

# THE SELECTION OF U.S. SUPREME COURT JUSTICES

by

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## A.

When I was asked to comment on the papers of Chief Judge McLachlin and Professors Brewer-Carias and Tomuschat from an American perspective, there was no way to predict how timely the subject of judicial appointments would become.

There have been about 130 presidential nominations to the U.S. Supreme Court, and about 30 of them have failed in the Senate. But there were no new appointments from 1994 to the summer of 2005, the longest such stretch hiatus in more than 180 years and the second longest period in American history without a change in the composition of the Court in American history.<sup>1</sup>

Then, rapidly, Associate Justice Sandra Day O'Connor announced her retirement in June 2005 and President George W. Bush promptly nominated Judge John Roberts to replace her. While Judge Roberts's nomination was pending before the Senate, Chief Justice William Rehnquist died on September 3. The president then decided to nominate Judge Roberts to succeed the late Chief Justice's seat, and, after hearings and public debate, the Senate confirmed him by a vote of 78-22. But this left the vacancy for Justice O'Connor's seat unfilled, and the president soon appointed his White House counsel, Harriet Miers, to replace Justice O'Connor. But she withdrew herself from consideration after her interviews with individual Senators did not proceed well, and after criticism by several conservative groups and individuals who, while ordinarily supportive of President Bush did not find Ms. Miers either sufficiently conservative or qualified professionally. President Bush thereupon nominated Judge Samuel Alito, whom the Senate was considering during the time of the Roundtable. Judge Alito was eventually confirmed by a vote of 58 to 42 on

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1 The longest period in American history without a change in the Court's composition was 1812-1823. Michael J. Gerhardt, 39 *U. Rich. L. Rev.* 909, 909 (2005) (citing Charlie Savage, *Win May Bring Power to Appoint 4 Justices; Campaigns Urged to Focus on Impact*, *Boston Globe*, July 7, 2004, at A3 ("The decade since the confirmation of Justice Stephen Breyer is the second-longest interval without a vacancy in American history – a period just shy of the 11-year record for Supreme Court stability, from 1812 to 1823."))

January 31, 2006. This flurry of activity has brought the selection process for Supreme Court justices very much to the fore.

In this article I do not shall I canvass the broad and varied powers of the Supreme Court and its important role in American life. These matters have already been presented to the Roundtable, most notably by my colleague, Professor Michel Rosenfeld, in his opening talk on “The ECJ and the U.S. Supreme Court Compared”. Instead, I will concentrate on the president’s authority to nominate Supreme Court justices (and all other federal judges) and the Senate’s authority of “advice and consent” to these appointments, or, by failing to consent, to defeating them.

The papers by Professors Tomuschat and Brewer-Carías very well address important issues relating to the European Court of Justice and South American high courts, and they need no elaboration from me. Chief Judge Beverley McLachlin of Canada has observed that the appointment of enlightens us on how judges are appointed to the Supreme Court of Canada. Toward the end of her discussion, she observes that the process “appears to respect the dual requirements of choice based on merit and preservation of judicial independence. [T]he goal should be to appoint individuals who embody the most valuable judicial qualities of competence, impartiality, empathy and wisdom.” Chief Judge McLachlin goes on to say that, “Unlike the appointments process for the Supreme Court of the United States, candidates are not questioned on their beliefs, their views on the law or their previous decisions.”<sup>2</sup>

In both passages Chief Judget McLachlin addressed two key elements in the Canadian system: the importance of “merit” and the exclusion of political factors<sup>3</sup> which she underscored by emphasizing “judicial independence”. Merit is also considered in the American U.S. appointment process, while judicial independence is protected by the constitutional provision that allows justices to remain in office permanently “during good behavior”.

## *B.*

In the U.S. – unlike many other countries – neither the Constitution nor a statute establishes any requirement for the position of Supreme Court justice: not age, not ex-

2 Beverley McLachlin, Remarks at the 6th International European Constitutional Law Network – Colloquium/International Association of Constitutional Law Roundtable on the Future of the European Judicial System 12 (Nov. 3, 2005).

