

Celebrity to Stealth:
Supreme Court Nominations Across Time

Presented to the faculty of Lycoming College
in partial fulfillment of the requirements for
Departmental Honors in Criminal Justice

by

Amanda Lenhart
Lycoming College

24 April 2009

Approved by:

(Dr. Jinney Smith)

(Dr. Susan Ross)

(Dr. Betty McCall)

(Dr. Georg Grassmueck)

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~ Chapter 1 – Introduction ~

As the only political officials to hold life tenure, Supreme Court justices represent an elite group that has the power to effect great change. Within legal history and scholarship, it is generally held that Supreme Court confirmations have changed over time and similarly, the characteristics of individual nominees have changed as well. While the earliest nominees largely had extensive political careers and were well known because of those experiences, more recent nominees lack such experience. Not only were earlier nominees politically experienced, they were also public personalities. However, there has been no systematic empirical research documenting their public profile. Here, contemporaneous newspaper articles were examined to determine if nominees were well known or unknown to the public. The results of the study suggest that nominations after 1930 are characteristically different than nominations prior to 1930, in that nominees from the earlier period were generally well known, while nominees from the later period generally were not.

Because nominations have changed over time, and unknown nominees are more easily confirmed, the pool of potential justices is severely limited. Unlike before, current nominees cannot have any contradiction in their lives; they must live by the same standards they espouse through their public careers. This was not always the case, though. Many Supreme Court justices lived their personal lives by different standards, or morals, than those they professed from the bench. Because such inconsistency was not viewed as hypocrisy, the public did not condemn justices and nominees of the past in the way that they do currently. While many justices professed different ideals from the

bench than they did in their personal lives, Chief Justice Taney provides the most interesting, and possibly the most controversial, example.

By 1850, most people in the United States not only knew what the Supreme Court was, but also who its justices were. The advent of mass printing technologies allowed a greater dissemination of information through newspapers than was previously possible, but photographs, radio, television, and the internet would not exist for some time. The literate public relied instead on the written word not only to inform them, but also to illustrate and visualize the things they may never see. In February of 1850, a journalist from New Hampshire published an article accomplishing just that. At the time, the Supreme Court was homeless and would not find a permanent structure for another eighty years. As this eloquent journalist wrote:

The Court room is in the northern wing of the Capitol, on the ground floor. It is broken by pillars and arched walls, and is badly lighted. It is handsomely furnished, with rich Wilton carpets, silken drapery, &c. The light is admitted from the rear windows alone, and the Judges sit with their backs to the light; the counsel who address them can scarcely see their faces. At 11 o'clock they enter deliberately, all dressed in black, and with gowns[.] After they are seated, the crier proclaims—'Oyez, oyez, oyez! the Supreme Court of the United States is now in session; all persons having business therein are admonished to draw near and give their attendance. God save the United States and these honorable Judges.'

The journalist continued to weave words in a way that relates the gravity of the Court he observed. After an illustration of the room itself, the journalist took time to sketch each justice:

In the centre sits the Chief Justice, Roger B. Taney of Md. He is tall, sallow, thin, hard-featured, and careless in dress. His history is well known. [...] The sincerity of his convictions no one doubts. There is about him an unmistakable air of intellect and authority, and he is not an unworthy successor of John Marshall (“[No Headline]”).

Here, Chief Justice Taney is favorably represented and clearly respected. Within a few short years, though, public opinion of him, and the Court, would drastically change. At the beginning of Taney's tenure, the Court reached a peak of success and respect that it had not before experienced. With one opinion, though, the Court's much needed and essential respect was gone; public confidence in the Court as an institution was dramatically shaken, and Taney lived his final years in failing health, never to see the Court he loved recover.

