that he now thought the death penalty should be abolished (Greenhouse, "Powell"). Powell probably turned out to be more moderate than Nixon expected from a Southerner, but Rehnquist would be more in line with Nixon's judicial philosophy.

### **3.6 William H. Rehnquist (1971)**

Rehnquist was the more conservative of the two nominees by a good margin. In his job as Assistant Attorney General, Rehnquist had prepared for a strategy meeting and was surprisingly offered the nomination by Deputy Attorney General Richard Kleindienst. (Woodward 193). White House counsel John Dean later took the credit, claiming he was the first to propose Rehnquist. Rehnquist was also a friend of Kleindienst who he had met when he lived in Arizona.

Rehnquist grew up in a conservative family in Wisconsin. After his service in World War II he went on to Stanford and Harvard where he graduated in political science. He then entered law school at Stanford and served as a clerk for Justice Robert Jackson afterwards. At Stanford he was a classmate of future justice Sandra Day O'Connor. He entered private practice in Arizona, and supported the campaigns of Barry Goldwater and Richard Nixon in 1964 and 1968. He was offered a job in the Nixon administration and moved to Washington in 1969 (Greenhouse, "Rehnquist").



Nixon hoped that the double nomination would help to get both through by spreading the focus of the senators. Senator Eastland moved quickly to avoid controversy and told the A.B.A. committee that he would subpoena each member to testify about their reasons if they did not give Rehnquist their highest rating. By a 9-3 vote, Rehnquist received that rating (Woodward 193).

At the hearings, several segregation cases came back to haunt Rehnquist. In 1952, while clerking for Justice Jackson, Rehnquist had written a memo that said “‘separate but equal’ facilities were all that was constitutionally required” (Ibid. 195). He was also questioned about having challenged the voting rights of minorities as an Arizona poll watcher (Powell and Rehnquist hearings, 71). Rehnquist had defended Nixon’s views of far reaching executive powers and supported mass arrest of protestors (Rosen 188). Senator Kennedy pressed Rehnquist about the incident at Kent State University in Ohio 1970, where anti-war protestors were killed by the National Guard. The Justice Department had not turned over FBI investigation files to Congress, claiming executive privilege. Rehnquist only answered in general terms, and defended the executive privilege as it could be unfair to the parts involved in an ongoing investigation (Powell and Rehnquist hearings, 37). He also criticized the Justice Department that Rehnquist was part of for spending vast resources on investigating the leak of the Pentagon Papers, which included secret information about actions taken in Vietnam War, while not prioritizing the Kent State incident.

The Rehnquist nomination was the first time the American Civil Liberties Union formally opposed a nominee (Simon 295). Senator Edward Kennedy was one of the strongest liberal voices against the nomination, and he stated that Rehnquist had shown a “dangerous hostility” toward minority rights (Rosen 188). Rehnquist was confirmed by a 68-26 vote on December 10, four days after Powell.

Nixon had disliked the way Rehnquist dressed the first time he met him and labeled him a “clown” for his “loud shirts” and colored ties. When he heard his name he had asked “Is he Jewish? He looks it” (Rosen 188). Rehnquist was highly regarded by the other justices for his calm temper and lack of pretentiousness. He would stay very conservative throughout his life. His service in the administration and his professed conservatism convinced Nixon, and the strategy of a double nomination might have

saved Rehnquist from a fate similar to that of Haynsworth and Carswell. Democratic Senator John Tunney remarked the following during the hearings:

Mr. Rehnquist, you and I are relatively young men, and, as such, I feel a very important responsibility in passing judgment on your qualifications, because it is entirely possible that in the year 2000 you will still be sitting on the Supreme Court if you are confirmed. (Powell and Rehnquist hearings, 75)

This observation emphasizes the worries that Democrats had as members of the Warren Court were gradually retiring and being replaced by more conservative justices. Though Rehnquist's views stayed distinctively conservative throughout his tenure he also showed a pragmatic side as he cared a lot about the Court as an institution. Rehnquist was promoted to Chief Justice in 1986, and continued to serve until 2005, leaving a long and conservative legacy on the Court.

### **3.7 Conclusion**

Richard Nixon's personality both helped and hurt him when it came to his Supreme Court nominations. Nixon was both a hardliner and a pragmatist at times. If we judge his appointments by his public statements of what he wanted justices to be like, he would probably have been most satisfied with Rehnquist and Burger. These nominations were also handled very well by the White House. The Burger nomination and the Rehnquist/Powell nominations were well planned and made an effective use of the news media when presented at televised press conferences. Rehnquist, who might have faced problems in the Senate, probably had an easier time because he was nominated at the same time as the well respected and perceived moderate Powell, spreading the attention of the Senate and the news media.

Nixon's two failed nominees, Haynsworth and Carswell, left him with little capital to spend and the Blackmun choice was a direct result of that. He never gave up on putting very conservative justices on the Court. The Haynsworth nomination could, as Nixon himself argued, be considered a fair attempt at putting a reasonably qualified Southern conservative on the Court. Haynsworth was unlucky with the timing and the heightened scrutiny because of the Fortas situation that Nixon had himself helped bring

about. Carswell was by most commentators considered less qualified and appears to be a spite nomination, which Nixon clearly was capable of going through with.

Nixon's legacy on judiciary appointments is important. He began a bold and defiant conservative campaign to appoint "strict constructionists" who would appeal to the rising conservative movement which former conservative Democrats were merging with. Nixon also employed a large team through his White House Office of Communications who organized country-wide campaigns of lobbying senators and writing letters to editors. Nixon, labeled by many as being vindictive and holding grudges, used the Justice Department to conduct research into sitting justices associations and financial dealings. The relationship between Nixon and Burger, in which they talked about issues before the Court and Burger recommended names for judicial nominations, was beneficial to Nixon. Although Burger voted against Nixon in *United States v. Nixon*, which eventually led to Nixon's resignation, their relationship was helpful for Nixon's agenda as they shared similar goals for the remaking of the judiciary. Nixon's large degree of involvement in the process increased the stakes for future presidents, by making it a part of a growing liberal versus conservative conflict, engaging interest groups, and bringing judicial politics into campaign rhetoric.

## 4. Gerald Ford

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When Richard Nixon resigned in 1974, Vice President Gerald Ford rose to the presidency as the first president who had never been elected for either the vice presidency or the presidency. The situation was genuinely unique. Nixon's abuses of power and Ford's lacking public mandate caused him to be careful during his short presidency. His pardon of Richard Nixon further damaged his popularity and left him with little political capital to spend. The pardon was a difficult decision at the time, but has later been viewed more favorably as a means of getting the nation to heal faster after a decade of assassinations, corruption, and lack of faith in its leaders. When William O. Douglas resigned from the Supreme Court in 1975, Ford lacked a mandate to push for a very conservative candidate.

### 4.1 John Paul Stevens (1975)

William O. Douglas, a prominent and outspoken liberal who had been appointed by President Franklin D. Roosevelt in 1939, suffered a stroke on December 31, 1974, when celebrating New Year's in the Bahamas. Douglas had been controversial, both for his behavior and temper on and outside the Court. He was considered a very influential liberal voice, and one was a steadfast supporter of free speech and environmentalism. But to some extent his influence was limited by his personality. He had published books and interviews that encouraged young people to revolt against the establishment, and published law related articles in erotic magazines (Rosen 169). His dissents could be particularly forceful and often alienating. He led a turbulent personal life, with periods of binge drinking, long vacations away from Washington, womanizing, and four marriages. President Ford who, while in Congress, had argued for Douglas' impeachment, sent a jet to get him back to the US for treatment. Douglas quipped to his wife that he hoped Ford would not drop him off in Cuba (Woodward 433). After months in rehabilitation, it became clear to the other justices that Douglas was not fit to return, and his colleagues tried to convince him in different ways, eventually ignoring him and delaying cases in which the preliminary vote was 4-4, hoping for a new justice to decide them. Douglas

insisted for a long time that he would be able to do his duties, and he did not resign until November 12, 1975.

Ford faced a difficult situation. He lacked a mandate, the Democrats had a majority in both houses, and the outgoing justice was a very prominent and unabashed liberal. The impeachment attempt of Douglas in 1970, encouraged by Nixon, was not viewed favorably at the time and now it made it difficult for Ford to break with Douglas' legacy by appointing a staunch conservative. The First Lady wanted him to name a woman (Woodward 479). The presidential election was less than one year away, and Ford had reason to be worried about the opposition he would face both in the primaries and the general election. A prolonged battle over a controversial nominee would likely hurt his chances.

Ford delegated much of the research and vetting to his Attorney General Edward Levi. Several names were floated by Levi, including Secretary of Housing and Urban Development Carla Hills, Republican Senator Robert Griffin, and judges J. Clifford Wallace, Robert Bork and, Arlin M. Adams (Woodward 485). They all had several problematic aspects. The judges had clearly conservative records, and the politicians were perceived to have close ties to Nixon or Ford. Nixon had named Bork acting Attorney General after his Attorney General and the Assistant Attorney General had both resigned when they were asked to fire Special Prosecutor Archibald Cox during the Watergate investigation.

One name that did not have any partisan attachments was John Paul Stevens. Born in 1920, Stevens was a Chicago native, a World War II veteran, and had clerked for Justice Wiley Rutledge (McFadden, "Stevens"). He had taught at several universities while having his own private practice before he was appointed by Nixon to the Seventh Circuit Court of Appeals in 1970 (Greene 99). Ford had met Stevens briefly at a reception and had gotten a positive impression of him as a modest Midwesterner (Woodward 486). Ford phoned Stevens to offer him the job, and announced it in a press conference on November 28.

The hearings on December 8 and went without incident. Some women's rights groups were concerned about his earlier opinions regarding women's rights. Questioned by Senator Kennedy, Stevens replied: "I think women should have exactly the same

rights under the law as men. I think they should have the same economic opportunities. But I do not think they should win every case they file” (Stevens hearings, 16). Warren Christopher, who would later become Secretary of State under President Clinton, testified for the A.B.A., who found that “Judge Stevens is one of the best persons available for appointment to the Supreme Court” (Ibid. 21). The Judiciary Committee recommended him unanimously, and the Senate confirmed him by a 98-0 vote on December 17, only three weeks after his nomination.

Stevens continues to serve on the Court as of 2009, and is now the senior Justice. At age 89 he is in very good health and maintaining a busy schedule (Rosen, “Dissenter”). As Justice Blackmun, he is perceived to have moved toward the left during his years on the Court. Another similarity is that both justices late in their careers came to the conclusion that the death penalty was unconstitutional under the Eight Amendment. In 2008 in a dissent to a decision of the Court not to take the case of *Baze v. Rees* Stevens argued that the Court should consider the constitutionality of the death penalty (*Baze v. Rees* 12). Stevens was long considered independent or moderate, and initially the conservatives might have been happy with his appointment considering the circumstances Ford faced. In later years, Stevens has been considered a very important part of the liberal wing of the Court. Stevens himself claims to be a conservative person and argues that the new appointments have moved the Court to the right while he has not changed much (Rosen, “Dissenter”). In 2005 Ford praised Stevens for his service and endorsed many of his views on the Court, specifically referring to the First Amendment and Steven’s support for safeguards in criminal proceedings. Stevens says he was “delighted” to receive such praise from the president who appointed him.

## **4.2 Conclusion**

The circumstances of William Douglas’ retirement and Gerald Ford’s lack of popularity and lack of a mandate made the Stevens choice relatively straight-forward. Ford might have preferred someone with stronger conservative credentials, but it would have been very difficult to nominate someone like Bork to replace Douglas. Ford consulted with several senators of both parties, as well as submitting more names to the A.B.A. than

Nixon had done (Simon 297). A moderate, respected nominee with a distinguished record and no obvious controversies was probably the only choice that could be considered politically safe at the time.

## 5. Ronald Reagan

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Ronald Reagan's Supreme Court appointments have had a significant impact on American society. Reagan appointed Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy, and he promoted William Rehnquist to Chief Justice. O'Connor and Kennedy have later been considered centrists on the Court, who have been able to be the critical "swing vote" in narrow decisions. Scalia and Rehnquist have been reliable conservatives. Before Kennedy was nominated, the Robert Bork and Douglas Ginsburg nominations failed amidst great controversy. They were both considered solid conservatives. In much of the Supreme Court literature, Ronald Reagan is considered to have been successful in making the judiciary more conservative. Reagan biographer Lou Cannon claims that "Reagan won the war to remake the federal judiciary and, to a large degree, the high court itself" (Cannon 802).

Reagan's predecessor, President Jimmy Carter, had not had the chance to appoint any Justices. He had tried to set up a merit-based seniority system for federal judges in order to reduce the number of political appointments. Reagan was not ready to continue this, and sought to pay more attention to the ideology of appointees. In *Battle for Justice*, Ethan Bronner lays out Reagan's judicial philosophy by explaining that "[f]rom the day Reagan took office in 1981, he and those around him made clear that policies of the two last decades toward race, sex, and religion ... would change drastically" (Bronner 23).

The literature on Ronald Reagan has mixed opinions on his level of involvement in policy. William K. Muir, Jr., explains how Reagan provided "the speech," a vision that his operatives used as basis for carrying out policy, but he was rarely involved or interested in the details (Greenstein: "Leadership" 289). Reagan delegated much of the research on judicial nominees to his aides and the Justice Department, but he laid out a clear direction and was willing to promote his nominations in the media more than any former president (Maltese 115).



### **5.1 Sandra Day O'Connor (1981)**

On July 7, 1981, Ronald Reagan nominated Sandra Day O'Connor to be the first woman Supreme Court Justice in American history. Reagan had promised to nominate a woman candidate during the campaign, and he chose to use his first nomination to fulfill that promise. O'Connor proved to be one of the most important Justices in the history of the modern Supreme Court. She became the "swing vote" in a Court that did not change in composition between 1993 and 2005. In *The Nine*, Jeffrey Toobin makes her the central character in his book about the Rehnquist Court. Her pragmatic attitude and her perception of "fairness" gained her a lot of admiration, and she largely escaped being labeled "liberal" or "conservative." Her nomination went relatively smoothly, but social conservatives showed signs of skepticism toward her credentials. This movement would increase its influence over future Republican nominations.

Justice Potter Stewart informed the Reagan administration before the official announcement of his resignation. Lou Cannon claims that Reagan was notified through Vice President Bush as early as February 1981 (804), while Christine L. Nemacheck writes that the information did not reach Reagan until late April because of the assassination attempt on him on March 30, after which Reagan spent two weeks in the hospital (Nemacheck 8). Stewart did not officially announce his resignation until June 18, so the administration had some time to consider candidates (Abraham 330).

There was a Republican majority in the Senate, and Reagan enjoyed great popularity at the time, after recovering from the assassination attempt. Although he had promised to nominate a woman during the campaign, he had not said it would be his first nomination. His popularity might have emboldened him to choose a relatively unknown woman when his advisers had several well known male conservatives on their lists, including later nominees Bork and Scalia (Cannon 804). The nomination might also have served to pacify the Senate by signaling that his judicial appointments would be moderate. By avoiding controversy this early in his presidency, he could position himself for a better relationship with the Senate and the public when the time for another appointment would come. It could also help his image with women as he had reelection in mind.

O'Connor was interviewed by Kenneth Starr, a Justice Department aide at the time, and she ensured him she was personally opposed to abortion. She told him she had never voted on the issue while she was in the Arizona State Senate, which, according to Jeffrey Toobin in *The Nine*, was either a lie or an omission, since there in fact had been a bill where she had voted "to end criminal prohibitions on abortion" (Toobin 40). This was not investigated further by the vetting team, something that would change in later nominations. Reagan met with O'Connor, and was "charmed" by her according to Reagan biographer Lou Cannon (Cannon 805). Reagan valued a personal connection, and he was convinced that O'Connor was the right choice. According to columnists Rowland Evans and Robert Novak, Reagan received newspaper clippings about the abortion bill in the Arizona State Senate and asked the Justice Department to look into it. This was the day before the nomination was announced, and Kenneth Starr phoned O'Connor who said she could not recall how she voted and that she had never advocated for any side of the abortion issue (Evans, "Why"). Starr then prepared a memo with no objections to the nomination.

The nomination was well received by politicians of both parties in her home state of Arizona, including Senator Barry Goldwater. Edward Kennedy and women's rights groups considered her the best they could hope for coming from Reagan (Abraham 332). Opposition was mostly raised by social conservatives, in particular Jerry Falwell, head of the Moral Majority, who used her pro-abortion votes in the state senate against her. Conservative activist Richard A. Viguiere, one of the architects behind the conservative movement since the 1980s, stated that "[o]urs is a new and somewhat fragile coalition, and we have now seen it treated in a casual and irresponsible manner" (Viguiere, "President's"). The White House tried to appease the growing constituency of social conservatives by stating that O'Connor had told Reagan that she was "personally opposed" to abortion, but would leave it to legislatures to regulate it (Abraham 333). Goldwater replied to Falwell's opposition by stating that "[e]very good Christian ought to kick Falwell right in the ass" (Abraham 332).

The hearings lasted for three days and were largely uncontroversial. O'Connor made an effort to appease conservatives by stating her skepticism toward busing as a means of achieving integration, as well as abortion, and legislating from the bench. She

also spoke in favor of the death penalty (Abraham 333). When pressed about the abortion issue by Chairman Strom Thurmond, a Republican, she said that any personal view should not influence an outcome. To appease skeptics she stated: “I would like to say that my own view in the area of abortion is that I am opposed to it as a matter of birth control or otherwise” (O’Connor hearings, 61). The Judiciary committee approved her nomination by 17-0 and one ‘present’ vote because of her vagueness on abortion. In the full Senate, the vote was 99-0.

The nomination had largely been a success for Reagan and further boosted his image. He had not involved himself to a great degree in the nomination. O’Connor was the only candidate Reagan interviewed, and he instantly liked her. Lou Cannon has described Reagan as a person who valued a personal connection, and that his aides were careful about whom he met with since “Reagan was apt to accept as valid any story, statistic, or policy recommendation that squared with his prejudices” (Cannon 181). At the point when he met with O’Connor, she was already at the top of the list, but her personality and her assurances regarding her policy views did probably convince Reagan that she was the right choice. Evans and Novak might to some extent have been correct in arguing that Reagan’s “narrow flow of information subject[ed] him to staff manipulation” (Evans, “Why”). Though one can only speculate if a record of one pro-abortion vote would have convinced Reagan to turn around and not nominate a person he had met with and instantly liked, and who also were one of the few women that were seriously considered.

Considering O’Connor’s emergence as a moderate voice on the Court, conservatives and most likely Reagan, too, became less enthusiastic about her. O’Connor, although always willing to compromise, was also influenced by others on the Court. Justice Brennan, a liberal who was an important part of the Warren Court, would push her away from the liberal wing (Greenburg 183, 124). But when he left, and Ginsburg joined who shared an interest with O’Connor in women’s’ issues, she would be more willing to consider the liberal positions. Breyer, a pragmatist like O’Connor, might have had a similar effect on her.

After 1973, *Roe v. Wade* had been the elephant in the room in most nominations. The kind of opposition from social conservatives that O’Connor faced would only

increase in later nominations. In 2005, Harriet Miers, a nominee with a very sparse legal record similar to O'Connor, was forced to withdraw her nomination because of conservative pressure. The growth of the conservative movement and increasing skepticism of nominees that were not "true believers" on abortion have made it more difficult for candidates like O'Connor. Conservatives have been disappointed by Justices like Stevens, Blackmun, O'Connor, Souter, and Kennedy, who have moved towards the center and not been reliable conservative votes. At the time, several commentators noted that a man with O'Connor's resume would probably not have been nominated (Abraham 335). O'Connor stated in 1983 that she was simply "lucky" to be in the right place at the right time (Nemacheck 14).

## **5.2 William H. Rehnquist – Chief Justice (1986)**

William Rehnquist had been a reliable conservative member of the court since he was appointed by Richard Nixon. As Chief Justice he left a conservative, but in many regards also moderate Court at his death in 2005. His main obstacle to making his conservative judicial philosophy the law was the "swing vote," his old friend Sandra Day O'Connor. They both had homes in Arizona, and they knew each other from Stanford University in the 1950s (Toobin 252). Rehnquist had been vocal and unashamed of his conservative views as an Associate Justice, which was a concern when he was promoted to Chief Justice.

Warren Earl Burger notified Reagan of his retirement as Chief Justice on May 26, 1986. He had prepared a list of candidates for promotion to Chief and for Associate Justice, respectively. The first list most notably featured Justices William Rehnquist and Byron White, and the former mentioned Robert Bork and Antonin Scalia (Nemacheck 85). Reagan's team added several names to the list, including Justice O'Connor and Anthony Kennedy. The Justice Department had awaited retirements, and had been reviewing possible candidates for several years (Nemacheck 86). Reagan had won reelection by a landslide in 1984, and with a Republican majority in the Senate, and his long time adviser Ed Meese as the new Attorney General, judicial policies were given more attention (Toobin 18). On June 9, news of the retirement had still not leaked, and

Reagan met with Meese, the White House Chief of Staff Don Regan, and White House Counsel Peter Wallison. They had narrowed the list down to 3 candidates – Rehnquist, Bork and Scalia – of which Reagan decided on Rehnquist and Scalia, whose nominations were announced on June 17 (Nemacheck 86).