3 Less than four months after Chief Judge McLachlin spoke, the prime minister of Canada announced a change in the appointments process, “with prospective judges now for the first time being required to face a televised parliamentary hearing before the prime minister makes his final decision to appoint.” N.Y. Times, Feb. 21, 2006, A6.

perience (judicial or otherwise), not even American U.S. citizenship.<sup>4</sup> Indeed, there is no constitutional requirement that a federal judge, including a Supreme Court justice, be a lawyer, and President Franklin D. Roosevelt apparently contemplated the appointment of a non-lawyer to the Court during World War II.<sup>5</sup> Nor does the Constitution establish the size of the Supreme Court, unlike the situation elsewhere.<sup>6</sup> Early in the Republic the Supreme Court had nine members, but in the aftermath of the Civil War, which ended in 1865, the Congress provided for as few as seven members before allowing the number to revert to nine, where it has remained.<sup>7</sup> In 1937, President Franklin Roosevelt proposed a complex scheme whereby an additional member would be appointed to the Supreme Court for each justice who reached the age of 70. Although Roosevelt was politically strong and popular with the public, the proposal was defeated in the Senate,<sup>8</sup> and there has been no more recent effort by a president or the Congress to change the size of the Court.

C.

What are the criteria for a presidential appointment to the Supreme Court? There are several, and many appointments will involve more than one. The first is professional merit, which Chief Judge McLachlin stressed. The recent appointment of Chief Justice John Roberts is an apt example. Even those unsympathetic to his conservative philosophy acknowledged his sterling record as a lawyer for the U.S. government and in private practice, and observers were immensely impressed with his testimony before the Senate Judiciary Committee. Roberts answered difficult constitutional

4 The Constitution merely states, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. Art. III, § 1.

5 Arthur S. Miller & Jeffrey H. Bowman, Break the Monopoly of Lawyers on the Supreme Court, 39 Vand. L. Rev. 305, 317 (1986) (“It is a matter of historical record that Professor Edward Corwin of Princeton, not a lawyer but a highly respected constitutional scholar, thought he would be named to the Court by Franklin Roosevelt”).

6 See Lee Epstein, Jack C. Knight, Jr. & Olga Shvetsova, Comparing Judicial Selection Systems, 10 Wm. & Mary Bill of Rts. J. 7, 23 (2001) (survey of 27 European countries finds compulsory time limits or mandatory retirement in most places).

7 In 1866, for example, Congress passed the Judicial Circuits Act, which provided that the next three justices to retire would not be replaced. The Act was intended to reduce Southern states’ perceived influence on the federal government in the post-Civil War environment. With the Circuit Judges Act of 1869, the number of justices was returned to nine. See generally Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 30, 72 (Wm. W. Gaunt & Sons Inc. 1993) (1927). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II*, 91 Geo. L.J. 1, 38-40 (2002).

8 On Roosevelt’s “court-packing” plan, in the context of the struggle over the role of the Supreme Court during the 1930s, see Leonard Baker, *Back to Back: The Duel between F.D.R. and the Supreme Court* (1967).

and jurisprudential questions without notes and without the assistance of aides, and he skillfully managed to avoid committing himself on issues that might come before the Court.

On the other hand, as suggested above, Harriet Miers was undone in part because neither her record as a lawyer nor her conversations with senators persuaded that she was of sufficient legal stature or adequately familiar with the complex and nuanced field of constitutional law to serve on the Court. The verdict on this point may be ungenerous to Ms. Miers. After graduating from law school, she fashioned an admirable career in the private practice of law, as an elected member of the Dallas City Council, as president of the Texas Bar Association and as a lawyer for George W. Bush, before and after he assumed the presidency. When one considers that Ms. Miers began her career about 35 years ago, before it was common for women to achieve the higher reaches of the profession, she had a record that of which any woman – or man – lawyer could be proud of. The decisive element in her decision to withdraw was the opposition of right- wing Republicans who concluded that she would not be reliable on the “social issues” – e.g. such as. abortion, gay marriage, and voluntary end of life.<sup>9</sup>

Over the years, many justices were attractive to presidents because of their high professional standing or attainments as judges or lawyers. A sample from the 20th century (excluding current members of the Court) includes Justice Oliver Wendell Holmes (appointed 1905), Justice Louis Brandeis (1916), Chief Justice Charles Evans Hughes (1910 as associate justice and 1930 as chief justice), Justice Harlan Fiske Stone (1925), Justice Benjamin Cardozo (1932), Justice Felix Frankfurter (1939), Justice William O. Douglas (also 1939), Justice Robert Jackson (1941), Wiley Rutledge (1943), Justice John Marshall Harlan (1955), and Lewis Powell (1972).