Scholars remember Roger Brooke Taney as a successful Chief Justice; however, his reputation may be unfairly marred by one opinion. Although time has shown the error of his decision, history has largely forgotten the man behind the justice. Taney was complicated and led a difficult and arguably spectacular life. He was an advocate of every sort. As a lawyer, he represented many different interests, not all of which he personally supported. Lawyers are hired to defend and support the position of their clients; they are not hired to advance their own personal ideals. In a similar sense, judges are intended to mediate the law, not write their own public policy. First, the Constitution, and second, precedent, control significantly what the decision in a case will be. Judges are constrained by those factors and may not, should not, and cannot make a decision completely disregarding them.

Born in 1777 to a family of former indentured servants, Roger Taney grew up among a prosperous group of tobacco farmers (Dickinson). Privately educated, Taney almost immediately felt a pull towards politics. First serving as a representative in a Federalist state, he became a Maryland state senator in 1816. Just a few years after, he became the Attorney General for Maryland in 1827. Moving outside of state politics,

Taney entered the federal arena in the 1830s, serving in many roles, including Attorney General, acting Secretary of War, and as a controversial Secretary of the Treasury.¹ As acting Secretary of the Treasury, Taney experienced his first failed senatorial confirmation. As a reward for faithful service, President Jackson then nominated Taney for a Supreme Court justiceship in 1834; nevertheless, the Senate still felt hostile towards Taney and rejected the nomination. Jackson did not relent, however, and nominated Taney again in 1835 following the death of Chief Justice John Marshall. This time, the Senate confirmed him, and Taney took the oath of office in March of 1836 (Dickinson). Because he had succeeded John Marshall, Taney had a large bill to fill. Chief Justice Marshall had worked tirelessly to make the Court a respected and powerful institution. Taney had to sustain carefully, and continue to grow, the Court's stature.

Although the Senate confirmed him, Taney's nomination was not universally accepted. A journal published in New York printed: "the pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney" (Supreme Court Hist. Soc.). Slowly, Taney began to establish himself on the Court. His opinions and jurisprudence were different from those of Marshall's, although that distinction soon became less of a cause of debate.

¹ The Bank of the United States wanted to renew its charter with Congress. At the time, William J. Duane was Secretary of the Treasury. President Jackson wanted to abolish the Bank and had Taney draft a statement, which essentially vetoed the Bank's renewal. This statement was later read to the cabinet and explained Jackson's reasons for rejecting the Bank. After his reelection, Jackson ordered Duane to withdraw the government deposited funds from the Bank and redeposit them into various state banks. When Duane refused, Jackson fired him and gave a recess appointment to Taney. Taney served in this position for about nine months, until the Senate rejected his nomination ("Roger").

As the Chief Justice gained footing on the Court, a case that would change his legacy began its slow ascension and would eventually land on the docket before him. Dred Scott was a slave owned by an Army surgeon. During the Mexican-American War (1846), the surgeon, John Emerson, took Scott from his home in Missouri to the free state of Illinois; Emerson had also taken Scott to Fort Snelling. The Northwest Compromise banned slavery in both Illinois and Fort Snelling. After the War, Scott returned to Missouri with Emerson. Following Emerson's death, Scott sued Mrs. Emerson claiming that because of his time on free soil, he was free and no longer a slave. In 1850, a Missouri court ruled in Scott's favor. On appeal, Missouri's highest court ruled that whether or not Scott was free in states that barred slavery under the Northwest Compromise was irrelevant, because he was still or had again become a slave upon reentering Missouri. The case then entered the federal judiciary and would shortly find its way to the Supreme Court (Supreme Court Hist. Soc.).

As this case worked its way through the court system, the country began to divide more definitively concerning slavery. Northern states not only opposed slavery in their own states, but also sought to end the practice throughout the country. Southern states, relying on slavery-provided cheap labor, staunchly rejected the northern notions. As the population expanded westward, the debate became especially heated. The Northwest Compromise had banned slavery from new states, but in 1854, Congress passed the Kansas-Nebraska Act, which allowed slavery to flourish where it was once banned (Supreme Court Hist. Soc.). Slaves from the South and West began to escape and make their way to the free Northern states, hoping that by reaching free territory, they would then themselves be free.