The process had been streamlined and professional, and the administration had been able to vet potential candidates well and ended up with alternatives that were all distinctly conservative. Scalia was the first Italian-American nominated to the Court, and it is likely that this was considered a benefit. Mark Silverstein argues that the nomination of the conservative Rehnquist for Chief Justice was expected to meet resistance from Democrats, but not enough to ruin the nomination. This would allow Scalia to be confirmed more easily than otherwise expected (Silverstein 151).

In the Judiciary Committee hearings, Rehnquist was questioned about his political philosophy, but not much of the criticism would stick. The issues that were brought up during his nomination hearings for Associate Justice were revisited but failed to create any controversy. He was challenged on decisions in lower courts in Arizona before he became a Justice, but would claim he did not remember and generally avoided answering specifics. Senator Edward Kennedy pushed about stories of Rehnquist’s resistance to civil rights legislation and desegregation, but Rehnquist would only recognize that he had at one time opposed desegregation public accommodations (Rehnquist CJ hearings, 150). Senator Paul Simon, a Democrat, writes in *Advice and Consent* that he was skeptical of the most conservative member of the Court becoming “the symbol of justice for the nation” (Simon 48). The committee finally sent him to the full Senate with a vote of 13-5; the minority votes were all cast by Democrats. The final Senate vote was 65-33, the most votes cast against a Chief Justice nominee in the 20<sup>th</sup> century (Cannon 805).

The strategy had worked out: Democrats would resist Rehnquist, but were not able to pin him down in the hearings. They had spent their capital, and the Scalia hearings a few days later would be quick and uncontroversial. Although Burger was a conservative, the new Chief Justice was even more unabashedly so, and the Reagan team could be satisfied with the result.

Rehnquist received much praise for his tenure as Chief Justice. It is hard to predict how a person will function in the leader role, but Rehnquist’s strict but fair and consistent

leadership style made him an efficient leader (Rosen 193). Several justices, including Rehnquist, had been unhappy with Burger's leadership. Rehnquist ran the conferences by strict rules and distributed important and unimportant case assignments evenly among the justices to avoid conflict (Toobin 30). He also worked to reduce the number of cases the Court would take.

Rehnquist took the Court in a conservative direction, but he failed to satisfy social conservatives. According to Jeffrey Rosen, Rehnquist later in his career moderated his "ideological passions" and instead focused his attention on preserving the institution of the Supreme Court (Rosen 193). Some major issues were decided against Rehnquist's will – gay rights, the death penalty, and cases regarding the war on terror (Toobin 237). Jeffrey Toobin claims this fact led Rehnquist to be disillusioned with his failure to promote a conservative ideology, and that he instead focused on preserving the institution, like his advocacy for renovating the Supreme Court building (Toobin 337). Jeffrey Rosen points to how Rehnquist during his tenure sided more often with O'Connor than Scalia (Rosen 206). But although unsuccessful on "hot" issues, Rehnquist's term as Chief Justice still saw a very conservative direction on matters of federalism. With Scalia and Kennedy on the Court, and later Thomas, Rehnquist was able to get conservative victories in limiting the influence of the federal government (Moen, "Federalism" 76). This would to some degree reduce the effects of gun control legislation, affirmative action, and availability of abortion, and was a significant achievement for Rehnquist.

### **5.3 Antonin Scalia (1986)**

Antonin Scalia has been one of the most outspoken and colorful members of the Court in recent years. He has also been a reliable conservative vote and a self-proclaimed "strict constructionist." His appointment was quite unremarkable and uncontroversial, though probably mostly because he was replacing a conservative Justice.

Scalia was on the suggestion list that Burger gave Reagan, and Reagan's team had already been considering him for a while. He had two major advantages: He was only 50 and would be able to serve for a long time, and he was Italian-American. His ethnicity was perceived as an advantage going into the nomination process and could serve to build

conservative capital among Italian-Americans (Maltese 126). Reagan also liked Scalia's "gruff charm," which might have contributed to postponing the nomination of Bork, the longtime conservative favorite (Toobin 18). In addition, there were fears that Bork would be perceived as so conservative that both nominations would be in danger (Bronner 17).

The Democrats tried to mount opposition to Rehnquist's nomination, but that proved to be a failing strategy. When the hearings began in the Senate Judiciary Committee, only a few days after the Rehnquist hearings, there was very little opposition. Scalia was praised by members of both parties, and the chairman, Republican Strom Thurmond, began by emphasizing Scalia's ethnicity (Scalia hearings, 2). This trend continued, and the most critical questions came from Senator Edward Kennedy. He began by asking Scalia bluntly if he would uphold *Roe v. Wade* (Ibid. 37). Scalia emphasized that he could not comment on specific cases, and when pressed by Kennedy he said he would uphold some earlier decisions, even if they might have been wrongly decided. Joe Biden asked how strictly Scalia would adhere to the text of the Constitution, and Scalia again moderated himself by saying that although he did not support interpreting it different from day to day there was still some "evolutionary content" there (Ibid. 49). The Senators were generally short and cordial in their questioning, and several came and went during the hearing. Biden asked a question that had already been addressed by Scalia when Biden was out of the room, and it was evident that Democrats were not organizing to put up a fight (Ibid. 50). Both the committee and the Senate approved Scalia unanimously. Liberal groups tried to organize protests, but there was just "no appetite" for another fight among Democrats (Davis 153).

Although the Iran-Contra affair was brewing at the time, it had not yet blown up, and Reagan still had a relatively positive image after reelection, along with a Republican majority in the Senate. Antonin Scalia's judicial views were well known, and under other circumstance he would probably have faced fierce opposition from liberals. But the Democrats would probably have had difficulties in sinking either Rehnquist or Scalia, and since the outgoing Chief Justice was a conservative, the balance on the Court was not in danger. Another lost fight might have reflected badly upon Democrats who were positioning themselves for the election later the same year. Senator Kennedy of Massachusetts may possibly have been strategically restrained in order to court Italian-

Americans in his home state, as Scalia would be confirmed anyway (Cannon 806). Almost 20 years later, Samuel Alito would later benefit from his nomination being overshadowed by a Chief Justice nomination, in some ways similar to Scalia's situation. The Democrats were unable to muster enough resistance to Scalia and Alito's nominations following a national debate over the choice of Chief Justice.

Scalia, along with Clarence Thomas, has emerged as one of the most conservative members of the Court, although the newcomers Roberts and Alito might be labeled similarly after more years on the bench. Scalia was not happy with the fact that the Rehnquist Court was not reliably conservative. Jeffrey Rosen claims that Scalia "would focus more on defending his own ideological purity than on persuading skeptical colleagues, and would alienate them in the process" (Rosen 193). Jeffrey Toobin argues that Scalia was bored with the job already in 1996, and that he was unhappy with his lack of influence and his share of important opinions. With two new conservative Justices joining the court in 2005, it would seem to be an improvement for Scalia. But they did not align themselves perfectly with him, and Toobin claims Scalia that is still dissatisfied (Toobin 318).

In Scalia's dissent to the 2008 decision in *Boumediene v. Bush* that granted more rights to the prisoners at Guantanamo, he wrote that it "will almost certainly cause more Americans to be killed" (*Boumediene v. Bush* 111). Scalia's opinions are often colorful and widely cited, and he might also consciously aim for a larger conservative audience since his influence on the Court is limited. Scalia has cut his own path, being a strict constructionist and seemingly unafraid of distancing himself from the other justices. He has served Reagan's conservative mission for 22 years, though it has been hindered by his lack of persuasive power and willingness to compromise.

#### **5.4 Robert Bork (1987)**

Robert Bork had been a hero of conservatives since the beginning of Reagan's presidency and his nomination had been widely expected (Parry-Giles 119). When it finally was Bork's turn in 1987, Reagan's presidency had entered its most difficult phase. The Democrats had taken back the Senate in the 1986 elections and the Iran-Contra scandal



was unraveling. Democrats were re-energized by their victories and finally had a chance to mount an all-out offensive against a conservative nominee. Most of the literature on the Supreme Court views Bork's nomination as a turning point, because media coverage, partisanship, and interest group involvement have increased since. Bork had been outspoken about his conservative views during his judicial career and although he tried to modify his image in the confirmation hearings, the political climate at the time added further damage to his chances.

Lewis Powell announced his retirement on June 26, 1987 without any advance notice to the president (Bronner 16). He had been a moderate and centrist voice on the court, and Reagan now had a chance to make the court even more conservative. The surprise element might have helped Bork's chances with Reagan, as he had been on the list since 1981. But several administration officials were skeptical. White House Chief of Staff, Howard Baker, Counsel Arthur B. Culvahouse, and Communications Director Thomas Griscom did not agree with Attorney General Ed Meese, who was an ardent supporter of Bork. Many liberals were aware of these differences, and since Meese was caught up in the Iran-Contra scandal, Griscom was lobbied with warnings about the controversy Bork might cause (Bronner 21). D.C. Circuit Court judge Laurence Silberman was also considered (Greenburg 93), but Reagan made it clear that Bork was his first choice and was not going to give up on promoting one of the most ardent conservative judges to the Supreme Court.

Bork's nomination was announced on July 1, only five days after Powell's resignation. Reagan affirmed his judicial view by stating:

Bork [is] widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, [and] shares my view that judges' personal preferences and values should not be part of their constitutional interpretations. (Ronald Reagan Presidential Library)

This would probably be Reagan's last nomination, and he wanted to complete his agenda to create a conservative majority on the court. Bork was rated as "exceptionally well qualified" by the American Bar Association, and his intellect and judicial credentials were not in doubt (Cannon 806). But his earlier outspokenness and his long history of

controversial statements would haunt him from the day he was nominated. Later the same day, Ted Kennedy made his famous speech about “Bork’s America”:

Robert Bork’s America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is - and is often the only – protector of the individual rights that are the heart of democracy. (Cannon 807)

Kennedy, like Reagan, had made a gamble. The speech was a departure from the tone of earlier nominations. In the hearings, Kennedy would continue attacking Bork. Bork’s long history of public statements about law made it easier to attack him than many previous nominees. Kennedy justified his aggressiveness with by argument that the seat that was up for nomination was a critical swing vote. His reasoning for using the language he did was that “the masses are not going to rise up over the issue of congressional standing. But they will over freedom in the bedroom” (Bronner 90). This was also part of his strategy to label Bork before anyone else could. He contacted former aides of his brothers and all black elected officials in the country in order to build a movement (Ibid. 91). Republicans were satisfied with the choice, and Bork enjoyed much respect from other judges. Justice Stevens also made a surprise statement and praised Bork in a speech (Taylor, “Stevens”). Liberals were well prepared because Bork’s nomination had been expected for many years, and after Scalia’s nomination there were leaks from the White House that Bork would likely be the next nominee (O’Brien 74).

Bork was more willing to talk in the hearings than some former nominees. He engaged in debate with senators, and several commentators agree that the hearings featured some of the most thorough constitutional debate ever in a nomination hearing. Bork’s legal point of view was that the courts had been inventing new constitutional rights. They exercised too much power in promoting pluralism and the positive discrimination of women, minorities, the poor, and criminals (Bronner 318). He had also in several speeches promoted the view that precedent that did not square with an originalist view of the Constitution, should be overruled with no hesitation (Bronner 229).

But Bork's major theme in the hearings seemed to be to modify his earlier statements. When asked about decisions that should be overruled, he instead cleverly used examples of wrongful decisions that he thought should be respected as precedent. He also stated that he valued precedence because there "is a need for predictability in legal doctrine" (Bronner 230). He was confronted with an audio recording from a speech he had made:

I don't think that in the field of constitutional law precedent is all that important...If you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it." (Taylor, "How")

When pushed about the statements, he said that it was "off-the-cuff" and that he had always included the idea that "some law was too entrenched" even if it was wrong (Bronner 230). He also would not comment specifically when asked about the right to privacy. He was critical of the rationale used to ban sterilization of retarded people (Shaffer 114, 124). Although he did not say he was in favor of reversing either practice, his statements helped his opponents in maintaining the public perception of him as an ideologue. To allow all senators to ask their questions, the hearings were extended into a Saturday. Arlen Specter, a moderate Republican senator from Pennsylvania, requested one and a half hour of questioning time, whereas the other senators needed five and ten minutes (Bronner 235). Specter went into detailed and critical questioning while expressing skepticism about Bork's judicial views.

Concluding his testimony, he stated that part of the reason he would like to be on the Court was that it would be an "intellectual feast," which was not well received either (Bronner 245). Bork had been careful not to be specific about how he would vote, but his attitude and philosophy were very evident. He was very eager to be on the Court but at the same time he seemed to have trouble not coming across as a man who thought he knew the law better than both senators and even justices. The reactions were mixed, and Senator Paul Simon, a Democrat, stated that he came out of the hearings with a respect for Bork, although he did not share his judicial views (Simon 65). But Bork's attempts to appear moderate did not win many opponents over, and the New York Times wrote that "his testimony last week contrasted sharply with positions he has publicly espoused from

1971 until quite recently” (Taylor, “How”). An energized opposition had enough material to fuel their campaign.

The hearings went on for twelve days in total. Seventeen organizations testified in Bork’s hearings, more than in any former nomination (Maltese 90) (Appendix 2). Democratic Senator Joseph Biden, who was the Chairman of the Senate Judiciary Committee, was a contender for the Democratic nomination for president. He was criticized by Republicans for opposing Bork, but his handling of the hearings was mostly considered fair (Greenhouse, “Washington”). He withdrew his candidacy during the hearings for other reasons, although his duties had hindered his campaigning (Dionne Jr., “Biden”). Several liberal law professors who testified promoted what the conservative Reagan biographer John Patrick Diggins calls a “postmodernist” view of the Constitution. Law was “not an ultimate source of authority” but an instrument that “could be used in light of its consequences, and not necessarily its intent” (Diggins 316). He claims that Reagan was in particular outraged by this, which seems to confirm Reagan’s critical attitude toward the activism of the Warren and Burger courts.

Senator Alan Simpson of Wyoming concluded that “[t]his will never happen again. ... The next time we have a Supreme Court nominee he or she ... will respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right or wrong” (Shaffer xiv). Senator Charles Grassley remarked that “never has a judicial nominee been so forthcoming in his views” (Ibid). Bork would later claim in a book that some of the senators simply did not understand what they were discussing, and he did not agree that it was a substantial constitutional debate (Ibid 134). In an interview with the D.C. Bar Association in 1998 he would also state that “by 1987 my attitude had changed ... as solicitor general I’d argued lots of cases before the Supreme Court so I knew the Court wasn’t going to be the grand intellectual experience people imagine it to be” (“A Conversation”). If this was Bork’s attitude, it can be argued that his attempts to explain and argue specific cases could come across as arrogant and even cold and insensitive.

Reagan made a total of 32 mentions of Bork in his public appearances, more than any president had done regarding a Supreme Court nominee up to that point (Maltese 115) (Appendix 1). But at the time Reagan got involved, it might have been too late.

Reagan went away for a three-week vacation in August and did not contact any senators until after the hearings ended on September 30 (Cannon 808). Bork was disappointed with Reagan's efforts, and when Griscom came up with the idea of letting Bork and his wife do a TV interview to "humanize" him before the committee vote, Bork rejected it as "below his dignity" (Bronner 283). He was not willing to campaign for his nomination.

Reagan invited Dennis DeConcini, a prominent Democratic senator, to his office a few days before the Senate vote to persuade him to vote for Bork. His efforts were in vain. Republican Senator Arlen Specter had also made up his mind and stated in an interview that if Bork's views had been the opinion of the Supreme Court, the Senate would have had segregated seats for blacks and whites (Baker, "Bork's Shadow"). Reagan even received several Republican visitors who urged him to drop the nomination as they realized that their chances were diminishing (Vieira et al. 171). Bork decided to make a public statement about not withdrawing, and Reagan made a speech where he promised that the next nominee would upset Democrats "just as much" (Simon 64). Reagan showed his commitment to Bork, but it was too little too late to help his nomination. Bork went out of the Judiciary Committee with a 9-5 majority against him, and was defeated 42-58 in the Senate on October 23.

The Bork nomination was a turning point in Supreme Court history. After his defeat, nominees would be more careful and reserved in their hearings. Even great legal minds will have problems in hearings if they do not watch their tongues. The Bork defeat also opened up nomination hearings for more organized efforts by interest groups. Whether it was the political circumstances or his history and personality that doomed his nomination is a matter of debate. There is no doubt that Bork's statements provided his opponents with plenty of ammunition, but it is impossible to know if the Democrats would have defeated him in any event. Bork's efforts to moderate his earlier views could not change the perception that he was a hard-line conservative. Bork has since stood by his earlier views, and in 2005 he stated that "[a] lot of conservatives are convinced that things would have been different if I had been confirmed....A lot of liberals think it would have been different, too, and they don't like it" (Baker, "Bork's Shadow").

Reagan was in a difficult political situation, but went with the much anticipated choice as Bork had been a long time conservative favorite for a seat on the Court.

Reagan's aides did a good job of using media appearances to promote policy throughout his presidency. Though during this nomination, neither Reagan nor his staff realized how he might be able to help by contacting senators or speaking to the media before and during the hearings. Meese's Iran-Contra problems at the Justice Department might have hindered him from doing a good job, and Reagan's lack of initiative may be attributed to his general distance to day-to-day politics. Bork stated in 2005 that "[t]here was a massive political campaign against me and there was no political campaign on my behalf" (ibid).

Reagan received a blow in a politically difficult time, but vowed to complete his mission to appoint a conservative. However, he had limited political capital to spend, and his next choice would prove to be even more damaging to his conservative Supreme Court project.

### **5.5 Douglas Ginsburg (1987)**

Reagan's next choice was Douglas H. Ginsburg, a 41-year old judge on the D.C. Circuit Court and former Harvard Law professor. His nomination was announced on 29 October 1987, only six days after the Senate rejected Bork. In the Justice Department, Attorney General Meese blamed the White House staff for not doing a good enough job on Bork and pressured Reagan about nominating Ginsburg (O'Brien 76). Ginsburg was considered a more reliable conservative than Anthony Kennedy, a California judge who had been on the list since the beginning and who was preferred by White House aides (Cannon 809). There was some concern that a long battle over the conservative Ginsburg could delay the appointment till after Reagan's presidency, but Meese prevailed by sending his predecessor William French Smith to talk to Reagan (Ibid.). Age was also an issue, as the younger Ginsburg would likely extend Reagan's legacy on the Court.

Senator Kennedy instantly heated up the already poisonous climate by announcing that Ginsburg was "an ideological clone of Bork" (Vieira et al. 183). Ginsburg had been appointed to the appeals court the year before, and the American Bar Association had barely rated him qualified because of his minimal experience (Taylor, "Man"). In the days after his nomination, there were reports of Ginsburg's involvement in a cable TV

company that would benefit from deregulation, and that he had filed a brief before the Supreme Court in favor of deregulation (Ibid. 184). This was followed by reports that his wife, a medical doctor, had performed abortions. Ginsburg had served as a clerk to Justice Marshall, and a fellow clerk and his ex-wife stated in the media that he was not a “Bork clone” and not particularly conservative (Gamarekian, “Ginsburg”). Before the public debate had begun, it was revealed that he had used marihuana as a law professor. These allegations doomed his candidacy. William Bennett, Secretary of Education, was given the task by Reagan to call Ginsburg and ask him to withdraw, which he did on November 8 (Cannon 810).

Ginsburg’s later record shows that he held on to his conservative views. In a 2002 speech to the CATO institute, a conservative think-tank, he criticized the Court for ruling that Roosevelt’s New Deal programs were constitutional, as well as disagreeing with *Griswold v. Connecticut* which recognized a right of privacy and allowed married couples to use contraceptives (Schwartz 4).

The failure of the Ginsburg nomination left Reagan with very little political capital to spend on his next nomination. The embattled Ed Meese had pushed a hard line in his choice of nominees, and Reagan had gone along with him. Possibly because he was occupied with the Iran-Contra problems, Meese had not ensured that the Justice Department and the FBI did a thorough background check of Ginsburg. Meese was a very strong influence long history with Reagan, their relationship dating back to Reagan’s governorship in California. Reagan put a lot of trust in his close advisors and with his limited involvement in the process, he underestimated the risk of nominating another judge with a clearly conservative record. Ginsburg would probably have met a lot of resistance from Democrats even without the scandals. So soon after the heated battle over Bork any candidate with a controversial background would be difficult to confirm. The lack of scrutiny that went into Ginsburg’s background was yet another lesson for a Reagan team that had already made a miscalculation regarding Bork’s chances.

## **5.6 Anthony Kennedy (1987)**

The failure of the Ginsburg nomination left Reagan with little choice but to nominate his third choice for the seat: Anthony Kennedy, a Californian and a judge on the Ninth Circuit Court. David H. Souter's name was mentioned briefly after a recommendation by his friend Warren Rudman, a Republican senator from New Hampshire, but Meese preferred the fellow Californian Kennedy (Yarbrough 95). Lou Cannon described Kennedy as a "straight-arrow" and "mainstream" man who "had never expressed his personal views on abortion in his writings" (Cannon 810). This was exactly what Reagan needed at the time. Kennedy's nomination was announced on November 11 1987, only three days after Ginsburg's withdrawal, and it was evident that Reagan wanted to get it over with (Simon 67).