On the other hand, there have been appointments that have conspicuously failed the test of judicial merit, including Justice James C. McReynolds (1915), Justice Pierce Butler (1923), Chief Justice Fred M. Vinson (1945), Sherman Minton (1948),

9 The demise of Harriet Miers was memorialized in a limerick penned by Lyn Nofziger, a leading conservative and strategist for President Ronald Regan:

Conservatives are fearful that  
Harriet  
Will be George Bush's Iscariot  
They have little doubt  
That she'd sell them out  
For a ride in a liberal's chariot.

Nofziger died on March 27, 2006. See N.Y. Times, March 28, 2006 B7 (setting out the poem).

and Justice Charles E. Whittaker (1957), all of whom were confirmed by the Senate.<sup>10</sup>

There are other justices who, when chosen, were widely regarded as lightweights or simply political choices, but confounded expectations and emerged as leaders of the Court. These include Justices George Sutherland (1922), Hugo Black (1937) and William J. Brennan (1956).

Although merit figures in the calculus whether to appoint, a Supreme Court justice is rarely chosen solely for that purpose.<sup>11</sup> More important is ideology. Presidents ordinarily seek justices who, at least in a general way, will implement the president's legal or political philosophy. In this respect, there have been many disappointments, as justices have veered from the philosophy of the appointing president or were asked to decide new and unpredictable issues. Some of these were President Theodore Roosevelt's appointment of Justice Holmes, President Dwight Eisenhower's appointments of Chief Justice Warren (1953) and Justice William Brennan, and President Richard Nixon's appointment of Justice Harry Blackmun (1970).

Ideological appointments tend to track the events of the day. For example, in the 1930s and early 1940s, the implicit test was loyalty to President Franklin Roosevelt's New Deal program to combat the great Great Depression. In the 1950s, the standard often related to racial desegregation and the degree to which the Constitution, particularly its protection of free speech and association, should thwart punitive governmental action against Communists and other leftists.

In recent years, presidents have concentrated on the "social" issues of abortion and gay rights and on issues of presidential power. Thus, President George Bush has nominated committed conservatives, although Harriet Miers turned out not to be conservative enough.<sup>12</sup> President Clinton nominated two liberal federal judges – Ruth Bader Ginsburg and Stephen Breyer – who, as discussed below, were considered within the judicial mainstream and therefore not strongly opposed by Republicans. The importance of ideology will be explored further during consideration of the Senate confirmation process.

10 These justices and a few others have been deemed "failures" in questionnaires submitted to scholars and lawyers. See generally Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 *A.B.A.J.* 1185 (1972); William D. Pederson & Norman W. Provizer, *Great Justices of the U.S. Supreme Court: Ratings and Cases* (1993).

11 An exception may be Benjamin Cardozo, a liberal whose brilliant scholarship and sterling performance as chief judge of the New York Court of Appeals led a conservative president Herbert Hoover, to nominate him. For a thorough biography, see Andrew L. Kaufman, *Cardozo* (1998).

12 Samuel Alito was a member of the Federalist Society, a group of conservatives and libertarians. He was also affiliated with Concerned Alumni of Princeton, which opposed Princeton's affirmative action policies for women and racial minorities. John Roberts served in two Republican administrations and, after leaving government, was legal counsel to Feminists for Life, an anti-abortion group.