Owners began to raise and offer rewards for the return of their slaves; states passed runaway slave laws. Northern, abolitionist judges struggled and were caught between their personal beliefs and their duty as judges to enforce the law. Although trial and circuit judges were more often caught in this antagonistic polarity, Chief Justice Taney also felt constrained by the law despite his personal views. Being from the border state of Maryland, Taney especially felt the stress of the growing tensions. Although he had, at one time, personally owned slaves, Taney freed them, retaining a few as servants (and paying them appropriate wages as such), and providing pensions for the ones who were too old to find suitable work (Abraham 82).

As Dred Scott's case slowly navigated the federal court system, tensions within the country reached an all time high. At the same time, the Supreme Court garnered levels of respect and admiration that even Marshall had not seen. When the Court first heard argument for *Dred Scott v. Sandford*,² the country needed and depended on the justices to resolve the issue for good, thereby keeping the Southern states from seceding and preventing the impending war. By dealing with the controversial issue of the day, the Court had flung itself into the national spotlight. The *New York Courier* said that "The Court, in trying this case, is itself on trial" (Supreme Court Hist. Soc.). All eyes

² After Emerson, Scott's owner, died, Scott belonged to his widow, who was the original party sued. When the case was transferred to the federal courts, ownership of Scott was transferred to Mrs. Emerson's brother, John Sanford. Court records incorrectly spelled his name, thus the case was titled *Dred Scott v. Sandford*. The Court first heard oral argument for the case in February of 1856 but failed to issue an opinion and reheard argument in December (Supreme Court Hist. Soc.). Although rare in Supreme Court history, this was not the only time the Court heard arguments twice for the same case. Just about one hundred years later, the Court would hear argument twice for *Brown v. Board of Education* involving segregation in public schools.

were on the justices, but on no one more so than Chief Justice Taney. The outcome of the case would have far-reaching implications.

Based on Taney's history and personal ideals, the public anticipated a decision favoring Scott; however, the actual decision was far from what was anticipated. The justices issued eight different opinions, two of which strongly dissented against the majority opinion written by Chief Justice Taney. Holding for the Court, Taney's opinion ruled against Scott, stating that Scott was not a citizen of the United States and, therefore, had no standing to sue. Additionally, Taney's argument in his majority opinion dealt largely with jurisdiction and did not focus on slavery as an institution. Public reaction mirrored the fractured votes on the Court. Not long after releasing the opinion, a Massachusetts newspaper reflected on Taney's apparent about-face. The paper recalled an incident years before. A lawyer at the time, Taney defended a "little negro girl" who "had most likely committed the crime" she was charged with, however, Taney delivered "the most eloquent speech he ever made [...] at the Frederick county bar, in defense of a little negro girl" ("[Black Republican]").

Chief Justice Roger Taney lived until 1864 ("Roger"). Public support of the Court would never reach pre-*Dred Scott* levels during Taney's life. Instead, Taney spent his remaining years in declining health, fighting very public battles against President Lincoln who, while remembered very favorably in history books, often walked a fine line of constitutionality. It is unfortunate that one opinion so negatively colored Taney's legacy. Judges, by the nature of their job, cannot and should not infuse their personal feelings into opinions. Judges merely interpret the law in question before them. The common law system that the United States operates under mandates that judges apply,

first, the rules proscribed in the Constitution and, second, applicable, standing precedents (Murphy et. al.439-40). Taney must have believed that that was what he was doing when he wrote the opinion.

Generally, it is difficult to see the person behind the judge. Once Taney became a justice, who he was as an individual no longer mattered. He has been condemned for writing *Dred Scott* without any recognition of the person he was without the robes of a justice. Coming from a family of indentured servants, defending a young slave, and later voting to free Africans being held on the ship *Amistad* despite them being charged with murder (Abraham 82), Taney was clearly far more complicated and conflicted than history remembers him being. By these and similar actions, Taney would appear to be sympathetic to abolitionists, however, he decided the *Dred Scott* case against Scott. During his entire tenure on the Court, but specifically with the *Dred Scott* case, the Court's opinions cannot be viewed as Taney's personal opinions. As a justice of the Supreme Court, he was constrained by the Constitution and precedent; he could not decide cases based on his own opinions, only based on how he read the Constitution.