Kennedy was sent to meet with senators to promote his candidacy. In his book, Senator Paul Simon describes how Kennedy's diplomatic manners earned him respect with both Democrats and Republicans. After Kennedy had spoken to Republican ranking member Orrin Hatch by phone and lauded him for his questioning of Bork and chatted with Democrat Robert Byrd on his interest in Senate history, the White House received green signals from both parties (Simon 67). Lou Cannon describes Senate liberals as "overjoyed" as they considered Kennedy the best nominee they could get from the Reagan White House (Cannon 811).

The hearings turned out to be close to the opposite of what Bork had gone through. Few reporters showed up, and there was little media coverage. Kennedy was careful in his statements, and he did not signal any hard-line conservative views. He was pressed by Republican Senator Charles Grassley on whether there was an activist consensus among law professors and in academia, but would not agree (Kennedy hearings 212). When asked by Senator Specter, liberal Harvard Law Professor Laurence Tribe supported Kennedy's statements about the Constitution as a document that will be interpreted in light of both its original words and in light of what has happened since (Ibid. 348). The committee recommended him unanimously, and the Senate confirmed him by a 97-0 vote.

Reagan was satisfied with the outcome, and he showed little sign of being embarrassed by the process regarding Bork and Ginsburg. Lou Cannon argues that this



was because he had “little personal connection with either man” (Cannon 811). Also, Reagan’s usual distance to the decision-making process and his concern for the larger ideas might have caused him not worry to about it.

In the first years of Kennedy’s service, Reagan and Meese had every reason to be happy with the appointee. Cannon, writing in 1991, characterizes Kennedy “as dependably conservative as Bork would have been” (Cannon 811). On matters like federalism, he would continue to mostly support the conservative justices’ agenda to reverse the New Deal precedents that allowed a great amount of federal regulation (Moen 76). But his views on social issues would change considerably over the years. Jeffrey Toobin describes how Kennedy, who had been a world traveler since his youth, was gradually influenced by what he experienced outside of the United States (Toobin 184). He argues that Kennedy also was influenced by foreign guests that the Justices entertained in Washington (Ibid. 186). Kennedy has gradually been drifting toward the center. He reaffirmed *Roe v. Wade* in *Planned Parenthood v. Casey* in 1992, and social conservatives were very disappointed when he in 2003 wrote the majority opinion in *Lawrence v. Texas*, overturning sodomy laws affirmed in *Bowers v. Hardwick* in 1986. The ruling, read aloud by Kennedy himself on the last day of the term, renounced the precedent and was viewed as a big victory by gay rights advocates (Toobin 190).

Kennedy’s legacy is another lesson for conservative activists. After the failures of Bork and Ginsburg, Reagan was forced to nominate someone who appeared moderate. Kennedy turned out to find his own path, and his views on several issues evolved over time. The evolution of Kennedy’s views would lead conservatives to be even more wary of nominees that did not have a conservative record.

## **5.7 Conclusion**

Ronald Reagan’s Supreme Court legacy is mixed when it is compared with his conservative judicial philosophy. Of the three new Justices he put on the court, two turned out to drift toward the political center. Of the six nominees he named, four are still considered reliable conservatives by most of the cited literature. The battle over Bork’s nomination marked a change in how nominees are chosen and presented to the public and

the Senate. Avoiding controversy became an even more important factor in getting a nominee through the confirmation process.

Reagan's Supreme Court nominations cannot just be looked upon in isolation. He had a larger strategy to change the judiciary. President Carter's merit-based seniority system was not continued. Appointments to federal courts, which had not always been scrutinized and in some cases had been a tool to award friends and loyal servants, were now part of an ideological conflict. Ronald Reagan's team, in large part influenced by Ed Meese, set out to make the federal judiciary more conservative. The Reagan team would keep large lists of conservatives who could be trusted to further his agenda from the bench. The most promising of these judges were promoted to the federal circuit courts and closely watched with a future Supreme Court nomination in mind (Mauro, "Reagan's Legacy"). The Federalist Society has proved to be a useful tool in maintaining a conservative legal community since it was founded in 1982 ("Our Background").

Reagan's level of personal involvement is not perfectly clear. He put a lot of trust in Meese, who championed Bork and Ginsburg. Arthur B. Culvahouse claims that Reagan never discussed *Roe v. Wade* and other specifics and only wanted to avoid "more judges or justices who would invent new theories to set guilty criminals free" (ibid). Biographer John Patrick Diggins argues that Reagan did not identify with social conservatives and speculates that the reason might be his Hollywood background and experiences in his own family. Reagan seemed more aligned with the strict constructionist movement. Lou Cannon agrees and states that Reagan "did not share the view of those militant intellectuals ... who sought to replace judicial activism of the Left with judicial activism of the Right" (Cannon 811). Conservatives' worries about O'Connor's social conservative credentials prior to her nomination did not seem to trouble Reagan, and his closest advisors did not present a case against her. When the Bork and Ginsburg nominations failed, Reagan was not distressed. Reagan trusted Meese, but seemed to not be visibly worried that the two most conservative choices were out of the race. He might have been more content with O'Connor and Kennedy than the social conservative movement is.

The social conservative movement has continued to increase its influence on the Republican Party, and a relatively unknown candidate like Sandra Day O'Connor might

today have run into the same problems that Harriet Miers would later do. That movement has grown to be able to influence judicial nominations in much greater ways since the O'Connor nomination. The conservative movement's rise since Reagan's presidency was made possible by a merging of religious and social conservatives with business interests and wealthy traditional Republicans. Rehnquist, with the help of Scalia, and later Thomas, set out to undermine much of the New Deal legislation that had allowed the federal government to regulate matters that were previously up to the states.

The Bork hearings and the extensive media coverage that accompanied them changed the nomination process. Later nominees have been more careful in discussing legal theory and indicating how they would vote. The vetting process has also been affected, and candidates with many public statements or controversial pasts are less likely to be nominated. Ronald Reagan's judicial policies changed the way the federal judges are appointed, and although his Supreme Court appointments have a mixed record when it comes to conservatism, he has put his mark on both the highest and the lower courts.

## 6. George H. W. Bush

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During the presidency of George H. W. Bush, two long-serving liberal justices retired, William Brennan and Thurgood Marshall. They were both appointed during the Warren Court, and their retirements provided an opportunity for Bush to continue Reagan's mission to make the judiciary more conservative. The retirements also had a historic significance, as Brennan and Marshall were the last liberal members of the Warren Court to retire and Marshall had been the first African-American justice. The era of liberal activism was over and was followed by an effort by the conservative justices to undo some of the achievement of the Warren Court. Bork had raised the stakes for nominations, and Bush put forward two nominees that he hoped would be confirmed without much controversy. He was successful in the case of David Souter, but the nomination of Clarence Thomas brought about even more debate and media attention than Bork did.

George H. W. Bush served one term as president. His presidency is still a subject of debate by scholars. He has been accused of lacking the "vision thing" (Greenstein, "Difference" 170). Following Reagan, under whom he had been vice president, he is viewed as less effective as a communicator, but as an effective and much respected administrator. Initially chosen as a running mate because of his moderate record, he did not take the social conservative movement any more seriously than Reagan did (Ibid. 163).

Bush relied to a large extent on his advisors and the groundwork of research done by the Reagan administration for his nominations (O'Brien 77). The replacement for Brennan, David H. Souter, was relatively unknown and raised few controversies during the nomination. Marshall's replacement, however, the conservative black judge Clarence Thomas, became the subject of intense media scrutiny. Souter's appointment has later been deemed a "mistake" by many conservatives as he turned out to vote more with the liberal wing of the Court than the conservatives. The controversies surrounding Thomas' nomination matched the Bork nomination in media coverage, as there was a mix of race questions, sexual allegations, and charges of extreme conservatism.

### **6.1 David H. Souter (1990)**

On July 20, 1990, William Brennan wrote a letter to President George H. W. Bush to announce his retirement. Brennan was 84 years old and had been on the Court since he was appointed by President Dwight D. Eisenhower in 1956. Brennan a Catholic and was known as a Democrat, and Eisenhower wanted to appeal to these groups since it was close to the presidential election (Davis 47). Brennan was an important player on the Warren Court, building consensus and often taking leadership within the liberal wing. Yet he also showed a temper and wrote fierce dissents at times. After his long service he enjoyed much respect from both liberals and conservatives. His liberalism was a dominant factor in the debate around his replacement, as a replacement would alter the balance of the Court in a major way. Thurgood Marshall, another liberal and only two years younger than Brennan, was also expected to retire soon, and many observers thought that Bush would have the opportunity to replace both. This further raised the stakes for the upcoming nomination.

Bush made it clear to his staff that he wanted to decide on a replacement within 48 hours to minimize the possibility for Democrats to prepare for criticizing his choice as had happened with Bork. At the time Bush was in a difficult position, as the federal deficit had increased greatly since the Reagan years, and he was considering agreeing to a Democratic bill that would increase taxes (Greenburg 88). Facing a Democratic majority in the Senate, Bush needed to avoid a confirmation battle. The major players in the short and intensive process to find a nominee would be White House Chief of Staff John Sununu, White House Counsel C. Boyden Gray, and Attorney General Dick Thornburgh. Thornburgh had been appointed by Reagan to replace the controversial Ed Meese, and Bush had chosen to keep him in his post.

At the White House, Gray recommended Solicitor General Kenneth Starr to Sununu. Starr had a long record of service for Reagan, and had served on the D.C. Circuit Court before resigning from that prestigious post to become solicitor general. The White House staff had researched several possible candidates to prepare for a vacancy on the Court, but Gray had focused mainly on Starr, since he presumed he was the most likely candidate (Ibid. 89). At the Justice Department, Thornburgh with his Deputy Attorney General J. Michael Luttig, had agreed that Starr was not “focused” enough and could

possibly drift toward the left (Ibid. 91). Luttig was a Texan, like Starr, but more conservative and would later be considered by George W. Bush for the Court.

In a meeting with the president on July 21 Thornburgh began by announcing that he thought Starr was not conservative enough, to the surprise of both Gray and the president. He was even willing to resign if Starr was nominated, and there was quickly an understanding that Starr was out. They then ruled out Laurence Silberman, also on the D.C. Circuit Court, because of his temperament and controversial statements he had made earlier. Bush said he liked Clarence Thomas, a black conservative who had worked in the Reagan administration. He was only 42 years old at the time and had limited judicial experience. Thomas had been appointed to the D.C. Circuit Court the year before, and Thornburgh and Gray were in agreement; he was a good candidate but it was too soon for him (Ibid. 93). Edith Jones, a conservative Southern judge on the Fifth Circuit Court, was also mentioned. Bush then turned to discuss David H. Souter, who had been appointed to the First Circuit Court of Appeals just a few months earlier. Souter, 51 years old and a native of New Hampshire, did not appear to have any skeletons in the closet, but not much was known from his writings. The meeting was inconclusive, but Gray focused his further vetting on Souter and Jones (ibid.).

Behind the scenes, Republican Senator Warren Rudman of New Hampshire had begun working to promote his good friend Souter. Rudman, a moderate Republican, had helped Sununu being elected governor of New Hampshire. Sununu had returned the favor by appointing Souter to the New Hampshire Supreme Court. Bush asked for interviews with Souter and Jones, and Sununu decided to make his push by recommending Souter (Ibid. 97). Rudman phoned Bush to make his case and said that Souter was “easily confirmable,” had “no skeletons in the closet,” and was one of “the most extraordinary human beings” he had known (Yarbrough 100). At the same time Gray and Thornburgh were worried about how the younger and more conservative Jones would fare in the Judiciary Committee hearings. Bush eventually went with the more scholarly Souter, who was also a fellow New Englander (Greenburg 101).

The reactions were mixed. Souter was unknown to most, and Justice Thurgood Marshall dryly replied that he had “never heard of him” when asked by a reporter. Sununu tried to appease conservatives by saying that Souter would be a “home run”

(Toobin 21). The White House Communication office prepared letters and editorials that portrayed Souter as a strong “law-and-order judge” (Greenburg 102). But doubts had already begun to spread in the White House and among conservative activists. Newspapers described him as an eccentric and frugal bachelor, and he did not do well in the preparation sessions for the hearings (Ibid. 103). Sununu was approached by several conservative activists, among them Paul Weyrich, who were disappointed that Jones was not picked. Some raised concerns that Souter could be a closet homosexual since he had never married. To avoid possible damaging rumors, Rudman contacted chairman of the Judiciary Committee, Joseph Biden, to offer female witnesses that could confirm that Souter was not gay. Biden “laughingly” declined but the fact that such concerns were brought up bothered Souter who confided to Rudman that he considered withdrawing (Yarbrough 124).

The fears over how well Souter would perform in the hearings were unfounded, as his testimony was considered flawless and would later become a model for other candidates. However, conservatives were alarmed by the things he actually said. Souter praised Justice Brennan and said that he “would be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have” (Souter hearings, 186). He said that the Warren Court rulings, despised by many conservatives, had been a “pragmatic implementation” of the Bill of Rights and that Americans had lived well with them (Ibid. 64). *Roe v. Wade* was specifically avoided, but Souter was questioned about the right to privacy recognized in *Griswold v. Connecticut* in 1965, where the right of married couples to use contraceptives was acknowledged. Souter agreed and referred to the much respected Justice John Marshall Harlan who had supported that view from a pragmatic perspective (Ibid. 54).

Despite a testimony that could be perceived as very moderate, several liberals voiced their opposition. The NAACP stated that Souter “failed to articulate that level of concern for fairness, equality and justice for all citizens that should be present in any individual taking a seat on the Court” (Molotsky, “N.A.A.C.P.”). The National Organization for Women distributed leaflets saying “Stop Souter or Women will Die” during the time of the hearings (Toobin 44). But many Democrats realized that Souter might be the best appointment they could get. Neither the NAACP nor the ACLU

officially opposed the nomination, as they had with Bork (Greenhouse, “Defining”). During the debates before the final vote in the Senate, Democratic Senator Paul Simon asked “is it likely that President Bush will send a nominee with more moderate views than Judge Souter?” He then went on to predict that Souter would vote to uphold *Roe v. Wade* (“Proceedings” 26973). Senator Rudman also talked privately to Democratic senators, assuring them that they should not be concerned regarding *Roe v. Wade* (Greenburg 164). The Senate vote was 90-9 in favor of his confirmation, and the votes against him were all cast by Democrats.

The Souter appointment soon turned out to be a disappointment for conservatives. Souter initially assumed a centrist position at the Court, but sided with liberals to uphold abortion rights in *Planned Parenthood v. Casey* in 1992. Linda Greenhouse, who was the Supreme Court reporter for the New York Times at the time, concluded after his first two terms in 1992 that his home was at the center. Commenting on his critical role, she said that “to find out where the Supreme Court is, look for David Souter” (Greenhouse, “Souter”). Souter has been a supporter of *stare decisis*, by upholding earlier decisions that have become ingrained in American society, especially those from the Warren Court. In that sense he has lived up to the pragmatism of his ideal John Marshall Harlan. Yet few writers perceive this as a personal turnaround by Souter. The fact that so little was known about his views, and that he as a New England conservative probably did not identify with the social conservative movement at the time, makes it difficult to argue that he had a change of heart. Although he has since become labeled as a liberal, this might have more to do with the fact that the old, outspoken liberals on the Court are now gone. After the retirements of Brennan and Marshall, the liberal wing consisted of more moderate members like Stevens, Souter, Ginsburg, and Breyer. Souter announced in a letter to president Obama on May 1, 2009 that he would retire after the end of the term.

While the mission to avoid another “Souter” has become a running theme among many conservatives, the criticism has been just as much directed against the president that appointed him. Bush made a conscious choice to avoid controversy in a situation where he had to make unpopular decisions and at the same time faced a Democratic majority. In light of Souter’s legacy, Bush might regret his choice. Attorney General Thornburgh’s veto of the well-vetted and loyal Kenneth Starr is probably viewed as a



mistake by conservatives in hindsight. But even if Thornburgh had approved of Starr, he might very well have faced a difficult battle in the Democratic Senate and with social conservatives. After Souter, those conservatives were less likely to permit a president to take chances on candidates with less known views, regardless of the political situation.

## **6.2 Clarence Thomas (1991)**

Thurgood Marshall announced his plans to retire from the Court in a letter to President Bush on June 27, 1991. Marshall was 82, and although his health was poor, most people assumed that he would await the presidential election before resigning (Phelps et al. 2). Marshall was the first black member of the Court. He had been solicitor general for President Johnson and was a veteran of the civil rights movement who had argued several segregation cases before the Court. Clarence Thomas was widely expected to be nominated because of his race and the scarcity of other qualified minority candidates that were conservative enough. In a press conference regarding his resignation, Marshall was very forthcoming about the likely nominee. He did not mention Thomas by name, but stated that his own ethnicity should not “be used as an excuse” for “[p]icking the wrong Negro.” He went on to say that “there’s no difference between a white snake and a black snake. They’ll both bite” (Toobin 25).

Thomas had been appointed to the D.C. Circuit Court in 1989 by President Bush. Thomas’ personal story was compelling and was emphasized by Bush when the nomination was announced. Thomas had grown up in Georgia, raised by his grandfather because his mother was too poor to care for him, and had worked himself through school and college (Ibid. 26). Yet he had benefited from the kind of affirmative action programs he opposed, both during his college education and for his position on the Equal Employment Opportunity Commission during the Reagan administration.

The Bush team was largely in agreement on the choice. Bush, Gray, Sununu, Thornburgh, and Vice President Dan Quayle had a brief discussion before Bush left for his summer home at Kennebunkport, Maine. Edith Jones was mentioned again, but Bush made it clear that she would probably cause too much controversy because of her well known conservative views. Thornburgh and Sununu considered the possibility of a

Hispanic nominee. Emilio M. Garza, a judge on the Fifth Circuit Court, was labeled “too green” after he was interviewed (Phelps et al. 8).

On June 30, Bush called Thomas and told him to travel to Maine the next day. Bush offered him the job when he arrived, and they held a press conference in the garden of Bush’ summer home (Ibid. 13). Asked about whether Thomas was nominated because of his race, Bush stated that “the fact that he is black and a minority has nothing to do with this in the sense that he is the best qualified at this time” (“Excerpts”). The statement was not considered credible either by conservatives nor liberals, as there had been a great pressure to appoint another minority member. Also, there were very few writings by Thomas available and he had never argued a case before a federal appeals court or the Supreme Court (Toobin 26).

When Thomas testified before the Senate Judiciary Committee in September, there was little controversy. Thomas made a thorough effort not to answer in specifics, probably eager to avoid repeating Bork’s mistakes. Senator Kennedy grew annoyed by Thomas’ evasive answers on abortion and stated: “You ask us to believe that an intelligent and outspoken person like yourself has never discussed *Roe v. Wade* with another human being” (Thomas hearings. Part 1, 452). The real controversy would not start until October however, after the committee had split its vote 7-7 on recommending Thomas.

A young law professor, Anita Hill, had served with Thomas in the Department of Education and on the Equal Employment Opportunity Commission. During that time, she claimed to have experienced several sexual approaches from Thomas. These allegations began to circulate in Democratic circles, but Hill was reluctant to come out publicly. Joseph Biden, the committee chairman, was afraid of the publicity and the explosive race questions that the allegations could result in. He suggested that Hill would have to let the FBI investigate it for the committee to consider it. That would mean that she had to go on the record with her name (Phelps et al. 214). On September 23, three days after the last hearing, Hill decided to submit her statement to the committee (Ibid. 216). The content was both controversial and explosive, and would eventually make the Bork controversy look tame in comparison. The Judiciary Committee decided to call Hill to testify on October 11.

Thomas reappeared at the beginning of the extended hearings, where he denied that he had acted the way Hill claimed. He provided a defiant statement and invoked the racial undertones by stating:

This is a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree. (Thomas hearings, part 4. 10)

In Hill's testimony, she detailed the allegations against Thomas. During the time they had worked together, she claimed he had approached her many times about going out. She had turned him down, and he began to talk about graphic scenes in pornographic movies, made crude jokes, as well as talking about his own sexual adventures (Ibid. 37). The senators grilled her for details on the working relationships. Statements from several people who worked with Hill and Thomas were included, and these people also disagreed on what had happened. Hill claimed not to know if he had made such statements to anyone else and said he would usually stop after she told him one or more times that she was not interested in hearing it (Ibid. 74). Republican Senator Orrin Hatch implied that an alleged remark by Thomas about a pubic hair was something Hill had taken from the movie *The Exorcist* (Ibid. 206). A male co-worker claimed that Hill fantasized that men around her made approaches towards her, including him, though in his case he denied doing so (Ibid. 97). A female co-worker made a testimony where she claimed that Hill's statements sounded like "schizophrenia," and that Hill was used as a "pawn" by interest groups and was doing it for personal advancement (Ibid. 338, 386). Hill's version was supported by another co-worker who stated: "If you were young, black, female and reasonably attractive, you knew full well you were being inspected and auditioned as a female" (Thomas hearings. Part 3, 1022).

Bush actively supported Thomas by promoting him in speeches and media appearances. He mentioned Thomas a total of 24 times, more than any other nominee up to that point except Bork (Maltese 115). Bush was less popular with the most the most

conservative members of the Republican Party than Reagan, and made a thorough effort to back Thomas to prove his commitment with that constituency.