Another important element in the appointment process is whether a candidate has a political mentor who can influence the president or those who advise him the president. In such cases, the president may not know the nominee or know him only slightly. In 1905, President Theodore Roosevelt nominated Oliver Wendell Holmes of Massachusetts, destined to be one of the greatest Supreme Court justices, on the recommendation of Massachusetts Senator Henry Cabot Lodge. Lodge and Roosevelt were well acquainted as Harvard graduates from the highest social circles, a group to which Holmes also belonged. In mid-century, President Eisenhower selected John Marshall Harlan largely on the say-so of his Attorney General, Herbert Brownell, who had been a close friend of Harlan from their days as lawyers in New York City. In the 1980s, after President Ronald Reagan's first two choices to succeed Justice Lewis Powell failed (Robert Bork and Douglas Ginsburg), he turned to Anthony Kennedy on the recommendation of Edwin Meese, a senior member of Reagan's staff. More recently, the first President Bush nominated for whom Thomas had worked, David Souter (1990), who was backed by Republican Senator Warren Rudman and Clarence Thomas (1991), a former aide to an influential Republican Senator, John Danforth of Missouri. Both senators carried weight with Bush.

Sometimes a president is his own political mentor. This was a factor that hurt Harriet Miers when it was suggested that Bush exercised poor judgment because of personal loyalty to her, and therefore engaged in "cronyism".<sup>13</sup> But appointments of close associates and friends have often succeeded. President Franklin Roosevelt appointed Felix Frankfurter, William O. Douglas, and Robert Jackson, all of whom were his advisors and frequent guests at the White House (Douglas regularly played poker with Roosevelt). President Harry Truman, a Democrat who came acceded to the presidency when Roosevelt died in 1945, was a king of cronyism, especially favoring his former colleagues in the Senate. None of the three senators he appointed to the Court – Harold Burton (1946), Fred Vinson (1947) and Sherman Minton (1949) – nor Truman's fourth appointee, Attorney General Tom Clark (1949), made much of a mark.

Another consideration, and often a decisive one, is a political debt owed to a nominee, even though the appointment may be meritorious in its own right. Two of Franklin Roosevelt's nominees who cashed in a political debt were Black, a Roosevelt loyalist in the Senate during struggles over the New Deal, and Jackson, Roosevelt's capable Attorney General who was also a friend. A political factor was important when Dwight Eisenhower appointed Governor Earl Warren of

13 See, e.g., Charles Krauthammer, Op-Ed, Withdraw This Nominee, *Washington Post*, Oct. 7, 2005, at A23, ("If Harriet Miers were not a crony of the president of the United States, her nomination to the Supreme Court would be a joke. . . ." Randy E. Barnett, Op-Ed., Cronysim: Alexander Hamilton Wouldn't Approve of Justice Harriet Miers, *The Wall St. J.*, Oct. 4, 2005. ("the core purpose of Senate confirmation of presidential nominees is to screen out the appointment of 'cronies'").

California to be Chief Justice in 1953. Eisenhower had struggled to win the Republican nomination for president in 1952, and he needed the support of California's delegates at the Republican convention to prevail. Warren, the California leader at the convention, delivered these votes in exchange for a promise by Eisenhower that he would nominate Warren to fill the first vacancy on the Supreme Court. To his later regret in light of Warren's liberal record, Eisenhower delivered on the promise even though he is said to have hesitated because the first appointment was for chief justice and not, as expected, for an associate justice.<sup>14</sup>

As noted above, presidential judicial nominations are subject to the Senate's "advice and consent." It is unclear, and usually not known, how often presidents seek the advice of senators before making an appointment, although it undoubtedly occurs at times either because a president respects the views of particular senators or because he wants to learn how the political wind will blow on a particular nomination.

Committee hearings on the qualifications of a nominee are a natural outgrowth of the Senate's authority to consent (or not) to a nomination because its decision should be an informed one. This is especially important because all federal judges, including Supreme Court justices, hold their positions for life "during good behavior." No justice has ever been removed from office under this standard, although Justice Abe Fortas resigned in 1968 under threat of impeachment because of credible allegations of financial and political corruption.