When Taney ascended to the Court in 1836, few foresaw the impact he would have. He had considerable political experience and a reputation as one of Maryland's best attorneys, but he was also very loyal to President Jackson. As all presidents do, Jackson took considerable care when choosing a replacement for the well-respected Chief Justice Marshall. Although Taney had worked under and supported President Jackson for a number of years prior to his nomination, Jackson could not have predicted the influence Taney would have on the Court, and by extension, the country itself. Every president hopes that his nominees become influential Court members, but most fulfill their seats

unremarkably—at least as unremarkably as a Supreme Court justice could do so. Roger Taney is a rare exception—even his manner of dress disturbed some.³

When President Jackson nominated Taney, and for several presidents thereafter, well known, political celebrities fit the bill of an ideal justice. Political experience allowed for the opportunity to foster a relationship with the President, and presidents tended to nominate only people they personally knew. Each successive president learns from the nominations of each prior president. Over time, for many reasons, presidents have abandoned the pool of well-known political celebrities and now seek out nominees from the obscure corners of the legal network (Abraham).

What kind of person would make the ideal justice has been debated for as long as the Supreme Court has needed justices on its bench. Until recently, justices came from various backgrounds. Some were senators, mayors, congressmen, professors, and judges. The current Court, though, is the first to be composed solely of former appellate court judges. In a speech at the University of Arizona Law School, Chief Justice John G. Roberts commented on how this has influenced the Court. He said that, “the method of analysis and argument shifted to more solid grounds of legal arguments,” which results in “a more legal perspective and less of a policy perspective” (Liptak). While Roberts accurately notes the change in the method of constitutional analysis, he fails to evaluate the positive or negative effects of such a shift.

Additionally, the recognizability of justices at the time of nomination may also have an effect on their ability to be a successful justice, largely because recognizability

³ Taney was the first justice to wear trousers under his robes instead of the more traditional knee breeches (Shnayerson 105).

affects their confirmation process. This research examines the changes in the nomination and confirmation process in an extensive literature review, spanning the entire history of the Supreme Court. Next, the research examines newspaper articles for a sample of justices, covering their nominations, and examines whether or not these justices were well known during their nomination/confirmation process. Finally, an evaluation is made regarding the future of the Court with respect to the current trends in nominations.

~ Chapter 2 – Literature Review ~

In a democracy, what the average person thinks is important to representatives, senators, and presidents alike. Members of the popularly elected branches must face reelection periodically, and the public can choose not to reelect, if given reason to do so. That is not true of the Supreme Court, however. Once a justice is nominated and successfully confirmed, he or she retains their job for life. Because of this, the nine darkly robed figures that comprise the Court are the single most powerful group of public officials. Although their power is shrouded in mysterious traditions and quiet authority, the Court has not always commanded such authority.

On February 1, 1790, the Supreme Court of the United States convened for the first time (Shnayerson 64). That first Court lacked a permanent home structure of its own. During its early history, justices spent part of the year hearing cases on the Supreme Court and the rest of the year traveling on horseback throughout the growing country to hear cases on circuit courts. Many of the justices who sat on the first Court fought in the Revolutionary War and several helped to draft and ratify the Constitution.⁴ Much has changed since those original justices sat on the bench. The politically active nominees with long established public records have been replaced by nominees now referred to as “stealth” nominees (Abraham). The idea of the stealth nominee first

⁴ None of these justices had any formal legal training. Levi Woodbury, on the Court from 1845 to 1851, was the first justice to have attended law school (Abraham 87). Benjamin Robbins Curtis was the first justice to actually graduate from law school (Abraham 89). More recently, Hugo Black never graduated from high school. Instead, he enrolled in Birmingham Medical School, finishing in only three years before going to University of Alabama School of Law at Tuscaloosa (Abraham 167). Supreme Court justices may be the most able legal minds, but they have never been the most educated, which suggests that the most qualified candidate is not always the best candidate.