The finale vote came down on October 15, and Thomas was confirmed by a very narrow margin, 52 to 48, 107 days after his nomination was announced. The White House was worried about investigative reporters, and since the swearing-in ceremony was scheduled for November 1, a party was arranged at the White House lawn on October 18. It featured a mock swearing-in by Justice White, but failed to stop the news media speculation. The White House went to the very unusual step of asking Chief Justice Rehnquist to swear in Thomas on October 23, only a few days after the funeral of Rehnquist's wife. According to Jeffrey Toobin, the Washington Post withdrew a story about Thomas' renting of pornographic videos because he was now officially sworn in (33).

Thomas has since become known as the most conservative and most originalist justice on the Court. To an even greater extent than Scalia, he votes his conscience and does not make much effort to compromise. His experiences in the hearings might have caused him to shed the fear of standing alone, but like Scalia he lacks persuasive power to convince moderate justices. Thomas' steadfast views may have led O'Connor to move even further toward the center as her way of working was that of a legislator by finding room for compromise (Greenburg 122). Media coverage of Thomas has often compared him to Scalia, if not implying that he follows Scalia. Greenburg points out that this is a mistaken assumption, as Scalia has joined Thomas as much as the other way around (Ibid. 125). Of the current Justices, he is among those who are the most willing to overturn precedent that he thinks breaks with the Framers' intent. In his concurrence in *United States v. Lopez* in 1995, which overturned the Gun-Free School Zones Act, he did not think the Court went far enough. He argued: "In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause." (*United States v. Lopez*). He wanted to revisit and overturn the precedent which has allowed for Congress to regulate matters related to interstate commerce. Since 1937 this interpretation has been essential for the federal government's increased involvement in people's lives, ranging from welfare to business regulation to gun control.

When Thomas released an autobiography in 2007, he confessed to still being angry about the Hill controversies (Dolin, “Anger”). Thomas’ independence is even more evident than Scalia’s. At the oral arguments, he very rarely asks questions. He dissents frequently. This contributes to him being viewed as an outsider and not part of the process where important compromises are made. However, he is revered in conservative circles and a very popular guest in places like the Federalist Society.

### **6.3 Conclusion**

Despite the disappointment about Souter, Bush’s appointments definitively made the Court more conservative. Souter, who was soon viewed as a liberal, was not as ideologically rigid as either Brennan or Marshall was. Thomas has firmly established himself on the conservative wing, arguably to the right of Scalia. For the conservative movement, the goal has been a safe and lasting majority on the Court, and in that respect Bush failed, as did Reagan. With appointments like Kennedy and Souter, there was still a pragmatic center and the Court did not consistently do the bidding of social conservatives. But although *Roe v. Wade* was upheld in *Planned Parenthood v. Casey* in 1992, the conservative justices were gaining ground in other areas. The effort to reverse some of the Warren Court precedence regarding federal regulation had been there since the late 1970s, but with Souter and Thomas on board there were hopes for more conservative progress (Schwartz 100).

The “circus” surrounding Thomas, as he himself labeled it, would further contribute to thorough investigation of future nominees. Although he was confirmed and today is a favorite of conservatives, many would have wanted to avoid such a spectacle. Souter’s nomination could not have been more different than Thomas. But it also served to increase the research into candidates, as he did not provide the conservative vote that was expected from him. Souter’s nomination included testimonies from 25 organizations, which was a new record. That record was beaten the year after, when 43 organizations testified in Thomas’ hearings (Maltese 91).

The Chairman of the Senate Judiciary Committee, Joseph Biden, announced in 1992 that the committee would have a closed-door session with every future nominee in

addition to the public hearings. The purpose was to be able to address any issues that had come to the attention of senators (Rutkus: "Roles" 37). This was most likely caused by the controversies surrounding Clarence Thomas.

Bush had to decide on his priorities, and considering the economic situation and his own reelection chances, he in the case of Souter made a conscious choice not to nominate a candidate that was known to be very conservative. In hindsight it is hard to predict what would have happened if Bush had nominated a candidate like Edith Jones. A highly contested confirmation battle could possibly have ended with a show of power by the Democratic majority in the Senate and forced him to put forward a candidate like Souter. That was the lesson from Reagan, who ended up with Kennedy after two controversial nominees had failed. Bush avoided the battle, but at the same time he lost credibility with the conservative movement.

## 7. Bill Clinton

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Bill Clinton was sworn in as president in January 1993 and would become the first Democratic president since Lyndon Johnson that would be able to appoint a Supreme Court Justice. The liberal agenda of the Warren Court, as well as its most activist members, had gradually diminished in the generation that had passed since the Johnson presidency.

Clinton had been elected in a three-way race between himself, President Bush, and independent candidate Ross Perot. He had a record of being a pragmatic moderate as governor of Arkansas, and he would nominate candidates with similar records. (Greenstein, "Difference" 177). Justice Byron White, a Kennedy appointee who had grown increasingly conservative, was replaced by Ruth Bader Ginsburg. Stephen Breyer took the seat of Harry Blackmun, who had developed into one of the most liberal justices. Both Ginsburg and Breyer were perceived as more moderate than liberal when they were nominated. Scholars disagree to some extent on their current labels. While they undoubtedly belong to the liberal wing of the current Court, they have not been as consistently liberal as Brennan, Marshall, or Douglas from the Warren Court.

The presidency of Bill Clinton is mostly known for its unprecedented economic growth, along with Clinton's problematic relationship with the Republican Congress and his impeachment trial. Considering Reagan's and Bush's problems with their appointments, both regarding ideology and controversies, Clinton would do very thorough research regarding his candidates.

### 7.1 Ruth Bader Ginsburg (1993)

Justice Byron White, appointed by President John F. Kennedy, announced his retirement on March 19, 1993. He confided to a former clerk that he would like to be replaced by a candidate of a Democratic president, even though his views were mostly considered conservative (Toobin 61). White and Rehnquist were the only dissenters in *Roe v. Wade*. The retirement came only two months into Clinton's presidency, and he had not received any prior notice of Justice White's plans.

The first two months of Clinton's presidency had been turbulent and his approval rating had gone down by more than 20 points. His two first nominees for attorney general had had to withdraw because they had hired illegal immigrants, and Congress failed to pass an important economic stimulus bill (Greenstein, "Difference" 179).

Clinton gathered the Vice President and White House lawyers to discuss possible replacements the day after the resignation had become known. He wanted a solid leader type for the seat and stated that it had to be someone "who will move people" (Toobin 63). Clinton was eager to put a non-judge on the Court, since the current members except for White were all former judges appointed by Republicans. Earl Warren had been a governor, and Clinton imagined someone with similar leadership skills. Mario Cuomo, the governor of New York, was mentioned, and several people liked the idea. George Stephanopoulos, who at the time was acting as press secretary, offered Cuomo the job. Cuomo was in doubt and said he needed time to think about it. It went back and forth for several days, and even when called up by the president, he could not give a definitive answer (Ibid. 64).

The considerations went on through April and May, and several of the people involved in the process began leaking to the press, causing frustration at the White House. Clinton's presidency had gotten off to a very rough start and another nominee at the Department of Justice had to withdraw. Clinton's nominee for Assistant Attorney General, Lani Guinier, had received fierce criticism for viewpoints expressed in her academic writings. The Secretary of the Interior, Bruce Babbitt, was favored by Clinton in June but for a number of reasons, including skeptical signals from Republican senators, he was dropped (Greenburg 167).

Clinton was actively engaged in the discussions, and later in the process he sat down to read background material on candidates himself. After considering more names that were far down on the list of candidates, he realized that they needed to look elsewhere. Senator Kennedy had recommended Stephen Breyer, a judge on the First Circuit Court and a Harvard law professor. Clinton arranged an interview with Breyer. The interview did not go that well; Breyer seemed uncomfortable and did not impress Clinton. Breyer had been in a bicycle accident shortly before and had suffered broken



ribs and a punctured lung, which may have contributed to this impression (Lewis, “Political”).

Clinton did not have other alternatives at the time and was still considering picking Breyer when his Attorney General Janet Reno suggested Ruth Bader Ginsburg (Toobin 69). Clinton had met Ginsburg when he was governor and was impressed by her then. She was a judge on the D.C. Circuit Court, had worked with the ACLU, and had been a significant player in the women’s rights movement in the 1970s. Her judging was well respected by her colleagues, both liberal and conservative, and she was a personal friend of Justice Scalia (Greenburg 168). She was called in for an interview that went very well, and Clinton received positive feedback from Republican Senator Orrin Hatch on the Senate Judiciary Committee (Ibid. 71).

Clinton made up his mind and announced the nomination on June 14 in a press conference with Ginsburg. He praised her for her achievements and she made a statement about women’s progress and a reference to her late mother. An annoyed Clinton abruptly ended the press conference after only one question from the media, where it was pointed out that the decision-making process had had a “zig-zag quality” to it (Davis 3).

The reactions were generally positive. Clinton had had to go through her opinions and speeches because there were uncertainties about her views on *Roe v. Wade*, but he felt that she would support it despite having criticized some of the reasoning behind it (ibid.). The New York Times stated that “it is debatable just how much she is either liberal or conservative” (Berke, “Ginsburg”). When preparing her for the hearings, she was shown videotapes of Souter’s testimony as an example of how to do it. She refused to watch the Bork tapes, as he was a colleague from the D.C. Circuit Court and she felt bad for him (Greenburg 170).

In the Senate Judiciary Committee hearings, Orrin Hatch opened on a very positive note. He said he was skeptical of some of her earlier writings, but that her “judicial opinions, however, indicate her understanding that her policy views and earlier role as advocate are distinct from her role as a judge” (Ginsburg hearings, 6). Democratic Senator Howard Metzenbaum in fact asked her to clarify her earlier criticisms of *Roe v. Wade*, as he was worried about her negativity towards it (Ibid. 148). Ginsburg was very forthcoming in her answers, giving long and detailed answers and engaging senators’

questions, but staying away from issues that might come before the Court. No Republicans criticized her association with the ACLU, often a favorite target of conservative criticism (Greenburg 171).

Ginsburg has been a reliable liberal vote on the Court since she took her seat. Although she has not displayed the aggressiveness in asserting ideological stances like earlier liberals, her record is clear. She has voted consistently in favor of abortion rights and affirmative action. The initial label she received as a moderate may have been a fair characteristic, but when put on a Court dominated by Republican appointees she did not surprisingly turn out to be one of the more liberal voices.

When Justice O'Connor retired in 2005, Ginsburg would assert herself even more strongly in cases where the two had often shared views. When the Court upheld the ban on the so-called "partial-birth abortion" practice in 2007, she wrote a fierce dissent stating: "Today's decision is alarming. It refuses to take Casey and Stenberg seriously. It tolerates, indeed applauds federal intervention to ban nationwide a procedure found necessary and proper" (*Gonzales v. Carhart*). When the decision was announced, she read the dissent aloud, which she very rarely does. Just a month later, the Court denied a woman the right to sue for sex discrimination because her claim was outdated in *Ledbetter v. Goodyear*. She had not discovered that she was paid less than male employees before the time limit to sue stated by law had run out. Ginsburg again read her decision aloud, accusing the majority of being "indifferent" to how "women can be victims of pay discrimination" (Greenburg 321).

Ginsburg is one of the names that are often mentioned regarding possible retirements. She has been struck by cancer twice, recently undergoing surgery in February 2009. But her willingness to engage both her opponents and battle her disease may suggest that she intends to stay on. Clinton may have been positively surprised as she has proved to be more liberal than what was feared by some Democrats at the time of her nomination.

## 7.2 Stephen Breyer (1994)

Justice Harry Blackmun announced his retirement on April 6, 1994 in a press conference with President Clinton. He was then 85 years old, and had hinted about retiring before, so it was not unexpected. Clinton stated that he had been informed several months before by Blackmun, which prompted a question from a reporter: “It took you three months the last time. Will it take you that long this time?” (“Statements”).

Much of the vetting and discussion of candidates had been done the year before. First Clinton asked Senate Majority Leader George Mitchell, who had briefly been considered for White’s seat. Mitchell was working on getting Clinton’s health care legislation passed, and declined. So did Babbitt, who was still on the list. Clinton considered Richard Arnold, a friend and very well respected judge that he knew from his days in Arkansas. He had passed on Arnold the year before because he was afraid of controversies as it might look as a reward to a friend from his own state. But Arnold received praise from more than hundred federal judges who signed an unprecedented letter to Clinton recommending him (Toobin 77). Arnold had been diagnosed with cancer, and although otherwise healthy, Clinton understood that it would be a great risk. After going to the unusual step of contacting medical experts himself for a review of Arnold’s health, he moved on. Arnold died in 2004 (Lewis, “Richard S. Arnold”).

Supporters of Breyer had mobilized, and Clinton received a video tape of a speech where Breyer showed his humorous and sunny side, as the rumors about the interview the year before were well known. Senator Kennedy pushed for Breyer, and Republican Orrin Hatch told Clinton that Breyer would be acceptable (Lewis, “As”). On May 13, Clinton announced the nomination of Breyer in a televised press conference. Clinton was “eager to make the evening news,” according to Jeffrey Toobin, and did not wait for Breyer to arrive at the White House (Toobin 79). Clinton might have been eager to make the announcement as soon as possible considering the criticism he received during the Ginsburg nomination. This time, the nomination process had taken a little more than a month, and had been much less messy than the process that led up to Ginsburg’s nomination.

Breyer had a distinguished background. He was born in San Francisco in 1938, and after graduating from Harvard he served as a Watergate prosecutor, worked on

deregulating the airline industry, and was chief counsel to the Senate Judiciary Committee (Margolick, “Scholarly”). The latter would earn him much praise in his hearings. As with Ginsburg, some liberals would worry about his ideological conviction. A colleague from Harvard stated that “Breyer’s basic social instincts are conservative” (ibid.). Republican Bob Dole was satisfied and stated that “[n]obody’s going to lay a glove on him,” while Democratic Senator Howard Metzenbaum was worried and said that Breyer had “consistently favored corporate interests and a weakening of Government regulations” (Lewis, “In”). Law professor Alan Dershowitz imagined Breyer as a leader on the Court: “He’s smarter than Scalia, but not nearly as bombastic” (Margolick).

In the hearings, Senator Hatch praised Breyer’s qualifications and even stated that he took “considerable comfort from Judge Breyer’s overall record that he will resist the siren calls of judicial activism” (Breyer hearings, 10). Senator Kennedy used his testimony to ensure that the way he understood Breyer’s decisions, he would indeed uphold the rights to privacy and rule in favor of the underprivileged and the environment (Ibid. 12). Breyer, as Ginsburg, was very eager to explain himself and would often give long answers. The praise continued, and although questions like abortion and the death penalty were touched upon by Republicans, Breyer was never pressed for a specific answer. Republican Senator Strom Thurmond, who was 92 years old, was commended by his colleagues for having attended the hearings of 25% of all Supreme Court nominees in the history of the Court. Thurmond did not ask any follow-up of Breyer after a soft question about *Roe v. Wade* (Ibid. 36). He also praised Breyer for his service on the committee. Democratic Senator Carolyn Moseley-Braun asked for Breyer’s specific views on where the right to privacy originated. Breyer engaged in a short academic discussion of various amendments before dodging the core of the question by stating that since *Planned Parenthood v. Casey* reaffirmed *Roe* in 1992 he viewed *Roe* as “settled law” (Ibid. 236). Some criticism dealt with the fact that Breyer held a significant amount of stock, but he stated that he was willing to sell it when possible (Ibid 143).

Breyer soon found himself considered to be a part of the liberal wing of the Court, for many of the same reasons as Ginsburg. They proved to have similar philosophies, and neither was eager to be as activist as the liberals of the Warren Court. The fears over Breyer’s moderate reputation were generally unfounded as he, like Ginsburg, would vote

in favor of affirmative action and abortion rights. Breyer has been labeled a “one-case-at-the-time pragmatist,” and when he in a book explained how he had an “attitude for interpreting the Constitution” instead of a textual approach, conservatives attacked him for lack of consistency (Greenburg 182). But this approach might also have helped convince moderate justices like O’Connor and Kennedy to join him.

### **7.3 Conclusion**

If Clinton’s goal was to avoid controversy, he certainly succeeded. Much of Clinton’s presidency would be turbulent, but his Supreme Court appointments were successful from a Democratic point of view. Clinton had an ambivalent relationship with the media and early in his presidency he was highly skeptical of the coverage he received, as was demonstrated by his reaction to critical questions during the announcement of the Ginsburg nomination.

After Breyer’s confirmation the Republicans took back Congress. At that point, Clinton’s mission with the Supreme Court was done, and the conservative backlash would not be able to influence the Court further. The remaining justices were relatively young considering what has been common on the Court, and further retirements were not expected during Clinton’s term. It was not until 2005 that the next vacancy would occur.

Despite the fact that seven of the nine justices who served from 1994 to 2005 were appointed by Republicans, liberals viewed the Court as “safe” regarding the abortion issue. The outgoing justices, White and Blackmun, arguably one conservative and one liberal, were replaced by two relatively moderate although liberal-leaning justices. Social conservatives realized that the fight to further influence the direction of the Court was lost for now, since they had not been able to overturn *Roe v. Wade* with a Court dominated by Republican appointees since the Nixon years.

Both Ginsburg and Breyer are Jewish, and although questions of race and religion have often been discussed for earlier nominations, their ethnicity was not used to promote them in statements by Clinton. The last Jewish justice, Abe Fortas, had left the Court in 1969 but there had been little pressure on Clinton to nominate any specific minority other than a woman.

The Court upheld *Roe v. Wade* in *Planned Parenthood v. Casey* in 1992. It was viewed as a major victory by liberals, and Kennedy, Souter, and O'Connor voted to uphold the right to abortion. But during Clinton's presidency, the Court reversed some of the federal regulation that had been permitted since the New Deal. In decisions like *New York v. United States* (1992), *United States v. Lopez* (1995), *Prinz v. United States* (1996), and *United States v. Morrison et al.* (2000), the Court struck down various laws that were based on the right of Congress to legislate matters that dealt with commerce between states. These decisions affected matters from nuclear waste disposal to gun control and affirmative action. Justices Kennedy and O'Connor provided support for several of these decisions (Moen 76). Although the social conservatives had little reason to be happy, those who were in favor of states' rights and less federal intervention had achieved substantial victories.

After their 1994 victories in Congress, Republicans took the fight to the lower courts. Since they controlled the committees, many of Clinton's nominees were stalled infinitely. Unable to do something about the Supreme Court, Republicans would continue Reagan's agenda to make the lower federal courts as conservative as possible. Clinton was pressed hard with Democrats in the minority and chose to avoid confrontation when Republicans raised protests against his nominees. Republicans campaigned against several nominees, singling out opinions they had written that they accused of being "activist." Clinton, who consulted Republican Senator Orrin Hatch on most nominations, even withdrew and avoided nominating several qualified candidates to avoid showdowns in the Senate (Schwartz 144). Senator Paul Simon criticized his own president, stating that "we're giving up fights too easily" (Ibid. 145). After Clinton's reelection in 1997, Republicans resorted to letting nominations be delayed infinitely. For many nominations, no Judiciary Committee vote took place, and Senate Majority Leader, Republican Trent Lott, never scheduled any vote in the Senate (Ibid. 156). The federal judiciary had a record backlog of cases, and even Chief Justice Rehnquist stated that the "growing number of vacancies was slowing the administration of justice and placing a burden on the courts" (Lewis, "Clinton").

In Clinton's last two years in the White House, Republicans blocked 56% of Clinton's circuit court nominees, anticipating a possible Republican victory in the 2000

presidential election. The numbers of blocked nominees for all federal judgeships were significantly higher during the Clinton years where Republicans were in the majority compared to the Reagan years where Democrats were in the majority (Schwartz 185). Under the next president Republicans would be just as firmly committed to the fight over the judiciary, but Democrats would resist fiercely.

## 8. George W. Bush

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George W. Bush was able to appoint two justices who shared his social conservative views: John Roberts and Samuel Alito. They replaced Chief Justice Rehnquist and Justice O'Connor respectively. Roberts became Chief Justice and is young enough that his legacy will probably put a mark on the Court. Both of these appointments came during Bush's second term and were largely uncontroversial, but between them the nomination of Harriet Miers failed. Bush's two terms were in large part characterized by the terrorist attacks on New York City and Washington and the Afghanistan and Iraq wars. But there was also a battle over the federal judiciary as Bush's appointments to the lower federal courts caused great controversy. But maybe even more importantly, his appointment to the presidency was ensured by a decision in the Supreme Court.

The 2000 presidential election was not decided on election night. Despite the fact that Vice-President Al Gore had a lead in the popular vote, the outcome depended on who won a majority of votes in Florida. All of Florida's votes in the Electoral College, which elects the president, would go to the winner of the state. Florida's Secretary of State, Republican Katherine Harris, ordered a mandated recount of the votes to stop seven days after the election. The Florida Supreme Court ruled against her and ordered the recounts to continue (Toobin 148). Several lawsuits were filed back and forth between the parties, and the Supreme Court heard two cases, one on December 4, in which it held that the Florida Supreme Court could not let the recount continue until it justified the standards for how to do so, and another one on December 11 where it finally stopped another manual recount because, in justice Kennedy's words, the standards for how ballots were considered in the recount did not provide "equal protection" for voters (Toobin 172). In the second case, the justices split along predictable ideological lines, with Rehnquist, Scalia, Thomas, Kennedy, and O'Connor in the majority, and Stevens, Breyer, Ginsburg, and Souter dissenting. Justice Stevens stated in his dissent:

Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law. (*Bush v. Gore*)



Later, both Kennedy and O'Connor admitted that the rushed majority opinion was not the "best effort" of the Court, although they are still committed to the result (Greenburg 175). Although both the decisions and the votes to take the cases were split among the perceived ideological lines on the Court, Justice Thomas and Chief Justice Rehnquist denied that there was an ideological divide (O'Brien 86). The battle over the election had been heated and unprecedented in the history of the United States, and a similarly heated battle would continue over judicial appointments in Bush's first term.