It is therefore surprising to learn that, although congressional hearings on proposed legislation or for purposes of investigating the executive branch, go back to the mid-19th nineteenth century, the first Senate hearing on a Supreme Court nominee took place in 1916 on Louis Brandeis, who was opposed by many leaders of the bar, including several presidents of the American Bar Association. The first hearing at which a nominee appeared at his confirmation hearing was apparently Harlan Fiske Stone in 1925, although Stone did not testify. The Black and Frankfurter nominations in the late 1930s were moderately contentious, and after the path-breaking desegregation decision in *Brown v. Board of Education*<sup>15</sup> the segregationist chairman of the Senate Judiciary Committee, James Eastland, delayed the confirmation of Justice Harlan for several months in 1955 because of the (valid) assumption that, as a justice, Harlan would support civil rights. In 1969, the Senate refused to approve two of President Nixon's nominees, Clement Haynsworth and Harold Carswell, to replace Justice Fortas after his resignation, thus opening the door for Harry Blackmun to succeed to the Fortas seat. By and large, however, the hearings on presidential nominees during this period were brief and not bitter, leading to confirmation by handy margins.

14 The story, which is not free from ambiguity, is ably related in G. Edward White, *Earl Warren: A Public Life* 144-152 (1982).

15 347 U.S. 483 (1954).

This benign pattern was dramatically disrupted in 1987 by the extensive hearings into Court of Appeals Judge Robert Bork, Ronald Reagan's choice to succeed Justice Lewis Powell. Bork was eminently qualified from a professional perspective: he had been a leading law professor, he had written important law review articles on antitrust law and constitutional law, and he had served in the U.S. Justice Department, rising to the position of Solicitor General, the third ranking official. There he acquired public notoriety when he discharged the Watergate Special Counsel, Professor Archibald Cox, at President Nixon's request, after his two superiors, the Attorney General and Deputy Attorney General, resigned rather than take this action. But fierce dissatisfaction with Bork developed in the Senate because of his extremely conservative record, and in particular the fear that he would be the fifth and deciding vote to overrule *Roe v. Wade*, the leading abortion rights decision,<sup>16</sup> which Justice Powell had supported.

Liberals and women's groups organized broad public opposition to Bork, and the American Civil Liberties Union aggressively fought the nomination on the ground that Bork was fundamentally opposed to civil liberties. The ACLU's large and active membership in all parts of the country, and its reputation for standing on principle, contributed heavily to Bork's eventual defeat by 58-42, the largest losing margin in history. The Senate Judiciary Committee engaged in close questioning of Bork on a wide range of constitutional issues. Bork contributed to his own demise by testimony that many regarded as condescending if not arrogant.<sup>17</sup> The Bork episode underscores Chief Justice McLachlin's observation at the conference that candidates for the U.S. Supreme Court, unlike nominees in Canada (at least until recently), are questioned "on their beliefs, their views on the law [and] previous decisions"<sup>18</sup>. It is a deeply political process, reflecting the vast authority of the Court on many constitutional issues that are widely regarded as "political."<sup>19</sup>

Following the Bork nomination, the Senate in the early 1990s aggressively questioned the two appointees of the first President Bush, although both were confirmed. Justice David Souter of New Hampshire was a largely unknown quantity; indeed he was often called the "stealth candidate." Souter had engaged in no extra-judicial writing, and both liberal and conservative senators were perplexed and concerned about the nomination. But after a strong intellectual and personal showing before the Judiciary Committee, Souter was confirmed comfortably by a vote of 90-9. The

16 410 U.S. 113 (1973).

17 Before Judge Anthony Kennedy was confirmed to take the Powell seat, President Reagan nominated Judge Douglas Ginsburg, formerly a professor at Harvard Law School, who was undone when it became known that he probably had smoked marijuana with his students.

18 See note 2, *supra*. On the Bork controversy, see Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (2005).

19 For a perceptive discussion of many recent nominations to the Supreme Court and citations to relevant Senate hearings, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure*, 26 *Cardozo L. Rev.* 579 (2005).

nomination of Judge Clarence Thomas, an African-American U.S. Court of Appeals judge, to succeed the civil rights icon, Justice Thurgood Marshall, was a far different matter. From the outset there was widespread doubt that Thomas had the stature to succeed Marshall, and there were many questions about his views on abortion, civil rights and other issues. After the Senate hearing ended, a female law professor who had been an aide to Thomas accused him of sexual improprieties, leading to further televised hearings that captured national attention because of the titillating nature of the subject. The Senate eventually confirmed Thomas by the narrowest margin in history, 52-48.