emerged in 1990 with the nomination of David Souter. Stealth refers to the Stealth Bomber plane and its ability to stay undetected, or under the radar. A stealth nominee is one that has had a successful and prestigious enough career in order to be considered qualified for the Supreme Court, but also has successfully managed to remain largely unknown by the public, politicians, and most of the legal community. Furthermore, stealth nominees lack a judicial record that may be held against them. Presidents choose these lesser-known candidates because they hope the Senate will more easily confirm them. In the new era, nominees have no public record and usually stay far from the political spotlight as that spotlight now brings surefire confirmation suicide.

Presidents have long acknowledged the importance of their nominations because even after their presidency has concluded, the justices they appoint still sit on the Court. Presidents in that past usually knew their nominees quite well before nominating them to the Court, but also realized that the first day the justice sits on the Court, that friendship must end. For example, after President Johnson told Thurgood Marshall that he would be nominated, Johnson said “Well, I guess our friendship is about busted up now.” To which, Marshall replied: “I would have no hesitancy in socking it to you” (Williams 331). Johnson understood the impact that Marshall would have on the Court and also understood that it was only a matter of time before Marshall made a decision with which Johnson would disagree. Judicial appointments are the longest lasting impact a president can have. For example, during his presidency, Carter appointed 40.2% of the entire federal judiciary (Abraham 263). As of 2008, 125 of those appointees are still serving on the bench (Federal Judicial Center, “Federal”). Clearly, judicial appointments are

significant; presidents carefully choose their nominees, knowing that their appointed justice will likely be their most noteworthy presidential act.

Framing the Judiciary

The judicial branch of the United States is an influential one, gaining considerable power not from what the Constitution inherently grants the institution, but from the respect garnered from what can be considered public awe (Murphy et. al.691-703). This was not always the case, though. During the debates prior to the ratification of the Constitution, the Federalist and Anti-Federalist parties debated the relative strength that the judiciary would have. Central to the argument was the concern that a strong judiciary may be more powerful than the other two branches, breaching the checks and balances framework of the new centralized government.

Alexander Hamilton directly addressed that particular concern, and others, in *Federalist #78*, originally published in 1788, just prior to the ratification of the Constitution. In the often-quoted paper, Hamilton argues that the judiciary will not and cannot be more powerful than the executive and legislative branches. To support that assertion, Hamilton says that the Court “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever” (Hamilton). Specifically, he argues that the only tool the judiciary has is its decisions. Unlike the legislature’s control of the budget or the executive’s control of the military, the judiciary has no such tool it can use to compel action. Because of that, the judiciary could never become stronger than the other two branches.

The Framers of the Constitution also debated whether or not the Supreme Court could or would have the power to declare acts of Congress unconstitutional. The Anti-Federalist fear was that if the Court was afforded this power, the Court would become inherently more powerful than the legislature, upsetting the equal-branch, checks and balances approach to government that the Founders intended (Hamilton). Hamilton commented on this, saying that “No legislative act, . . . , contrary to the Constitution, can be valid” (Hamilton). He sets up an argument stating that because Congress must follow the Constitution, not allowing the Court to rule congressional acts as unconstitutional when, in fact they were, would in effect say that Congress was more powerful than the Constitution, which both Federalist and Anti-Federalist camps agreed, it was not.

The first time the Court ruled an act of Congress unconstitutional was not until 1803 in *Marbury v. Madison* (Shnayerson 115). Although the details are largely unimportant, this decision, written by the famous Chief Justice John Marshall, declared an act of Congress unconstitutional, stating that Congress overstepped the powers granted to it by the Constitution. As can be expected, President Thomas Jefferson was furious that the Court did this, but there was little he could do. Once the Court delivered an opinion, it endured, unless a future case overruled it or a constitutional amendment changed it. In a later and similarly politically charged case President Jackson allegedly said, “John Marshall has made his decision, now let him enforce it” (Shnayerson 99). Clearly, as Hamilton argued, the Court did not have the power to enforce the decision. Not inconsequentially, the Court would not declare another act of Congress unconstitutional for another fifty years (Murphy et. al. 47-48).