While President Clinton had not been fully committed to pushing through his nominees for federal judgeships in the face of opposition, Bush was in a more favorable position as Republicans controlled the Senate from 2003 to 2007. They went on the offensive from the start. The very conservative John Ashcroft was appointed to Attorney General with an unprecedented 42 votes against him in the Senate, and the White House announced that the American Bar Association would no longer be given the names of possible nominees for screening despite the long standing tradition of doing so (Schwartz 197).

Faced with conservative nominees from Bush, the Democrats responded by denying the most controversial nominations a vote. To achieve this they effectively used a filibuster in which the Republicans would have to gather 60 votes in order to close the debate and vote on the nomination. While the Republicans under Clinton did not schedule hearings and votes on nominees, Democrats were now in the minority and did not control the committees. They had to use the filibuster to stall the president's nominees. Republican leaders in turn threatened to end the practice of the filibuster, which they claimed they could do with a simple majority vote in the Senate. This was called the "nuclear option" and was a much debated topic in 2004 and 2005. Scholars and historians debated whether it would be legal or not. The filibuster was saved in 2005 by the "Gang of 14," a group of senators from both parties who agreed to a document who would preserve the filibuster by voting together if necessary but at the same time reducing the usage of it on judicial appointments (Hulse). This allowed many of Bush's nominees to take their seats.

On October 25, 2004, the Court announced that Chief Justice Rehnquist had been hospitalized for treatment of thyroid cancer. Speculation about the seriousness of the

disease started immediately as the presidential election was only two weeks away (Greenhouse, “Rehnquist Treated”). The Court’s statement did not provide much detail, and Rehnquist was away from the Court until March 2005 while working on opinions at home. Justice Stevens, the senior Associate Justice, led the oral arguments and conferences (Greenburg 9). At the time Justice O’Connor was considering leaving the Court because her husband had been diagnosed with Alzheimer’s disease. Among the justices there has traditionally been an understanding that two simultaneous vacancies should be avoided, as the public and the Senate should be able to give each nominee a thorough review. This was what O’Connor had in mind when she visited her old friend Rehnquist in June 2005. Rehnquist surprisingly said that he wanted to stay another year. O’Connor was then faced with two choices. One was leaving right away, since it was the end of the term and the Senate would need the time before the next term to consider a nominee. The other was staying on for another two years. She had been prepared to stay one more year, as she and most others assumed the visibly weakened Rehnquist would retire (Greenburg 20). But she was not left with much choice after hearing Rehnquist’s response.

### **8.1 John G. Roberts (2005) – Chief Justice**

Most Supreme Court observers had assumed that Rehnquist would retire at the end of the term, and there was widespread surprise when O’Connor resigned in a letter to President Bush on July 1, 2005. Bush had won reelection the year before with a reinvigorated social conservative movement behind him. The Court had not changed in composition since 1994, a new record in the time the Court had had nine members. Conservatives were also watching the 85-year old Stevens and the cancer-stricken Rehnquist. The possibility of shaping the Court for decades to come was very real. With the surprise retirement of a centrist like O’Connor, the balance of the Court was suddenly in play in a way it would not have been had Rehnquist retired. Democrats’ options remained few as they were in the minority in the Senate, and the “gang of 14” had contributed to a higher threshold for filibustering judicial nominations. But Republicans were also surprised by O’Connor’s retirement. C. Boyden Gray, the former counsel for the first President Bush

during his Supreme Court nominations, stated in an interview with the New York Times: “I’m not sure we are as prepared for an O’Connor vacancy” (Stevenson, “O’Connor”). Replacing a moderate female justice would be different than replacing the ailing Rehnquist.

Conservatives were generally not worried about Bush’s level of commitment to appointing conservative judges. But in the days following O’Connor’s retirement there were concerted efforts to discourage Bush from nominating one man, his trusted advisor through many years and now Attorney General, Alberto Gonzales. Gonzales had served on the Texas Supreme Court before Bush brought him along to Washington as a White House counsel. Among conservatives he was viewed with suspicion since his record was not substantial enough to ensure that he was committed to their causes. Activists Paul Weyrich and Phyllis Schlafly, along with columnist Robert Novak, let it be known immediately after O’Connor’s retirement that Gonzales should not be considered (Toobin 267). Justice Souter was used as an example of the risk of nominating someone with an ambiguous conservative record.

Bush was prepared for a vacancy and already in May 2005 the White House team had interviewed several possible candidates (Ibid. 273). Among the people in the team were Vice-President Dick Cheney, Attorney General Gonzales, White House Chief of Staff Andrew Card, strategist Karl Rove, and White House Counsel Harriet Miers (Stolberg, “Court”). Compared to earlier presidents, Bush’s interviewing team consisted of more people and higher level people.

Several candidates were interviewed. J. Michael Luttig, a judge on the Fourth Circuit Court who had worked at the Justice Department and was part of the team that had screened nominees for the older President Bush, was considered. He fit the profile, as he was reliably conservative, only 50 years old, and had previously been a clerk for Justice Scalia. J. Harvie Wilkinson, also on the Fourth Circuit Court, was considered well fit for the role as chief, but he was 60 years old and would probably have a shorter tenure (Ibid.). Samuel Alito, 55, had served on the Third Circuit Court since 1990. He was favored by William Kelley, Harriet Miers’ deputy. Kelley had not been able to find any opinions by Alito that he disagreed with. Miers also liked Alito’s “quiet confidence” and the fact that he had seemed less interested in positioning himself for the job than Luttig

(Greenburg 294). Edith Brown Clement, a judge on the Fifth Circuit Court, was also interviewed but was not considered a front-runner. She was not well known for anything except her conservative views, and the team assumed she was on the list because Bush wanted a woman there (Ibid.). Miguel Estrada, a Hispanic who had been nominated for the D.C. Circuit Court but blocked by Democrats, refused to go through the confirmation process again (Ibid. 198).

Of the people on Bush's list John Roberts may have had the most impressive reputation. He was well liked by both liberals and conservatives and was considered one of the best lawyers to argue before the Supreme Court. He had clerked for Rehnquist and had worked in the Reagan and Bush administrations, but when he was nominated for the D.C. Circuit Court at the end of Bush's last term in 1992, the Democrats never allowed a vote on the nomination. He was re-nominated in 2001 by the younger Bush, but the Democrats stalled the nomination until 2003 when he finally received the seat (Schwartz 102, 245). At 50, he was in a good position to serve for a long time should he be chosen for the Supreme Court.

Roberts did not do well in his interview. The team was constrained by the fact that they could not ask about specific cases, and Robert's generalized answers were not as reassuring as they had hoped for (Greenburg 193). In addition, Harriet Miers, who had come with Bush from Texas to Washington, was not convinced by the Washington insiders who told her to trust Roberts (Toobin 275). Bush's choices had boiled down to Robert and Luttig. Miers favored Luttig, but was willing to listen to several of the insiders who approved of Roberts, including Ed Meese and C. Boyden Gray (Ibid. 276). After O'Connor's resignation, on July 15, 2005, Bush interviewed Roberts himself. The timing was lucky for Roberts, as the D.C. Circuit Court on the same day approved of Bush's use of military tribunals for the prisoners at Guantanamo Bay, with Roberts in the majority. Cheney and Miers were convinced (Ibid. 277).

Robert's nomination was announced on a televised prime-time news conference on July 19, 2005. He was praised as having "enormous skills" and for being fair minded by both liberal and conservative lawyers, and the New York Times stated that he "was clearly among the less provocative picks Mr. Bush could have made" (Purdum, "In"). The day after, Republicans in the Gang of 14 said that a filibuster would not be justified,

and the nomination seemed to be safe (Toobin 278). O'Connor was very excited about Roberts, whom she really liked, but she was disappointed by the fact that Bush did not nominate a woman (Ibid. 213). Roberts began preparing for the hearings that were scheduled to start on September 6. Liberal and conservative activists began their campaigns and dug through Robert's past in search of hints regarding his views. Documents from his time at the Justice Department in the early 1980s were released by the National Archives. He had argued for several conservative causes, opposing the expansion of the Voting Rights Act, argued for judicial restraint, and opposed affirmative action (Stolberg, "Court"). These statements failed to make any significant impact, possibly because it was argued that he only had promoted the official views of the administration. Both in the media and in private meetings with senators Roberts fared well and no greater scandals surfaced (Greenburg 238).

On September 3, 2005, Chief Justice Rehnquist died in his home in Virginia. Although the speculation about his health had been ongoing since the announcement of his cancer, the news media had largely dropped the subject when he had not resigned at the end of the previous term. The news came just as the Hurricane Katrina unfolded, a catastrophe which turned out to cost more lives than any natural disaster in modern American history.

Bush had to act quickly in case that he wanted to nominate Robert for Chief Justice, since the hearings were to start on September 6. There had been an ongoing conservative campaign for Justice Scalia as Chief Justice, as he was perceived as a dedicated fighter for judicial restraint against liberal activists (Toobin 280). But Scalia was 69 years old, and there was the potential of a filibuster or even a bigger fight over abolishing the filibuster in the Senate. Thomas was another justice that Bush admired but he was considered even more controversial. The remaining justices were not committed enough to be considered, and conservatives also would have disapproved of elevating any of them to Chief. Outside the Court, several of the candidates considered for O'Connor's seat were vetted for Chief. But Roberts was chosen over the more controversial Luttig and the older Wilkinson. Roberts had made a very good case for himself since his nomination for Associate Justice and he was presumed to be confirmed for that seat (Greenburg 242). In a press conference on September 5, Bush nominated Roberts for

Chief Justice and referred to how well the Senate and the American people had received Roberts (Stevenson, “President”).

The first hearing for a Supreme Court Justice in eleven years began on September 12. The Democrats focused on what they viewed as the high stakes. Senator Joe Biden framed the question that captured the minds of many senators:

For 70 years, there's been a consensus, Judge, on our Supreme Court on these issues of privacy and protecting the powerless. And this consensus has been fully, fully embraced, in my view, by the American people. But there are those who strongly disagree with the consensus, as is their right. And they seek to unravel the consensus.... And quite frankly, Judge, we need to know on which side of that divide you stand, for whoever replaces Justice Rehnquist, as well as Justice O'Connor, will play a pivotal role in this debate and for tens of millions of the American people, this is no academic exercise. For the position you will take in this debate will affect their lives in very real and personal ways for at least, God willing, the next three decades. And there is nothing they can do about it after this moment. (Roberts hearings)

Roberts had prepared well for the hearings. He was not willing to go into specifics. In line with the conservative skepticism to judicial activism, but in neutral terms, he characterized his own role as that of an umpire: “Umpires don't make the rules; they apply them” (ibid.). He went on to ensure the senators about his lack of agenda:

I have no platform.... I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. (Ibid.)

His evasiveness became the subject of criticism and even cartoons in newspapers. Yet Roberts impressed senators with his detailed knowledge of old cases, and he even cited the Federalist Papers from memory. Asked by Senator Specter about *Roe v. Wade*, he was uncommitted, stating that it was “settled as a precedent of the court” but at the same time made it clear that decisions are sometimes reversed (Toobin 281). Democratic Senator Edward Kennedy announced that he was not convinced and stated: “I hope I am proved (sic) wrong about John Roberts.” Democratic Senator Charles Schumer of New York made it clear that the real battle was ahead: “The curtain is about to rise on the nomination of a replacement for Justice Sandra Day O'Connor.... If ever there was a time

that cried out for consensus, the time is now” (Stout, “Roberts”). The Judiciary Committee sent him to the Senate with a vote of 13-5 on September 22. Several senators went on the record with how they would vote, and it appeared that Roberts had a safe margin and the support of many Democrats. Senator Hillary Clinton, although opposing Roberts and possibly positioning herself for the 2008 election, acknowledged Robert’s qualifications: “My desire to maintain the already fragile Supreme Court majority for civil rights, voting rights and women's rights outweighs the respect I have for Judge Roberts's intellect, character and legal skills” (Stolberg, “Panel”).

Roberts was confirmed as the seventeenth Chief Justice of the United States on September 29 by a 78-22 vote, a bigger margin than his predecessor. Later the same day he was sworn in by the Senior Justice, John Paul Stevens.

## **8.2 Harriet Miers (2005)**

On October 3 Bush nominated White House counsel Harriet Miers to replace Justice O’Connor. The choice surprised both conservatives and liberals. The only hint Bush had dropped was a statement the week before where he had said that “diversity is one of the strengths of the country” (Williams, “Bush”). O’Connor and the First Lady had also stated that they preferred a woman (Toobin 282). Compared to the relatively easy time Roberts had had after his nomination, Miers would fare a lot worse, and the contrast between how the two nominations were handled was quite remarkable.

After O’Connor retired, White House Chief of Staff Andrew Card had asked Miers if she wanted to be considered. She had declined and was put in charge of administering the search for a nominee (Toobin 284). She was probably considered mostly because of her gender, as the list of women and minority candidates was relatively short. But people on Bush’s team knew her as a hard-working and dedicated woman, and thought those qualities could serve her well on the Court. In addition they trusted her conservative credentials despite her lack of judicial experience. But since she took herself out of consideration, the search for a well qualified candidate who was not a white male continued through the Roberts nomination and his confirmation.

There were few women on Bush's list, and most of them would have trouble getting confirmed. Edith Clement, who had been considered before Rehnquist died, was not as respected as Roberts. Janice Rogers Brown and Edith Jones were both appealing but had been filibustered by the Democrats when nominated for lower courts. There were just not many conservative women candidates who could pass as qualified (Toobin 285). As for the Hispanic alternatives, Estrada still declined, and Bush had realized that Gonzales would not convince social conservatives. Andrew Card realized the limited options and had decided to research Miers. He asked her deputy William Kelley to do a background search of her, similar to what was done regarding other candidates. As is pointed out in Greenburg's book, the quality of secret advice from a subordinate in the position of reviewing his boss is questionable (Greenburg 249). During a dinner at the White House on September 21 Democrat and Senate Minority Leader Harry Reid had suggested Miers to Bush, saying that "[i]f you nominate Harriet Miers, you'll start with fifty-six votes." Reid had worked with Miers preparing for Robert's nomination and had come to respect her (Greenburg 256). At the time Republicans held 55 seats in the Senate. Leonard Leo of the Federalist Society was asked about Miers, but he did not consider her candidacy very likely, so he did not object other than questioning the lack of a judicial record (Toobin 288). But the Bush team already had an answer for that. Bush knew her very well and both he and the rest of the vetting team were sure of her allegiance to conservatism. In their view, she would not be another Souter.

Miers had lived her whole life in Texas before Bush brought her to Washington. She had been partner at a major law firm and president of the State Bar, the first woman who had served in both positions. Bush had also appointed her to the chair of the Texas Lottery Commission while he was governor (Williams, "Bush"). She had never been a judge, which was unusual for recent nominees. Clinton had wanted to appoint a non-judge in order to get new perspectives on the Court but had not been able to. Bush had now made an unusual choice, as the candidate was both a woman and had no experience from the bench. Bush and Miers had another thing in common: They were both born-again Christians. In her 30s, Miers, who was raised a Catholic, had had a spiritual awakening and joined an evangelical church in Texas (Wyatt, "In"). Her trusted relationship with the president and their shared experiences of joining Evangelical



movement late in their lives may have led Bush towards choosing her. Gonzales was skeptical and had been warned by associates in the Justice Department that her nomination would not be received well by conservatives. He visited Bush just before the nomination to raise the concerns. But Bush felt assured that conservatives would be more positive toward Miers than they had been toward the prospect of a Gonzales nomination, even though Gonzales argued they would not (Greenburg 267).

In his nomination speech, Bush told conservatives to trust him on Miers' views: "I've known Harriet for more than a decade. I know her heart, I know her character" (Toobin 289). The assurances failed to convince the most vocal activists, who were the ones Bush had hoped to appease. The lack of supporters for Miers was very evident in the first few days. Only a few spoke out in favor of her. However, Republican Senator Orrin Hatch on the Judiciary Committee was convinced: "A lot of my fellow conservatives are concerned, but they don't know her as I do" (Stout, "Bush"). Democratic Senator Harry Reid praised her, but did not officially endorse her (Williams, "Bush"). Two judges who had known her were put forward by the Bush team as witnesses regarding her character, and they vouched for her in the media (Toobin 291). But what they had in common was the fact that they knew her and had worked with her. To most observers she was unknown, and conservative skepticism would only rise. Conservative activists like Rush Limbaugh, Laura Ingraham, David Frum, and Bill Kristol all criticized the choice during the first days after her nomination (Greenburg 271). The common theme was that she might be conservative, but they would only settle for someone who was reliably conservative and whose views were well known to replace the swing vote of O'Connor. A Souter or a Kennedy would not be acceptable this time.

The nomination hearings were scheduled to start on November 7, which gave Miers less time to prepare than Roberts had had. She was also doing badly in her preparations, since she was not used to discussing constitutional law and unfamiliar with being questioned. The idea of withdrawing her nomination was discussed, but Andrew Card insisted that she would improve (Greenburg 279). The confusion continued. James Dobson, the powerful head of the evangelical group Focus on the Family, said that he had knowledge that made him sure that Miers would be a good Justice (Kirkpatrick, "Endorsement"). Senator Arlen Specter, a moderate pro-choice Republican and leader of

the Judiciary Committee, had gotten the impression from Miers that she indeed would let *Roe v. Wade* stand, and considered calling Dobson to testify (Ibid.) (Greenburg 280). On October 19, Specter, in partnership with the ranking Democratic member on the Judiciary Committee, submitted a questionnaire to Miers and the White House where they asked for clarifications of her views and her role in the Bush White House. They found her response unsatisfying and resubmitted the questions stating in unusually strong language that her responses were “inadequate,” “insufficient,” and “insulting” (Kirkpatrick, “Court”). At the opposite side of the political spectrum, Republican Senators Lindsey Graham and Sam Brownback wrote a request for more information from the White House, but with a different goal.

The exit strategy was proposed by conservative columnist Charles Krauthammer in a column on October 21 in the Washington Post. He suggested that the requests for information from the White House jeopardized executive privilege and that the president could not release the information that was requested (Krauthammer, “The”). Card and Bush understood the situation and Card, who had been a strong supporter of Miers, told her that it would not work (Greenburg 284). She resigned in a letter written to Bush on October 27, stating the reasons Krauthammer suggested. She also included the following statement: “I share your commitment to appointing judges with a conservative judicial philosophy,” possibly as a message to her critics (Miers).

Compared to the Roberts nomination, Miers’ nomination had been a disaster. Bush had not anticipated the conservative backlash or their lack of confidence in his assurances. The lack of qualified and non-controversial minority candidates had left him with little choice but to nominate Miers. The demand for a minority or woman candidate had been strong in both liberal and conservative camps, and Bush was probably wise to pursue it. But when left with no other alternatives than Miers, he had underestimated the force of the social conservative movement that had helped him get re-elected. They needed to be assured that she would not be another Souter or Kennedy, or even an O’Connor. Republican presidents had used up their mistakes quota, and Bush would have to deliver. Since O’Connor was confirmed in 1981 the rules had changed. The conservative movement was now able to set the premises.

### 8.3 Samuel Alito (2005)

On October 31, President Bush nominated Alito for O'Connor's seat. Bush stated that Alito "has more prior judicial experience than any Supreme Court nominee in more than 70 years" (Bumiller, "Bush"). Alito's background made a stark contrast to Miers. His nomination was announced only four days after the withdrawal of Harriet Miers. Bush had spent the weekend at Camp David, following the indictment of Lewis "Scooter" Libby, Cheney's Chief of Staff over the CIA leak investigation where the name of an agent had been made public. Miers was back at her job researching nominees, and this time she had her way. There was little debate over the candidates, as only Luttig and Alito were considered seriously. Both Bush and Miers liked Alito more (Toobin 298). Alito also had the advantage of being potentially less controversial than Luttig, and Bush did not need any more controversy even though this time the critics were likely to be the Democrats. The failed Miers nomination had given Bush the opportunity to appoint a white conservative male against fewer protests than he would probably have received had Alito been his first choice.

Alito, who came from and still lived in New Jersey, had served on the Third Circuit Court since 1990. His resume was impressive: He had attended Princeton and Yale and served as assistant to the solicitor general under Reagan, before he took his seat on the circuit court. Most troubling to liberals, Alito had dissented when the abortion case of *Planned Parenthood v. Casey* had come before his court in 1991. He had not wanted to strike down the spousal notification portion of the law (Bumiller, "Bush"). The Supreme Court later struck it down, and O'Connor's opinion criticized the notification as "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry" (*Planned Parenthood v. Casey*). One may assume that O'Connor was more skeptical of Alito's nomination than of Robert's.