By contrast, President Clinton's two appointees to the Supreme Court had non-adversarial hearings that led to prompt confirmation. Judge Ruth Bader Ginsburg (1993) while a law professor had been a staff member and then a general counsel of the American Civil Liberties Union, and she therefore could have been a highly contested choice. But Ginsburg was endorsed by Ross Perot, a strong third party presidential candidate in 1992 whose presence in the election had contributed to Clinton's victory. She received an even more influential boost when the prominent conservative Supreme Court justice Antonin Scalia, who had served with Ginsburg on the Court of Appeals for several years and had become a friend, assured leading Republicans that Ginsburg was qualified and not extreme in her views. The appointment of Stephen Breyer (1994) had a similar trajectory. His main backer was the influential Senator Edward Kennedy, for whom Breyer had worked as an aide on the Judiciary Committee while on leave as from a professorship at Harvard Law School. Breyer was known and liked by the committee's leading conservatives, Senators Orrin Hatch and Strom Thurmond, thus virtually guaranteeing Breyer a stressless hearing and easy confirmation.

An important issue at Senate hearings has been what sorts of questions are appropriate to ask someone who, if confirmed, would be ruling on cases involving identical or similar questions. It is widely accepted that it would be improper to ask how a nominee would rule on a forthcoming case, and by extension it has become rare for nominees to be questioned on how they would have voted on earlier cases, including *Roe v. Wade* or, in an earlier day, the *Steel Seizure* case.<sup>20</sup> But it is also tacitly agreed that senators can ask nominees to discuss their judicial philosophies, such as whether there is a right to privacy embodied in the Constitution even though "privacy" is not mentioned in the document. This is, of course, an indirect, and not infallible, way to learn how a nominee may vote on abortion and related cases. Similar indirections are used in connection with free speech, federalism and other hot issues.

20 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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The process is not tidy, and the line between proper and inappropriate questioning is unclear.<sup>21</sup>

In many confirmation contests there is tension between a nominee's professional qualifications and his or her ideological identity – sometimes referred to as the “legalist” and “political” approaches to a nomination. This issue tension surfaced in the recent nominations of Chief Justice Roberts and Justice Alito. Both men were viewed as deeply conservative and therefore likely to alter the direction of the Supreme Court, especially Alito, who replaced the more moderate Justice Sandra Day O'Connor. On the other hand, Roberts and Alito were well qualified professionally, and this consideration eventually overcame some Democratic opposition to the nominations and their eventual confirmation.<sup>22</sup>

Senate hearings are now established parts of the process of confirmation to the U.S. Supreme Court. To some it may appear unseemly to subject nominees to such inquiries, but it is justified in the American context because of the vast power that Supreme Court justices wield through lifetime appointments, which now can mean many decades of service. In these circumstances, it is desirable that both the public and the Senate have access to as much information about a candidate's philosophy and temperament as can be learned without impropriety.

On the other hand, there is a broad consensus that Senate hearings, as they are now constituted, are a highly imperfect means of appraising a nominee. Senators tend to make speeches instead of probing a nominee's qualifications, and even pointed questioning ordinarily permits the nominee to answer in generalities and avoid confrontation with the most difficult issues. Nevertheless, the current system is likely to continue because senators do not want to lose the opportunity to shine (or at least to appear) in nationally televised hearings and because nobody has come up with a plainly better alternative.<sup>23</sup>

#### *D.*

The Supreme Court is very different today than when I was a law clerk to Justice John Marshall Harlan in 1957-1958. Not surprisingly, the composition of the Court has completely changed; Justice Brennan was the last survivor, retiring in 1990. Al-

21 Professors Charles Fried and Ronald Dworkin recently engaged in a sophisticated debate on these issues in the context of the Alito nomination. ‘The Strange Case of Justice Alito’: An Exchange, 53 *The New York Review of Books* 67 (April 6, 2006).

22 For a full discussion of the “legalist” versus “political” approaches to Supreme Court appointments, see Michael Comiskey, *Seeking Justices* (2004), discussed in D. Grier Stephenson, Jr., *The Judicial Bookshelf*, 30 *J. Sup. Ct. Hist.* 284, 296-298 (2005). See also Michael J. Gerhart, *Merit vs. Ideology*, 26 *Cardozo L. Rev.* 353 (2005).