The reactions were fairly predictable: Democrats raised questions about his views, while Republicans and conservative groups praised him. Senator Patrick Leahy from Vermont, who was the ranking Democrat on the Judiciary Committee, called the nomination a "needlessly provocative nomination" and accused Bush of trying to cater to the conservatives that had brought Miers down (Bumiller, "Bush"). The hearings were

scheduled to begin on January 9, 2006, more than two months after the announcement, which gave both sides time to prepare. In national news, however, the CIA leak case and the aftermath after hurricane Katrina still dominated. In December tensions rose as a document from Alito's time in the Reagan administration was released. Alito had argued for several strategies to weaken *Roe v. Wade*. Conservatives came to his defense saying that he had been arguing on behalf of the government. The Alliance for Justice, a liberal advocacy group, stated that the problems with Alito ranged from civil rights to police searches, and that abortion was only one of many issues (Hulse, "After"). Democrats hinted at the possible use of the filibuster, although they knew it would be difficult. Arlen Specter, the moderate Republican from Pennsylvania, said there was "no basis" for a filibuster (ibid.).

Senator Specter began the hearings by addressing the abortion question in his statement to the Committee. He stated: "This hearing will give Judge Alito the public forum to address the issue, as he has with senators in private meetings, that his personal views and prior advocacy will not determine his judicial decision, but instead, he will weigh factors such as stare decisis" (Senate Confirmation Hearings - Day 1, 2). Specter, who wished to avoid a filibuster, wanted Alito to reassure senators that he would respect settled law. Again the underlying theme seemed to be abortion rights, which Specter supported. Following Specter, Senator Leahy's statement noted concerns for Alito's views on executive powers, civil rights, and privacy. He called the document Alito had written for the Reagan administration "disturbing" (Ibid. 4).

Senator Kennedy was also critical and asked Alito about his membership in a conservative organization at Princeton called "Concerned Alumni of Princeton." The organization was very conservative, and in Kennedy's words its views were "anti-woman, anti-black, anti-disability, anti-gay" (Senate Confirmation Hearings: Day 4, 12). Alito explained that he was not much involved with the organization and had only joined because it had supported the right of the military to recruit on campus (Toobin 316). Kennedy also criticized Alito's views on executive powers. He closed by stating: "[I]n case after case, we see legal contortions and inconsistent reasoning to bend over backward to help the powerful. He may cite instances to think that he helped the little guy, but the records clear that the average person has a hard time getting a fair shake in

Judge Alito's courtroom" (Senate Confirmation Hearings: Day 4, 12). The New York Times, in an editorial called "Judge Alito's Radical Views," opposed his confirmation stating: "If the far right takes over the Supreme Court, American law and life could change dramatically." The editorial went on to contrast his views to the pragmatic centrist views of Justice O'Connor. On January 31, 2006 the Senate voted to confirm Alito by 58-42, the closest margin since the confirmation of Clarence Thomas. Only four Democrats voted for Alito (Stout, "Alito").

Compared to Miers, Alito had completely different qualifications. He was a white male and had served as a judge for a long time. His opinions were conservative and conservatives immediately approved of him. The failed Miers nomination probably made his confirmation easier. There had been a very strong effort both from Bush, the media, Democrats, and several commentators to appoint a woman or a member of a minority group. But the number of such candidates with enough conservative credentials was limited. After Miers the criticism against Alito was mostly about his views, not his ethnicity or gender. In some ways, the situation was comparable to Anthony Kennedy's nomination. Kennedy followed two failed candidates, and there was no appetite for a fight anymore. However, this time Alito followed a candidate whose conservative credentials were called into questions, not the other way around. Kennedy had been confirmed because he was not as unapologetically conservative as Bork. In 2005, with a Republican majority in the Senate, Alito was the "safe" candidate. And this time the conservative movement was satisfied.

#### **8.4 Conclusion**

At the time of writing, Roberts and Alito have served for three years and both have generally lived up to conservatives' expectations. Bush can probably be content that his legacy on the Supreme Court is two reliably conservative votes. As with Clinton's nominees, none of them has turned out to drift away from the block they were expected to belong to. Had Bush's failed nominee, Harriet Miers, been confirmed, she would probably have been watched more carefully for any signs of not being conservative. The reason that Miers was considered in the first place was the strong public pressure to

nominate a woman or a member of a racial minority. With few qualified candidates that were women or minorities, Bush had ended up with Miers. The failure of the Miers nomination dampened the pressure to name someone from those groups. This allowed Bush to consider white males, which was the pool in which there were the most candidates with unambiguous conservative records.

The conservative movement, which generally was very approving of Bush, would not accept his personal assurances. They needed to see proof that they would not get another justice that would drift toward the center or left wing. The Bush administration lost some major cases, proving that a Court with seven justices appointed by Republicans would not rubberstamp Bush's controversial usage of executive powers. *Hamdi v. Rumsfeld* and *Boumediene v. Bush* were decided against the administration and in favor of the rights of the detainees at Guantanamo to get their cases heard before federal courts. At the same time, the Rehnquist Court had been successful in rolling back some of the New Deal precedents that had allowed for Congress and the federal government to regulate matters of commerce between states. Conservatives could be relatively satisfied about their agenda to diminish federal intervention in matters like affirmative action, gun control, and environmental regulation by giving more power to the states (Moen 76). The new appointees were likely to pursue this just as strongly.

Despite the humiliation of the Miers nomination Bush ended with two solid conservative appointments. Chief Justice Roberts, praised for his intellect and skill by liberals and conservatives alike, will probably be the symbol of the judicial branch for many years to come. Justice Alito, replacing the pragmatic O'Connor, has further turned the Court toward the right. The failed Miers nomination turned out to make it easier for Bush to nominate a "safe" conservative candidate.

## 9. Summary and Conclusion

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The purpose of this concluding section is to use the trends identified in the discussion of individual nominations to draw general conclusions considering the various factors which decide how a nominee is chosen and whether the nomination succeeds or fails. Some trends are easy to see, while others are harder to identify since there are only twenty nominations. The categories used are not mutually exclusive and several of them overlap to some extent. The last two categories, dealing with qualifications and controversies, will try to establish to which extent those two factors can explain how a nomination turns out. As observed in the introduction, several presidents have not been afraid of nominating candidates with weak qualifications or a clear record of ideological commitment. Though there are well-known examples of the failures of such candidates, it is useful to investigate to what extent they succeed in this period and why they are nominated.

### 9.1 Timing

Nine of the twenty nominations were announced in the period from May to July, after the Court had heard its last arguments of the term and in time before its next term began in October. When justices retire in good health and not for reasons that have made their departure immediately required, they usually choose to retire at the end of a term. They also try to avoid more than one retirement per term, to further ease the work of the president and the Senate in replacing them. However, roughly half of the nominations in this thesis were announced during the term. There appears to be two main reasons for this. Firstly, there was a relatively high rate of failed nominations. In the period covered in this thesis five of twenty nominations failed and nominations following them were usually announced in the fall. Secondly, the fact that many justices serve until they are at an advanced age makes sudden retirements for health reasons or death more likely.

When justices died or resigned abruptly, as in the cases of Fortas, Black, Harlan, Douglas, and Rehnquist, nominees to replace them were announced during the Court's term or shortly before it began. In the cases of nominees following failed candidates –

like Carswell, Blackmun, D. Ginsburg, Kennedy, and Alito – nominations also occurred during the term.

Nominations at the end of a president's term are at risk of being delayed by a partisan Senate. When Chief Justice Earl Warren retired and President Johnson nominated Abe Fortas to replace him, Republicans successfully stalled the nomination until after the presidential election so President Nixon could appoint his replacement. There were similar fears regarding Democratic action during Reagan's unsuccessful nominations of Bork and D. Ginsburg.

The fact that the Court's work is severely hindered by the absence of one or more justices does not seem to accelerate the process or favor nominees' chances. In two of the three cases where the first nominee failed, the second nominee also failed. These cases were Haynsworth and Carswell, and Bork and D. Ginsburg, respectively. In the other case of a failed nomination, that of Harriett Miers, the next nominee was confirmed. The data sample is very small, but it does suggest that senators value other factors more than the Court's immediate practical concerns when evaluating a nominee.

## **9.2 Diversity on the Court**

When replacing a justice of a certain ideology, religious affiliation, or ethnicity there has often been an expectation that diversity should be maintained. Initially there was an emphasis on geographic diversity, but in the twentieth century the mentioned characteristics became a matter of concern.

With the retirements of Justice Thurgood Marshall, the first African-American on the Court, and Justice O'Connor, the first woman on the Court, presidents felt obliged to nominate similar candidates. Both George H. W. Bush and George W. Bush suffered from low approval ratings at the time of the nominations. The elder Bush chose Clarence Thomas, hoping that his racial affiliation would provide enough support to get him confirmed despite his well-known and very conservative views. George W. Bush chose Harriet Miers, hoping that she would be confirmed because of her gender and the widely expressed sentiment that there should be another woman on the Court. Both presidents got into trouble for their choices: Thomas was confirmed by a razor-thin margin, and



Miers had to withdraw because her qualifications were seriously questioned. Yet at the same time, both presidents started out with a difficult situation since there were few candidates that fit the diversity criteria and had relevant qualifications and conservative views. There were plenty of well-qualified white males to choose among, but such a choice might have reflected badly on the presidents.

The pressure on presidents to ensure a balance on the Court varies with the circumstances. When the Miers nomination failed, both the president and the public were more focused on getting the seat filled than nominating another woman. When Abe Fortas had to resign from the Court because of media scrutiny of his financial dealings, there was little pressure on Nixon to maintain a “Jewish seat.” Some expectations do not relate directly to the outgoing justice but to the balance of the Court. Nixon considered women for his appointments, and the expectations continued until Reagan announced that he would appoint one. When Reagan nominated Antonin Scalia, a point was made that he was Italian-American and a Catholic. When Bush nominated Samuel Alito, there were already four Catholics on the Court, and his Italian-American heritage received much less attention than Scalia’s.

There are at the time of writing expectations of President Obama to name another non-white justice. Most frequently suggested is a Hispanic candidate since Hispanics are a significant minority group with no representation on the current Court. There is also a strong pressure to nominate another woman as there is currently only one on the Court. This will influence the president’s options to some degree and make it harder for him not to fulfill at least one of those criteria. The situation is not unusual, since all the presidents in the period covered in this thesis faced some expectations regarding gender and ethnicity.

### **9.3 Ideology**

The ideology of the outgoing justice influences the president’s options in choosing a replacement. If the retiring justice is perceived to share the president’s ideology, there is likely to be little controversy over the nomination of a well-qualified similar candidate. George W. Bush replaced Chief Justice Rehnquist with the well-qualified and

conservative John Roberts, and the confirmation was not considered to be in danger. Similarly, Bill Clinton replaced the liberal Harry Blackmun with Stephen Breyer, considered a moderate to liberal judge at the time.

The possibility for conflict increases significantly when a centrist justice retires, and the replacement is perceived to be liberal or conservative. Robert Bork's nomination was defeated because of concerns that his views would tilt the Court sharply towards the right since he would have replaced the moderate Lewis Powell. Similarly, Samuel Alito was criticized heavily by Democrats and liberals because he was considered far to the right of Justice O'Connor whom he replaced. Senators can get into trouble for stating that they vote with the ideological balance of the Court in mind; yet the voting patterns shows that it happens. Democrat and chairman of the Senate Judiciary Committee, Joseph Biden, who had earlier spoken of Bork as a well-qualified conservative, changed his position when Bork was nominated since he thought the Court would become too conservative. He stated that "while Judge Bork was 'a brilliant man,' that did not mean 'hat there should be six or seven or eight, or even nine Borks' on the Court" (Noble, "Biden"). Republicans criticized his change of mind and accused him of not doing his job fairly.

A nominee that is considered to be moderate, or not outright ideological, has a good chance of replacing a moderate justice. Sandra Day O'Connor was confirmed by a 99-0 vote when she replaced Potter Stewart, and Anthony Kennedy was confirmed by 97-0 when he eventually replaced Lewis Powell after the failed nominations of Robert Bork and Douglas Ginsburg. A moderate nominee, or in some cases more moderate than a previous failed nominee, also has a good chance of replacing a clearly liberal or conservative justice. Blackmun replaced Fortas, Stevens replaced Douglas, and Souter replaced Brennan, all with 89 or more votes.

When a nominee is presented who is perceived to hold a different ideological position than the retiring justice, there is usually some amount of conflict. Nixon failed to replace the liberal Fortas with conservatives Haynsworth and Carswell and eventually had to settle for Blackmun who was less ideological. Souter and Thomas, both nominated by George H. W. Bush, were criticized by liberals since they were replacing liberal icons Brennan and Marshall. In the nominations covered, there are only two examples of a

justice being confirmed that turn out to have an ideology widely at variance with the predecessor. Chief Justice Burger, a conservative, replaced the liberal Chief Justice Warren. Thomas, also a conservative, replaced the liberal icon Marshall. Arguably, the replacement of White with R. B. Ginsburg was also a shift of ideology, although not as dramatic as the other two since White was not easily categorized. Thomas was confirmed by a very thin margin, while Burger was nominated by Richard Nixon who had just taken office after Lyndon Johnson had failed to replace Warren with Fortas. At the time Democrats were demoralized and had little motivation to fight against Burger.

One irregularity in this pattern is the nomination of Harriet Miers. Little was known about her views, other than the fact that Bush tried to ensure his conservative base that he knew “her heart.” The Senate Minority Leader, Democrat Harry Reid, thought highly of her from working with her on judicial nominations and ensured Bush that he would support her. Several Democrats might also have been likely to vote for her confirmation since she was a woman, hoping that she might turn out to vote like O’Connor. She might also have been the best they could hope for from a Republican president. What stopped Miers’ nomination was a conservative uproar. Controlling the presidency and Congress, and having ensured a deal that lessened the risk of a filibuster, emboldened conservatives now demanded that O’Connor be replaced by a nominee who was fully committed to conservatism and would tilt the Court toward the right. This fact testifies to the growth and increased influence of the conservative movement since their stern warnings to Reagan regarding his nomination of O’Connor.

The liberal justices currently on the Court are either Republican appointees in the cases of Stevens and Souter, or were perceived to be moderate at the time of their appointment in the cases of R. B. Ginsburg and Breyer. They are not as consistently liberal as earlier liberals like Douglas, Marshall, and Brennan.

Despite conservatives’ mistrust of the ideology of potential nominees who are not outspoken conservatives, few of the justices have made ideological turnarounds compared to what was expressed at the Senate hearings. The cases of Blackmun, Stevens, Kennedy, and Souter are often cited to prove how justices may surprise the presidents after appointment. However, few of them revealed anything but a moderate attitude in their hearings and in their background. Both Blackmun and Kennedy were chosen for

their less conservative record than the two failed ideological nominees before each of them. Laurence Tribe discusses the “myth of the surprised president”, and argues that presidents had little reason to be surprised after choosing candidates with less known track records (92).

A future president replacing a justice with a candidate of a different ideological stance should expect it to be a tough battle. The polarization of American politics is not a new phenomenon, but during the last decades it has affected judicial nominations in an increasing degree. Jeffrey Toobin argues that “[t]oday, the fundamental divisions in American society are not regional or religious, but ideological.” He claims that conservatives “cared more about the Court than their liberal counterparts” (338). Nominees put forth by Republicans have in several of the nominations been viewed critically not only by liberals but also by conservatives. The demands of a sufficient convincing ideological affiliation have also come from conservatives. As argued by Moen and Schwartz, the most conservative justices have in the last decades been able to undo some of the Warren Court precedent regarding federal authority and regulation.

There are more conservative justices now on the Court than during the reigns of Warren and Burger, and those justices are also more consistently conservative and ideologically rigid.

#### **9.4 The President’s Involvement**

There has been a varying degree of involvement by the president in choosing a nominee. Clinton, the only Democratic president to appoint justices in the period covered, spent much time studying the candidates. The involvement of Nixon, George H. W. Bush, and George W. Bush varied. Ford and Reagan trusted their advisors to a large extent and were not much personally involved.

Clinton started out with a goal of putting a non-judge on the Court. When he failed to do so because several of his candidates turned down the offers, progress was halted and the process was drawn out. Clinton even sat down to read the writings of candidates to consider their judicial philosophy. When he appointed Ginsburg and Breyer, Democrats were in the majority in the Senate and he faced less opposition than

Reagan and George H. W. Bush. Clinton personally interviewed both his nominees. As the first Democratic president able to appoint a justice since Lyndon Johnson, Clinton did succeed in avoiding controversy, and his appointees have generally turned out to vote with the liberal wing of the Court.

Nixon, George H. W. Bush and George W. Bush were all committed to appointing justices with conservative philosophies. Nixon's involvement varied: He was adamant about appointing strict constructionist Southern justices, but let aides and the Department of Justice vet candidates. When needed, he intervened and interviewed candidates or persuaded them to accept the nomination. He had a good relationship with Burger, and they met several times to discuss judicial matters before and after Burger's appointment. He also interviewed Blackmun, but did not talk to Powell until the latter had turned down the offer from the Attorney General, and Nixon had to phone him to persuade him to change his mind.

George H. W. Bush trusted his advisors and especially White House Chief of Staff John Sununu when picking Souter. The choice of Thomas for the next vacant seat was made easy by the fact that he was young, conservative, and black. Although Bush sat down and discussed possible options with his vetting team, his decisions were shaped by how candidates were vetoed and promoted by members of his team, in the cases of candidates Starr and Souter. When the choice was made, Bush stuck with Thomas and promoted him throughout the process. George W. Bush's vetting processes followed a similar pattern to his father. He listened to worried conservatives in choosing not to nominate Gonzales. But in the case of Miers, he went along with the nomination despite warnings. His team thoroughly interviewed candidates before he talked to them. Despite the rhetoric about their commitment to appointing strict constructionist judges, Nixon, Bush, Sr., and Bush, Jr., relied to a large extent on their vetting teams. They all nominated candidates that conservatives would criticize either at the time or after they took their seats.

Ford and Reagan had a more hands-off approach to the nominations. Ford only appointed one justice, Stevens, and trusted his Attorney General's judgment to a large degree. He did not interview Stevens before calling him to offer the nomination. Ford was also constrained by difficult political circumstances. Reagan's appointments were

also influenced heavily by forces in his administration. The White House staff and the Department of Justice were in conflict about candidates, and Reagan was not eager to pick sides, as argued by his biographer Cannon. This made the process confusing at times, and Reagan did not heed the warnings about nominating Bork. He was also late in reacting to the massive campaign against Bork.

Richard Davis labels nominations as either constituency choices or consensus choices (61). He argues that a president will try to nominate someone who has the ideology to satisfy his constituency if he is running for re-election or has enough support in the Senate, while if he is faced with opposition or needs to build alliances he will pick a nominee that is likely to achieve consensus support. This view provides a useful dichotomy and works well on constituency candidates like Bork or consensual candidates like Stevens and Kennedy, but it is complicated by nominations that have aspects of both categories or have failed to satisfy the constituencies they were meant to appeal to. The nomination of Thomas tried to exploit Democrats' expected support of minorities, although he was an ideological candidate. Miers was presented as a woman and a conservative, but failed to convince Bush's own conservative constituency.

Henry J. Abraham uses four different motivations for the president: Objective merit, personal friendship, balancing representation or representativeness on the Court, and real political and ideological compatibility (5). These are valuable additions to Davis's categories. Several nominations were influenced by friendship or personal connections. Nixon knew Burger before he nominated him, and Burger's advice played a part in the nomination of Blackmun as well as Rehnquist's promotion to Chief Justice. Clinton wanted to appoint fellow Arkansan Richard Arnold, and George W. Bush nominated his close advisor Harriet Miers. Some nominees are recognized by both parties for their merits, as in the cases of Powell, Bork, and Roberts. Yet in most nominations the president is limited by factors outside his control which limits the number of candidates early in the process.

The data from this period are inconclusive about how the personal involvement of the president influences the outcome. Although Clinton managed to appoint two justices who are now considered liberal, the political climate was friendlier than for many of the other presidents since his nominations occurred before the Republican takeover of

Congress in 1994. The amount of time Clinton dedicated to deciding on his first nominee proves that his approach had its weaknesses. The record of the less involved presidents is also inconclusive: Far from all of Nixon's, Ford's, Reagan's, or George H. W. Bush's appointments turned out to meet the expectations of conservatives. Whether the handling of the nomination by the president was orderly or chaotic does not seem to guarantee that the nominee will turn out the way the president hoped.

## **9.5 The Senate**

The meaning of the "advice and consent" clause in the Constitution has been heavily debated over the years. The Senate has asserted its authority by conducting thorough hearings and rejecting nominees. Nixon attacked Senators for interfering with his powers to appoint but was heavily criticized. In the Judiciary Committee hearings, the members are free to ask the nominee detailed questions, as well as trying to make a good impression in front of the television cameras. Senators that are not on the Judiciary Committee can also wield their influence in making statements to the media and participating in the final vote.

During the most controversial hearings in this period, those of Bork and Thomas, senators asked detailed and personal questions knowing that millions were watching. Epstein and Segal argue that the charge from Bork and various other players that the process has become "political" is a well-known fact and that the process always has been political (143). Senator Biden, who was chairman of the Judiciary Committee, was still engaged in his presidential campaign when Bork was nominated. It would be hard for him not to take the campaign into account as the process went along. Similarly one can expect that senators who are up for reelection shortly after a nomination will consider how voters will react. Mark Silverstein argues that Senate primaries and Senate elections have become more partisan, leading to more ideological Senators, a fact which will influence the president's options (190).

During this period the practice of blocking nominations of lower federal court judges increased. Although there had been no filibusters of Supreme Court nominees since the Fortas nomination, the prospect seemed more likely than earlier before it was

avoided by the bipartisan “gang of 14” in 2005. There was also a national debate about not only the filibuster but federal judges and their importance. Representative Tom DeLay, the then Republican House Majority Leader, heated up the rhetoric by calling for impeachment of liberal judges and saying that they needed to be “intimidated” (Schwartz 153). Several Republican senators who were eager to satisfy their social conservative constituents picked up the rhetoric. Satisfying a partisan constituency was also a concern early in the period, and it convinced a Republican senator who had opposed Haynsworth that he needed to support Carswell to prove himself (Simon 292).

In hindsight statements like those of DeLay may seem exaggerated and even embarrassing. But when Republican senators accused Anita Hill of lying or lashed out at their Democratic colleagues for what they thought were unfair characteristics of Robert Bork, it was because they were defending the nominee from attacks they thought were unfair. Similarly, Democratic senators thought that Bork and Thomas did indeed threaten the legacy of civil rights and privacy that the Court had established over the course of several decades and wanted to use all legitimate means to deny them their seats.

Senators are simply unable to avoid being “political” as the process itself is political. What may be more important to look at is how consistent they are in their consideration of nominees. Opposing a nominee on the grounds of well-formulated differences of judicial philosophy is very common. Fierce rhetoric and sudden changes of mind reflect poorly on the senators when it appears to be in order to prove their conservative or liberal credentials.

## **9.6 News Media and Interest Groups**

Richard Nixon’s White House Office of Communications began the practice of treating nomination like election campaigns. The office distributed information about the nominee to the media and promoted the nominee through leaflets and letters to the editor. By using the same tactics as grass-roots election campaigns, it reached a wider audience than would normally rally for or against a judicial nominee. By bringing aboard interest groups that share the president’s values, a president can have a great number of supporters committed to the nominee from the day the nomination is announced. The



president's press conferences are covered by the news media, and he can ask senators to help him promote a nominee.

Supreme Court nominations include several aspects that make them interesting for the news media. Powerful actors like the president and senators are part of the process and are eager to provide the press with endorsements and statements of opposition. The nominee is likely to be serving for decades on a court that deals with important and divisive questions of economics, crime, culture, and values. Nominees are in most cases unknown to the public, and both sides fight to label them in a certain way.

The nomination of Robert Bork is frequently used as an example of how a targeted campaign can influence the outcome of a nomination. There were, however, controversies in the news media and heavy interest group involvement in nominations prior to Bork. The nomination of G. Harrold Carswell failed because there were several revelations of statements he had made in the news media, and interest groups were vocal in denouncing those views. In Bork's case there was a combination of factors that led to the failure of his nomination. His nomination had been expected for several years, and both interest groups and the Democrats were well prepared. A Democratic majority in the Senate and Bork's long public record made it easy to find statements in his past that were unfavorable. The nomination of Clarence Thomas brought two additional factors that the news media could not resist: race and sex.

Laurence Tribe stated in 1992 that the "new visibility of the nomination process ... has undoubtedly produced changes in the way that nominees are selected and packaged by the White House and in the manner that nominees present themselves to the Senate and the Nation" (Simon 14). That visibility takes away much of the nominee's privacy. Potter Stewart turned down a nomination for Chief Justice because of the media attention, and Harry Blackmun was frustrated by how his 85 year-old mother was approached by the media. If any of them had been nominated after Thomas, they might have been less inclined to accept the offer. The president might also choose to avoid potential well-qualified nominees who have even the slightest record of controversy in their pasts.

Prior to Reagan presidents rarely made more than a couple of public statements in support of a nominee. Reagan and George H. W. Bush mentioned Bork and Thomas

respectively 32 and 24 times (Maltese 115). Davis finds a 38% increase in the number of articles on nominees in *The New York Times* after Bork, and a 115% increase in *Time Magazine* (98) (Appendix 3).

Interest groups influence the process by paying for advertising, appearing in the media, testifying before the Senate, and urging their members to contact their senators. The participation of organizations in the hearings was infrequent until the Haynsworth nomination, after which only the Blackmun hearing had no organizations testifying. The Thomas hearings had a total of 43 testimonies from organizations and although the number varies it became common in this period (Maltese 91).

George W. Bush consulted members of the Federalist Society about several of his potential nominees. As the issue of abortion became prominent after *Roe v. Wade*, religious groups became more involved. During the nomination of Harriet Miers, James Dobson's statements suggested that he had received an assurance by the White House or by Miers that she would oppose *Roe v. Wade*. Dobson is the head of the conservative group Focus on the Family. Several interest groups have grown out of Court decisions. Since the question of the legality of abortion was decided by the Court, both opponents and proponents direct their efforts toward the Court with the hope of either upholding the decision or overturning it. The possibility that the Court might take an abortion case again motivates the work of these groups. The interest groups also serve a purpose in researching the nominees, and supplementing the work done by the staff of senators as argued by Davis (111).

The American Bar Associations is viewed very critically by Republicans since they perceive it to have a liberal bias. Its ratings of nominees, and in some cases potential candidates, receive attention from both senators and the news media. A rating lower than "well qualified" is viewed as a disadvantage. A.B.A.'s conflict with Republicans was evident with Nixon's threats of calling members of its rating committee to testify under oath, as well as George W. Bush's exclusion of them from the screening process.

Information from interest groups cannot always be trusted, and since they are important players both in their statements to the media, their advertising, and their work with senators, such information should always be viewed critically. Several senators dwelled on the revelations of Haynsworth's finances and Alito's membership in a

conservative alumni organization. Yet for Haynsworth there was a lack of evidence of serious wrongdoing and Alito's association with the organization proved not to be substantial. The nature of the allegations against Thomas was not well suited for a Senate hearing, and the result did not establish what had actually happened. When a seat on the Supreme Court is at stake it is not surprising that various interest groups will use the means necessary to show a nominee in the best or worst possible light. And the news media will cover any such controversy or allegation, making it an issue regardless of its relevance to the nominee's judicial merits. Such similarities between the nomination process and political campaigns have increased during this period.

### **9.7 Qualifications**

Presidents and senators often state that the qualifications of a nominee are their main concern. In that case there should be a correlation between qualifications and the rate of success. Measuring the objective qualifications of a nominee is difficult. Experience as a judge, administrative and political experience, education and skills in law, ability to write, and teaching experience are some of the qualifications that have been promoted for the nominees. All the current members of the Court have served as judges on federal appeals courts. Of the twenty nominations covered, only William Rehnquist, Lewis Powell, and Harriet Miers had never been judges.

The high frequency of justices with experience as judges is a recent phenomenon. The backgrounds of the members of the Warren Court were much more varied. William O. Douglas was a former chairman of the Securities and Exchange Commission, Hugo Black was a former Senator, Earl Warren was a former governor of California, and Byron White was a former football star and Deputy Attorney General under President Kennedy. There appears to be several reasons for this development. Richard Nixon stated that he wanted justices that were "strict constructionists." Judges have written opinions that can be examined for signs of their judicial philosophy. Nixon admired the writings and speeches of Warren Burger and had no reason to doubt what kind of philosophy he would bring to the Court. Judges might be viewed as safer choices than people with other backgrounds, because it is more difficult to know how they would act as judges.

Warren's activism, which surprised many, probably made Nixon skeptical toward non-judges.

Several nominees have received some criticism regarding their qualifications or experience, including G. Harrold Carswell, Sandra Day O'Connor, William Rehnquist, Clarence Thomas, and Harriet Miers. Carswell, Nixon's hurried choice after the failed Haynsworth nomination, had just been appointed to the Fifth Circuit Court and had less experience than many previous nominees. Sandra Day O'Connor had no experience from the federal judiciary but was a Stanford graduate like Rehnquist, and had been a majority leader in the Arizona state senate as well as a judge on the Arizona Court of Appeals. Her qualifications were not impressive compared to earlier nominees, but the fact that she was a woman had made it harder for her to get work and experience. William Rehnquist and Harriet Miers were met with skepticism. The A.B.A. committee was not unanimous in their rating of Rehnquist, after Nixon with the help of the conservative Democrat and Chairman of the Judiciary Committee James Eastland had threatened to subpoena them to testify if they did not give him the highest rating. Miers withdrew because she received criticism from both Democrats and Republicans regarding her lack of a judicial record and any record of her judicial philosophy. Although she was a skilled lawyer and a partner at a major law firm, she had not argued any important cases. Clarence Thomas was very young at 43 and had very limited experience as a judge.

Not all of the nominees had been judges for long, at least not on the federal appeals courts. Douglas Ginsburg, Clarence Thomas, and John Roberts had been on the D.C. Circuit Court for less than two years, and David Souter had been appointed to the First Circuit Court less than a year before his nomination to the Supreme Court. The Reagan administration began a conscious strategy of promoting young conservatives to the federal courts and then to watch them with future Supreme Court vacancy in mind. Judicial experience seems to be respected even by critics, and as long as the nominee has such experience, potential criticism often focuses on other aspects, in most cases ideology. Lewis Powell and John Roberts were perceived as well-qualified because of their extensive work as lawyers. Powell, who had not been a judge, had been a private attorney and president of the A.B.A. His lack of experience as a judge was outweighed by his long career and his well-known work for several organizations and corporations.

Roberts was respected for his frequent appearances as an attorney before the Supreme Court.

Carswell and Miers, who received the most intense criticism for their lack of qualifications, failed to be confirmed. Rehnquist and Thomas, who were confirmed against a number of votes, were also hurt by allegations of racism and sexism which makes it harder to judge to which extent their qualifications affected the vote. Powell, Stevens, R. B. Ginsburg, Breyer, and Roberts, all received a great amount of praise from both parties for their qualifications, and with the exception of Roberts, they were all confirmed by 87 or more votes.

There appears to be a positive correlation between the votes a nominee receives and the expressed support for his or her qualifications by senators, the media, and interest groups. There are exceptions, which occur in the cases of Bork and Roberts, when ideological opponents are more worried about the ideological balance on the Court than by his or her qualifications. A problematic aspect in arguing for such a correlation is the fact that there is no uniform standard for measuring the merits of a nominee, as argued by Davis (43). No one can know for certain how a nominee will vote on the Court, and it is also difficult to know whether that person will write quality opinions or get along well enough with the other justices to build alliances and promote his or her views. It is more difficult to consider how a non-judge will fare regarding these factors, while a judge will likely continue to rule in the same manner he or she has done before. The “safe” choice of appointing and confirming candidates that have been judges has emerged as presidents and senators have become more concerned with getting ideological allies on the Court. Though recent appointees now have judicial experience and are likely to be well trained in their reasoning and writing, the diversity of the Court suffers.

## **9.8 Controversies**

If there are controversial revelations about the nominee, confirmation becomes much less likely. The nominations of Haynsworth, Carswell, Rehnquist, D. Ginsburg, and Thomas were all influenced by matters not strictly related to their judicial philosophies. Bork’s

problems were caused by the long record of his judicial views, and Miers got in trouble for the lack of such.

Some of these controversies are not related to the nominee's legal qualifications and judicial philosophy. Haynsworth's financial interests and Ginsburg's use of marihuana may not appear to be particularly damning. But Haynsworth was unlucky with the timing of his nomination shortly after Fortas' resignation for financial involvements. D. Ginsburg's habits were not looked kindly upon considering the conservative attitudes toward drug use. His conservative record did not save him. Accusations of attitudes that are viewed as unacceptable in society, whether it is racism as in the cases of Carswell and Rehnquist or sexism in the case of Thomas, make the vote much closer in the Senate if the nominee is confirmed at all.

A nominee's legal philosophy has in most cases failed to sink a nomination. Opponents have in each nominations expressed concern by the nominee's record, whether it is perceived as too conservative or too liberal. We cannot know if Bork, if he had been confirmed, would have turned out to be more conservative than Scalia or Thomas. Bork's problem was that his public record was longer and more detailed than those of Scalia and Thomas. Miers, whose views were largely unknown, appears to be an exception. Candidates with few records like Kennedy and Souter were easily confirmed, but when Miers was nominated the conservative movement managed to stop her. The opposition can to some extent be explained by her lack of judicial experience compared to Kennedy and Souter, but conservatives had become better organized and more involved in judicial nominations by the time she was nominated.

Controversy is not created out of nothing. In several of the cases the failure was labeled as unfair by supporters of the nominee. But Bork's record of statements was very specific regarding his conservative judicial philosophy and did not square with his testimony. The charges against Thomas were supported by other women than Anita Hill. Miers had little judicial experience. The fact that this information was thoroughly covered in the media and brought up by senators should have been expected. Although a senate hearing might not be a good setting to investigate allegations of the nature of those leveled against Thomas, it should be expected, especially after Bork. Most nominees own stock and do not get in trouble for it. Fortas' resignation after his dealings with an

investor raised the bar for a period and helped sink Haynsworth's nomination. Haynsworth might have met resistance regardless since Democrats were eager for a fight, but his involvements added to the damage. Harry Blackmun, who eventually was confirmed for the same vacancy, was not questioned much about his investments.

Haynsworth's investments and D. Ginsburg's marihuana use might have been the least judicially relevant of the controversies in this period. Although criticism is brought by opponents who may use any unfavorable argument, in most cases it dealt with matters related to how the nominee would perform in his or her job if confirmed. Bork's supporters might contend that he was brought down by a targeted and well planned campaign, but the criticism was founded on his judicial philosophy. In the current system, presidents and nominees should expect such a level of inquiry.

## **9.9 Concluding Remarks**

The literature on the Supreme Court generally agrees that nominations have become more contested and that they represent a higher priority for both parties since Nixon's presidency. The reasons given for this development vary. After analyzing the twenty nominations in this period, we see that some factors have become apparent.

The president will not always make the most rational and non-controversial choice. Several nominees have characteristics that one would expect to meet opposition. The president is influenced to make such choices either by his own conviction, at the urging of advisors, by expectations considering the certain traits in outgoing justice, or expectations from a particular constituency. Despite the growing amount of research in the field, and after the much debated failure of the Bork nomination, later presidents have still not been able to avoid embarrassment from their nominations.

The increased coverage by the news media and investigations into the candidates' backgrounds will rarely defeat a nominee based on information that is unrelated to his or her judicial philosophy or lack of such. Several justices have expressed concern about the increased publicity. Yet the controversies that arise from revelations have mostly been relevant to the question of how the nominee would act as a justice. The involvement of more interest groups has made the process increasingly similar to a political campaign.

The Senate hearings are widely covered in the news media, but a national debate about judicial ideology similar to the one that followed the Bork hearings has not occurred again in the same degree. Unless there is a controversial revelation, the news media focus mainly on the nomination announcement and a small part of the testimony by the nominee.

There has been a gradual trend toward selecting nominees that have prior experience as federal appeals court judges. Although the Court now has a more pluralistic composition regarding religion, gender, and ethnicity compared to 1969, the justices' professional experience is less varied. This is likely caused by the president's interest in nominating candidates who have qualifications that senators will respect and judicial records that matches the president's views. Yet it excludes some perspectives and experiences that non-judges could contribute with.

Republican presidents nominated all but two of the twenty nominees covered. The Court gradually became more conservative as presidents focused more on ideology. Yet the turn took decades and several nominees have turned out less conservative than expected.

As long as a nominee is perceived to have sufficient judicial experience and has not conducted himself or herself in a controversial manner, he or she has good chances to be confirmed.



## Appendices

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### Appendix 1: Public Statements of Support from the Presidents Who Nominated Them

#### President Truman

Harold H. Burton: 0

Fred M. Vinson: 0

Tom C. Clark: 0

#### President Eisenhower

Earl Warren: 0

John Marshall Harlan: 2

William J. Brennan Jr.: 0

Charles E. Whittaker: 0

Potter Stewart: 0

#### President Kennedy

Byron R. White: 0

Arthur J. Goldberg: 0

#### President Johnson

Abe Fortas: 0

Thurgood Marshall: 3

Abe Fortas (for chief justice): 3

Homer Thornberry: 1

#### President Nixon

Warren E. Burger: 1

Clement F. Haynsworth: 2

G. Harrold Carswell: 3

Harry A. Blackmun: 0

Lewis F. Powell: 0

William H. Rehnquist: 0

#### President Ford

John Paul Stevens: 1

#### President Carter

(No nominees)

#### President Reagan

Sandra Day O'Connor: 2

Antonin Scalia: 5

William H. Rehnquist

(for chief justice): 4

Robert Bork: 32

Douglas Ginsburg: 3

Anthony M. Kennedy: 10

#### President Bush

David Souter: 10

Clarence Thomas: 24

#### President Clinton

Ruth Bader Ginsburg: 5

Stephen Breyer: 1

(Maltese 115)

## Appendix 2: Public Hearings on Supreme Court Nominees

TABLE 5. Public Hearings on Supreme Court Nominees, 1930–1994

<i>Nominee and Year of Nomination</i>	<i>Length of Hearings (in days)</i>	<i>Transcript Length (in pages)<sup>(a)</sup></i>	<i>Number of Organizations Testifying<sup>(b)</sup></i>
Charles Evans Hughes (c.j.), 1930	1	(c)	0
John J. Parker, 1930	1	83	2
Owen Roberts, 1930	1	(c)	0
Benjamin Cardozo, 1932	1	(c)	0
Hugo Black, 1937	1	(c)	0
Stanley Reed, 1938 <sup>(d)</sup>	1	26 <sup>(e)</sup>	1
Felix Frankfurter, 1939 <sup>(f)</sup>	2	128	3
William O. Douglas, 1939 <sup>(d)</sup>	1	3 <sup>(e)</sup>	0
Frank Murphy, 1940 <sup>(f)</sup>	1	(c)	0
Harlan Fiske Stone (c.j.), 1941	1	2 <sup>(e)</sup>	0
James F. Byrnes, 1941	0	0	0
Robert Jackson, 1941 <sup>(f)</sup>	4	70	0
Wiley Rutledge, 1943	0	0	0
Harold Burton, 1945	0	0	0
Fred M. Vinson (c.j.), 1946	1	(c)	0
Tom Clark, 1949	3	359	10
Sherman Minton, 1949	1	23	1
Earl Warren (c.j.), 1954	2	104 <sup>(e)</sup>	2
John Harlan, 1955 <sup>(f)</sup>	2	182	7
William Brennan, 1957 <sup>(f)</sup>	2	40	0
Charles Whittaker, 1957 <sup>(f)</sup>	1	34	0
Potter Stewart, 1959 <sup>(f)</sup>	2	146	0
Byron White, 1962 <sup>(f)</sup>	1	26	2
Arthur Goldberg, 1962 <sup>(f)</sup>	2	103	0
Abe Fortas, 1965 <sup>(f)</sup>	1	58	1
Thurgood Marshall, 1967 <sup>(f)</sup>	5	198	1
Abe Fortas (c.j.) and Homer Thornberry, 1968 <sup>(f)</sup>	16 <sup>(g)</sup>	1,404 <sup>(g)</sup>	0
Warren Burger (c.j.), 1969 <sup>(f)</sup>	1	116	1
Clement Haynsworth, 1969 <sup>(f)</sup>	8	762	11
G. Harrold Carswell, 1970 <sup>(f)</sup>	5	467	5
Harry Blackmun, 1970 <sup>(f)</sup>	1	134	0
William Rehnquist and Lewis Powell, 1971 <sup>(f)</sup>	5 <sup>(g)</sup>	492 <sup>(g)</sup>	8
John Paul Stevens, 1975 <sup>(f)</sup>	3	229	3
Sandra Day O'Connor, 1981 <sup>(f)</sup>	3	414	15
William Rehnquist (c.j.), 1986 <sup>(f)</sup>	4	1,165	16
Antonin Scalia, 1986 <sup>(f)</sup>	2	369	10
Robert Bork, 1987 <sup>(f)</sup>	12	6,511	17
Douglas Ginsburg, 1987	0	0	0
Anthony Kennedy, 1987 <sup>(f)</sup>	3	1,119	14
David Souter, 1990 <sup>(f)</sup>	5	1,198	25
Clarence Thomas, 1991 <sup>(f)</sup>	11	3,300	43
Ruth Bader Ginsburg, 1993 <sup>(f)</sup>	4	681	8
Stephen Breyer, 1994 <sup>(f)</sup>	3	(h)	9

- <sup>(a)</sup> Includes material submitted for the record.
- <sup>(b)</sup> Does not include individuals not representing organizations.
- <sup>(c)</sup> No transcript.
- <sup>(d)</sup> Nominee present at hearing but not testifying.
- <sup>(e)</sup> Transcript is unpublished, double spaced.
- <sup>(f)</sup> Nominee testified.
- <sup>(g)</sup> Combined hearings.
- <sup>(h)</sup> Transcript not published when this book went to press.