23 Accord, Dawn E. Johnson, 26 *Cardozo L. Rev.* 463, 476 (2005) (“The prospects for substantial change appear dim, at least for the short run.”).

though the ideological balance has not altered on the surface – then and as now (since 1994) four justices regarded as “liberal” have struggled to attract a decisive fifth vote. But the political dial during the past half century has moved considerably closer to the conservative pole. In the earlier period, there were at least two members – Justices Douglas and Brennan – who were far more liberal than any current justice, and there was no justice as aggressively conservative then Chief Justice Rehnquist and Justices Scalia and Thomas have been, and as Justices Roberts and Alito appear to be.

Another important difference is that the current Supreme Court is composed entirely of former federal judges. By contrast, during my clerkship year, only three of the justices were former federal or state judges – Harlan, Brennan and Whittaker, with Harlan having served only about one year in a U.S. court of appeals. This change in profile is directly related, in my view, to today’s far more searching appointment and confirmation process. Political leaders do not want to risk approving a person without a judicial record that can be used as an important (though not infallible) predictor of behavior on the Court.

This is not surprising. Over the past half century, many justices have disappointed their sponsors by going over to the “other side”. Such appointees by Republican presidents include Chief Justice Justice Earl Warren and Justices Brennan, Blackmun, Stevens and Souter, and, and other Republican appointees (O’Connor and Kennedy) have not been cast econservative votes on important issues.

Democrats have been less bedeviled than Republicans by this “switching” problem. The most famousA notable (and complex )case exception is Justice Frankfurter, who, after a career as a liberal law professor (includingand a founder of the American Civil Liberties Union ) , was regarded as a turncoat by many for failing adequately to support civil liberties, especially when harsh anti-Communist measures were enacted in the 1940s and 1950s.<sup>24</sup> But Frankfurter’s record was not unidimensional and is not easy to summarize in conventional categories of liberal or conservative, and his eventual performance on the Court was suggested by some of his scholarly writings while a law professor<sup>25</sup> and therefore should not have come as

24 See, e.g., *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring in upholding conviction of Communist leaders for conspiracy “to advocate overthrow” of the government by force and violence. See also *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting from invalidation of requirement that children in state schools daily pledge allegiance to the flag of the United States). But see *Yates v. United States*, 354 U.S. 298 (1957) (joining opinion that restricted the scope of the statute enforced in the Dennis case); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (Frankfurter, J.) (limiting the statute providing for deportation of aliens who had been members of the Communist Party).

25 For a discussion of whether Frankfurter, prior to his judicial appointment, “advocated civil liberties solely or primarily as a political ideal, while taking a different stance regarding the institutional role of the Supreme Court in resisting encroachments on protected rights,” see Norman Dorsen, Book Review, 95 *Harv. L. Rev.* 367, 377-380 (1981).

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a complete surprise. Another Democratic appointee possibly who might be placed in this category is Byron White, who was nominated by President Kennedy in 1962 and speedily confirmed. But White had a mixed ideological record on the Court – never fully joining either major bloc. But he had not been touted as a liberal when appointed.

A casualty of the quest for maximum certainty by this history largely explains the recent preference for sitting judges as potential Supreme Court justices. Nevertheless, while the selection of lower court judges may assist predictability, it means foregoing, at least to some degree, the appointment of them is some loss among the justices with high-level experience in the executive and legislative branches and in the private practice of law. For example, in 1950 there were five former senators sitting on the Court, and now there is none. The Court's docket is varied, and the greater wider the range of legal and political pre-Court -experience, the more likely that the justices will bring well-informed and diverse approaches to the cases. Nor is prior judicial experience a reliable indicator of the quality of an appointment; many excellent justices lacked such experience, including Hughes, Brandeis, Black, Frankfurter, Douglas, Powell and Rehnquist.

What is not in doubt as we look ahead is that a searching and complex process of nomination and confirmation will continue as long as the Supreme Court exercises its present broad authority under the United States Constitution. There is no indication that this will change in the foreseeable future.