(Maltese 90-91)

**Appendix 3: Changes in Number of New York Times and Time Magazine Stories of Supreme Court Nominations before and after Bork Nomination Process**

Table 3.1  
Changes in Number of *New York Times* and *Time Magazine* Stories of Supreme Court Nominations before and after Bork Nomination Process

	<i>NYT</i>	<i>Time</i>
<i>Pre-Bork</i>		
Stewart/O'Connor	36	4
Burger/Rehnquist	54	4
Scalia	12	2
<i>Post-Bork</i>		
Powell/D. Ginsburg/Kennedy	63	15
Brennan/Souter	53	15
Marshall/Thomas	35	16
White/Ginsburg	42	7
Increase Post-Bork over Pre-Bork	38%	300%

(Davis 98)

## Works Cited

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- “A Conversation with Robert H. Bork.” Bar Report. December/January 1998.  
<[http://www.dcbbar.org/for\\_lawyers/resources/legends\\_in\\_the\\_law/bork.cfm](http://www.dcbbar.org/for_lawyers/resources/legends_in_the_law/bork.cfm)>
- Abraham, Henry J. Justices and Presidents. A Political History of Appointments to the Supreme Court. Second Edition. New York & London: Oxford University Press, 1985.
- Baker, Peter. “Bork's Shadow Looms Over Court Opening.” Washington Post. July 12, 2005. <[http://www.washingtonpost.com/wp-dyn/content/article/2005/07/11/AR2005071101670\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/11/AR2005071101670_pf.html)>
- Berke, Richard. “JUNE 13-19: Ruth Bader Ginsburg; Clinton Picks a 'Healer' With Few Detractors For the Supreme Court.” The New York Times. June 20, 1993.  
<<http://query.nytimes.com/gst/fullpage.html?res=9F0CE1DA163EF933A15755C0A965958260>>
- Bronner, Ethan. Battle for Justice. How the Bork Nomination Shook America. New York: Sterling Publishing Co. Inc., 2007.
- Bumiller, Elisabeth and Carl Hulse. “Bush Picks Appeals Court Judge to Succeed O’Connor on Court.” The New York Times. October 31, 2005.  
<<http://www.nytimes.com/2005/10/31/politics/politicsspecial1/31cnd-court.html>>
- Cannon, Lou. President Reagan. The Role of a Lifetime. New York: Simon & Schuster, 1991.
- Chen, Jim. “Filburn's Legacy.” Emory Law Journal, Vol. 52, p. 1719, 2003  
<<http://ssrn.com/abstract=901026>>
- Clinton, William J. “Remarks on the Nomination of Stephen G. Breyer To Be a Supreme Court Associate Justice and an Exchange With Reporters.” The American Presidency Project. May 16, 1994.  
<<http://www.presidency.ucsb.edu/ws/index.php?pid=50179>>
- Davis, Richard. Electing Justice - Fixing the Supreme Court Nomination Process. New York: Oxford University Press, 2005.
- Diggins, John Patrick. Ronald Reagan. Fate Freedom and the Making of History. New York & London: W. W. Norton & Company, 2007.
- Dionne Jr., E. J. “Biden Withdraws Bid For President In Wake Of Furor.” The New York Times. September 24, 1987. <<http://www.nytimes.com/1987/09/24/us/biden-withdraws-bid-for-president-in-wake-of-furor.html>>
- Dolin, Monica. “Anger Still Fresh in Clarence Thomas’ Memoir.” ABC News. October 3, 2007. <<http://abcnews.go.com/TheLaw/Story?id=3682886&page=4>>
- Epstein, Lee and Jeffrey A. Segal. Advice and Consent. The Politics of Judicial Appointments. New York: Oxford University Press, 2007.
- Evans, Rowland and Robert Novak. “Why Did He Choose Her?” Washington Post. July 10, 1981.
- “Excerpts From News Conference Announcing Court Nominee.” The New York Times. July 2, 1991. <<http://www.nytimes.com/1991/07/02/us/the-supreme-court-excerpts-from-news-conference-announcing-court-nominee.html>>

- Gamarekian, Barbara. "Ginsburg: A Quiet Life Turns Public." The New York Times. November 3, 1987. <<http://www.nytimes.com/1987/11/03/us/ginsburg-a-quiet-life-turns-public.html>>
- Greenburg, Jan Crawford. Supreme Conflict. The Inside Story of the Struggle for Control of the United States Supreme Court. London, England: Penguin Books, 2008.
- Greenhouse, Linda. "Defining Souter, Some; Undogmatic Middle-of-the-Road Nominee Is Surprise for Liberals and Conservatives." The New York Times. September 19, 1990. <<http://www.nytimes.com/1990/09/19/us/defining-souter-some-undogmatic-middle-road-nominee-surprise-for-liberals.html>>
- . "Lewis Powell, Crucial Centrist Justice, Dies at 90." The New York Times. August 26, 1998. <<http://www.nytimes.com/1998/08/26/us/lewis-powell-crucial-centrist-justice-dies-at-90.html>>
- . "Souter Anchoring the Court's New Center." The New York Times. July 3, 1992. <<http://query.nytimes.com/gst/fullpage.html?res=9E0CE2DE1F3AF930A35754C0A964958260>>
- . "Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years." The New York Times. June 26, 1995. <<http://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html>>
- . "Washington Talk: The Bork Hearings; For Biden: Epoch of Belief, Epoch of Incredulity." The New York Times. October 8, 1987. <<http://www.nytimes.com/1987/10/08/us/washington-talk-the-bork-hearings-for-biden-epoch-of-belief-epoch-of-incredulity.html>>
- . "William H. Rehnquist, Architect of Conservative Court, Dies at 80." The New York Times. <<http://www.nytimes.com/2005/09/05/politics/politicsspecial1/05f1rehnquist.html>>
- Greenhouse, Linda and Katharine Q. Seelye. "Rehnquist Treated For Thyroid Cancer, Supreme Court Says." The New York Times. October 26, 2004. <<http://query.nytimes.com/gst/fullpage.html?res=9A05E5DA143DF935A15753C1A9629C8B63>>
- Greene, John Robert. The Presidency of Gerald R. Ford. Lawrence, Kansas: University Press of Kansas, 1995.
- Greenstein, Fred I., Leadership in the Modern Presidency. Cambridge, Massachusetts and London, England: Harvard University Press, 1988.
- . The Presidential Difference. Leadership Style from FDR to George W. Bush. Princeton: Princeton University Press, 2004.
- Hoff, Joan. Nixon Reconsidered. BasicBooks, A Division of HarperCollins Publishers, Inc., 1994.
- Hulse, Carl. "For Senators, a Pact Does Not Mean Peace." The New York Times. May 27, 2005. <<http://www.nytimes.com/2005/05/27/politics/27cong.html>>
- Hulse, Carl and David D. Kirkpatrick. "After Memo, Democrats Are Taking Firmer Stance Against Alito Nomination." The New York Times. December 2, 2005. <<http://www.nytimes.com/2005/12/02/politics/politicsspecial1/02confirm.html>>
- "Judge Alito's Radical Views." The New York Times. January 23, 2006. <<http://www.nytimes.com/2006/01/23/opinion/23mon1.html>>

- Kirkpatrick, David D. "Court Nominee Is Asked to Redo Reply to Questions." The New York Times. October 20, 2005.  
<<http://www.nytimes.com/2005/10/20/politics/politicsspecial1/20confirm.html>>
- . "Endorsement of Nominee Draws Committee's Interest." The New York Times. October 10, 2005.  
<<http://www.nytimes.com/2005/10/10/politics/politicsspecial1/10confirm.html>>
- Krauthammer, Charles. "Miers: The Only Exit Strategy." The Washington Post. October 21, 2005. <<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102001635.html>>
- Lewis, Neil A. "As Political Terrain Shifts, Breyer Lands on His Feet." The New York Times. May 15, 1994. <<http://query.nytimes.com/gst/fullpage.html?res=9E0DE2D71F39F936A25756C0A962958260>>
- . "Clinton Has a Chance to Shape the Courts." The New York Times. February 9, 1997. <<http://query.nytimes.com/gst/fullpage.html?res=9E01E1DB133CF93AA35751C0A961958260>>
- . "In a Sea of Praise, Discouraging Words." The New York Times. May 16, 1994. <<http://query.nytimes.com/gst/fullpage.html?res=9C06E2D81638F935A25756C0A962958260>>
- . "Richard S. Arnold, 68, Judge Once Eyed for Supreme Court." The New York Times. September 25, 2004. <<http://query.nytimes.com/gst/fullpage.html?res=9F00E1D81E39F936A1575AC0A9629C8B63>>
- Maltese, John Anthony. The Selling of Supreme Court Nominees. Baltimore and London: The Johns Hopkins University Press, 1998.
- Margolick, David. "Scholarly Consensus Builder: Stephen Gerald Breyer." The New York Times. May 14, 1994. <<http://query.nytimes.com/gst/fullpage.html?res=9F06E1D71E39F937A25756C0A962958260>>
- Mauro, Tony. "Reagan's Legacy: A Transformed Judiciary." Legal Times. June 14, 2004. <<http://www.law.com/jsp/article.jsp?id=1086989271386>>
- McFadden, Robert D. "The President's Choice – John Paul Stevens." The New York Times. November 29, 1975. <<http://www.nytimes.com/1975/11/29/national/29STEV.html>>
- Miers, Harriet. Withdrawal Letter. October 27, 2005. <[http://graphics8.nytimes.com/packages/pdf/politics/miers\\_letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/miers_letter.pdf)>
- Moen, Ole O. "New Judicial Federalism: The Rehnquist Court, Judicial Activism, and Devolution." American Studies in Scandinavia. 36:2 (2004): 49-76.
- Molotsky, Irvin. "N.A.A.C.P. Urges Souter's Defeat, Citing Earlier Statements on Race." The New York Times. September 22, 1990. <<http://query.nytimes.com/gst/fullpage.html?res=9C0CE5DD1E39F931A1575AC0A966958260>>
- Nemacheck, Christine L. Strategic Selection. Presidential Nominations of Supreme Court Justices from Herbert Hoover through George W. Bush. Charlottesville and London: University of Virginia Press, 2007.

- Noble, Kenneth B. "Biden Vows to Lead Forces Against Bork's Confirmation." The New York Times. July 9, 1987. <<http://www.nytimes.com/1987/07/09/us/biden-vows-to-lead-forces-against-bork-s-confirmation.html>>
- O'Brien, David M.. Storm Center. The Supreme Court in American Politics. Seventh Edition. New York, London: W. W. Norton & Company, 2005.
- "Our Background." The Federalist Society. <<http://www.fed-soc.org/aboutus/id.28/default.asp>>
- Parry-Giles, Trevor. The Character of Justice. Rhetoric, Law, and Politics in the Supreme Court Confirmation Process. East Lansing, Michigan: Michigan State University Press, 2006.
- Phelps, Timothy M. & Helen Winternitz. Capitol Games. Clarence Thomas, Anita Hill, and the Story of a Supreme Court Nomination. New York: Hyperion. 1992.
- Purdum, Todd S. "In Pursuit of Conservative Stamp, President Nominates Roberts." The New York Times. July 20, 2005. <<http://www.nytimes.com/2005/07/20/politics/politicsspecial1/20nominee.html>>
- "Remarks Announcing the Nomination of Robert H. Bork To Be an Associate Justice of the Supreme Court of the United States." Ronald Reagan Presidential Library. July 1, 1987. <<http://www.reagan.utexas.edu/archives/speeches/1987/070187c.htm>>
- Rosen, Jeffrey. The Supreme Court. The Personalities and Rivalries that defined America. New York: Holt Paperbacks. Henry Holt and Company, LLC., 2007.
- . "The Dissenter." The New York Times. September 23, 2007. <<http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>>
- Rutkus, Denis Steven. Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate. Congressional Research Service Report for Congress. March 20, 2008. <<http://www.fas.org/sgp/crs/misc/RL31989.pdf>>
- Rutkus, Denis Steven & Maureen Bearden & Sam Garrett. Supreme Court Nominations 1789-2005. Actions (Including Speed) by the Senate, the Judiciary Committee and the President. New York: Nova Science Publishers, Inc., 2007.
- Schwartz, Herman. Right Wing Justice: The Conservative Campaign to Take Over the Courts. New York: Nation Books, 2004.
- "Senate Confirmation Hearings - Day 1" [Alito hearings]. The New York Times. January 9, 2006. <<http://www.nytimes.com/2006/01/09/politics/politicsspecial1/text-alito-day1.html>>
- "Senate Confirmation Hearings - Day 4" [Alito hearings]. The New York Times. January 12, 2006. <<http://www.nytimes.com/2006/01/12/politics/politicsspecial1/day4-text.html>>
- "Senate Judiciary Committee Hearings on Nomination of Judge Roberts." The New York Times. September 12, 2005. <<http://www.nytimes.com/2005/09/12/politics/politicsspecial1/12text-roberts.html>>
- Shaffer, Ralph E. (editor). The Bork Hearings. Highlights from the most controversial judicial confirmation battle in U.S. History. Princeton: Markus Wiener Publishers, 2005.
- Silverstein, Mark. Judicious Choices. The politics of Supreme Court confirmations. Second Edition. New York & London: W. W. Norton & Company, 2007.

- Simon, Paul. Advice & Consent. Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles. Washington, D.C.: National Press Books, 1992.
- Supreme Court of the United States. Baze v. Reez.  
<<http://www.supremecourtus.gov/opinions/07pdf/07-5439.pdf>>
- Supreme Court of the United States. Boumediene v. Bush.  
<<http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf>>
- Supreme Court of the United States. Bush v. Gore.  
<[http://frwebgate.access.gpo.gov/supremecourt/00-949\\_dec12.fdf](http://frwebgate.access.gpo.gov/supremecourt/00-949_dec12.fdf)>
- Supreme Court of the United States. Callins v. Collins.  
<<http://supct.law.cornell.edu/supct/html/93-7054.ZA1.html>>
- Supreme Court of the United States. Gonzales v. Carhart.  
<<http://www.supremecourtus.gov/opinions/06pdf/05-380.pdf>>
- Supreme Court of the United States. Planned Parenthood v. Casey.  
<<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=505&invol=833>>
- Supreme Court of the United States. The Court and Its Procedures.  
<<http://www.supremecourtus.gov/about/procedures.pdf>>
- Supreme Court of the United States. United States v. Lopez.  
<<http://www.law.cornell.edu/supct/html/93-1260.ZC1.html>>
- “Statements on Retirement Of Blackmun From Court.” The New York Times. April 7, 1994.  
<<http://query.nytimes.com/gst/fullpage.html?res=940DE7DF163EF934A35757C0A962958260>>
- Stevenson, Richard W. “President Names Roberts as Choice for Chief Justice.” The New York Times. September 5, 2005.  
<<http://www.nytimes.com/2005/09/05/politics/politicsspecial1/05cnd-scotus.html>>
- Stevenson, Richard W. and Linda Greenhouse. “O’Connor, First Woman on High Court, Resigns After 24 Years.” The New York Times. July 1, 2005.  
<<http://www.nytimes.com/2005/07/01/politics/01cnd-court.html>>
- Stolberg, Sheryl Gay. “Panel Approves Roberts, 13-5, As 3 of 8 Democrats Back Him.” The New York Times. September 23, 2005. <  
<http://query.nytimes.com/gst/fullpage.html?res=9D04EED71730F930A1575AC0A9639C8B63>>
- Stolberg, Sheryl Gay and David E. Rosenbaum. “Court Nominee Prizes 'Modesty,' He Tells the Senate.” The New York Times. August 3, 2005.  
<<http://www.nytimes.com/2005/08/03/politics/politicsspecial1/03confirm.html>>
- Stout, David. “Alito Is Sworn In as Justice After 58-42 Vote to Confirm Him.” January 31, 2006. <<http://www.nytimes.com/2006/01/31/politics/politicsspecial1/31cnd-alito.html>>
- . “Bush Seeks to Quell Criticism of Court Nominee From the Right.” The New York Times. October 4, 2005.  
<<http://www.nytimes.com/2005/10/04/politics/politicsspecial1/04cnd-bush.html>>



- . "Roberts Is Sworn In as Chief Justice of U.S.." The New York Times. September 29, 2005. <<http://www.nytimes.com/2005/09/29/politics/politicsspecial1/29cnd-confirm.html>>
- Taylor, Stuart Jr. "How Bork Recast Ideas In His Senate Testimony." The New York Times. September 21, 1987. <<http://query.nytimes.com/gst/fullpage.html?res=9B0DE7D91F3BF932A1575AC0A961948260&sec=&spon=&pagewanted=all>>
- . "Justice Stevens, in Unusual Move, Praises Bork as Nominee to Court." The New York Times. August 1, 1987. <<http://www.nytimes.com/1987/08/01/us/justice-stevens-in-unusual-move-praises-bork-as-nominee-to-court.html>>
- . "Man In The News: Youthful Conservative Judge: Douglas Howard Ginsburg." The New York Times. October 30, 1987. <<http://www.nytimes.com/1987/10/30/us/man-in-the-news-youthful-conservative-judge-douglas-howard-ginsburg.html>>
- Toobin, Jeffrey. The Nine: Inside the Secret World of the Supreme Court. New York: Doubleday, 2007.
- Tribe, Laurence. God Save This Honorable Court. New York: Random House, 1985.
- US Constitution. <[http://www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html)>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. NINETY-FIRST CONGRESS. FIRST SESSION. ON NOMINATION OF CLEMENT F. HAYNSWORTH, JR., OF SOUTH CAROLINA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. SEPTEMBER 16, 17, 18, 19, 23, 24, 25, AND 26, 1969. <<http://www.loc.gov/law/find/nominations/haynsworth/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-FIRST CONGRESS SECOND SESSION ON NOMINATION OF GEORGE HARROLD CARSWELL, OF FLORIDA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. JANUARY 27, 28, 29, AND FEBRUARY 2 AND 3, 1970. <<http://www.loc.gov/law/find/nominations/carswell/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. NINETY-SECOND CONGRESS. FIRST SESSION. ON NOMINATIONS OF WILLIAM H. REHNQUIST, OF ARIZONA, AND LEWIS F. POWELL, JR., OF VIRGINIA, TO BE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES. NOVEMBER 3, 4, 8, 9, AND 10, 1971. <<http://www.loc.gov/law/find/nominations/rehnquist-aj/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-FOURTH CONGRESS FIRST SESSION ON NOMINATION OF JOHN PAUL STEVENS, OF ILLINOIS, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. DECEMBER 8, 9, AND 10, 1975. <<http://www.loc.gov/law/find/nominations/stevens/hearing.pdf>>

- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. NINETY-SEVENTH CONGRESS. FIRST SESSION. ON THE NOMINATION OF JUDGE SANDRA DAY O'CONNOR OF ARIZONA TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. SEPTEMBER 9, 10, AND 11, 1981. <<http://www.loc.gov/law/find/nominations/oconnor/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. NINETY-NINTH CONGRESS. SECOND SESSION. ON THE NOMINATION OF JUDGE ANTONIN SCALIA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. AUGUST 5 AND 6, 1986.  
<<http://www.loc.gov/law/find/nominations/scalia/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. NINETY-NINTH CONGRESS. SECOND SESSION. ON THE NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES. JULY 29, 30, 31, AND AUGUST 1, 1986.  
<<http://www.loc.gov/law/find/nominations/rehnquist-cj/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. ONE HUNDREDTH CONGRESS. FIRST SESSION. ON THE NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. DECEMBER 14, 15 AND 16, 1987.  
<<http://www.loc.gov/law/find/nominations/kennedy/hearing.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. ONE HUNDRED FIRST CONGRESS. SECOND SESSION. ON THE NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. SEPTEMBER 13, 14, 17, 18, AND 19, 1990.  
<<http://www.loc.gov/law/find/nominations/souter/hearing.pdf>>
- United States of America Congressional Record. PROCEEDINGS AND DEBATES OF THE 101st CONGRESS. SECOND SESSION. VOLUME 136—PART 19. OCTOBER 1, 1990 TO OCTOBER 8, 1990.  
<<http://www.loc.gov/law/find/nominations/souter/debates.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. ONE HUNDRED SECOND CONGRESS. FIRST SESSION. ON THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. SEPTEMBER 10, 11, 12, 13, AND 16, 1991.  
<<http://www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf>>
- US Senate Judiciary Committee. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY. UNITED STATES SENATE. ONE HUNDRED THIRD CONGRESS. FIRST SESSION. ON THE NOMINATION OF RUTH BADER GINSBURG, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. JULY 20, 21, 22, AND 23, 1993.  
<<http://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf>>

- Vieira, Norman and Leonard Gross. Supreme Court Appointments. Judge Bork and the Politization of Senate Confirmations. Carbondale and Evansville: Southern Illinois University Press, 1998.
- Viguiera, Richard A. "President's Choice Of O'Connor Could Be Politically Damaging To New Republican Coalition." Conservative Digest. August 1981.
- Williams, Timothy. Bush Names Counsel as Choice for Supreme Court. The New York Times. October 3, 2005.  
<<http://www.nytimes.com/2005/10/03/politics/politicsspecial1/03cnd-scotus.html>>
- Woodward, Bob & Scott Armstrong. The Brethren. Inside the Supreme Court. First Simon & Schuster Paperback edition 2005. New York: Simon & Schuster, 1979.
- Wyatt, Edward and Simon Romero. In Midcareer, a Turn to Faith to Fill a Void. The New York Times. October 5, 2005.  
<<http://www.nytimes.com/2005/10/05/politics/politicsspecial1/05miers.html>>
- Yarbrough, Tinsley E. David Hackett Souter. Traditional Republican on the Rehnquist Court. Oxford University Press US. 2005.  
<<http://books.google.com/books?id=mvV0cVeWVmUC&dq>>

All internet sources accessed and verified as of May 2, 2009.  
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