After much debate, the language that the Framers finally agreed upon, and what was finally ratified in Article III of the Constitution, provides little information as to how the courts should operate and even less guidance on how they should be staffed. The three short sections of Article III explain that judges of the Supreme and lower courts will continue in their posts during good behavior and will receive compensation for their services. The article also explains the original jurisdiction⁵ of the Supreme Court and a brief explanation of treason.⁶ In its entirety, though, the article provides little guidance and leaves much open to interpretation. How actual trials should be conducted and what qualifications the judges should have are not discussed. This is due, more than likely, to the novel nature of the co-equal federal court system and not a mere oversight. The Founders did not have good models upon which to base the judiciary, forcing them to use only broad terms, which left much open to interpretation (Shnayerson 56-64).

Because of the ambiguities in Article III, how the judiciary operated was a product of trial and error. The Supreme Court, its justices, and all operating procedures changed many times before finally settling on the nine-justice, primarily appellate jurisdiction structure that the Court reflects today. Over time, the Court structure and size changed as a result of political debates through Congressional acts and by the Court itself, through its opinions. When the Supreme Court first met, the justices were required to hear cases on the Supreme Court level, and they were also required to try cases on the circuit court level. When the judiciary was set up, no funds were allocated to hire circuit

⁵ Original jurisdiction cases are those which the Supreme Court is constitutionally mandated to take, and no other court is permitted to try them. During those cases, the Supreme Court serves as a trial court. Such cases involve diplomatic personnel or one state suing another state.

⁶ Treason is the only crime stated in the Constitution.

court judges. To compensate, the justices and judges from the lower district courts would periodically meet to hear cases as temporary circuit courts (Shnayerson 60-61).

Circuit riding was only one of many things that made qualified persons reluctant to accept judicial nominations. This task involved riding on horseback through a circuit for about half a year, which could span several states, keeping a justice away from his family and the comforts of home (Shnayerson 60). Only the necessities could be carried with them, because buggy space was limited. Travel was difficult and justices often had to endure extreme cold if they served northern circuits, or extreme heat if riding in southern circuits.

When the judiciary was first established, no provisions were made for circuit court judges, and Congress required two Supreme Court justices to preside over each circuit court hearing. This placed considerable strain on the justices as there were only six justices at the time. Although far fewer cases came before circuit courts and the Supreme Court then, the workload was nonetheless tremendous and extremely strenuous on those six men. In a relatively futile attempt to lessen the burden on the justices, Congress reduced, from two to one, the number of justices required to serve on each circuit court. Continuous debate eventually led to the creation of circuit judgeships in the Judiciary Act of 1801, but Congress reversed much of the Act in 1802, forcing justices to ride circuit again. Finally, in 1869, Congress provided for permanent circuit court judgeships and Supreme Court justices were no longer required to ride circuit (Federal Judicial Center, "Supreme"). The justices could finally focus their efforts on the increasingly large docket of the Supreme Court.

During its infancy, the Supreme Court docket largely consisted of civil cases (Federal Judicial Center, “Supreme”). These early cases often involved land disputes because the law was especially unclear, although rapidly developing, in that area. The justices did not have control over much of their docket, because Congress had the power and authority to regulate jurisdiction, a power that Congress has never shied away from using whenever that particular power suited their aims. In 1891, however, Congress allowed the justices some control over the docket by allowing review of circuit court appeals through granting certiorari (Federal Judicial Center, “Supreme”).⁷ Although this was a positive power, it allowed the justices to reject or refuse to hear many cases, thereby limiting the amount of cases they hear each year. A piece of legislation passed in 1925, called the Judges Bill (because the justices wrote it) expanded their discretion by limiting the kinds of cases the Court was mandated to hear (Shnayerson 178). By 1988, almost all types of mandatory jurisdiction cases were no longer mandatory, and the justices had wide-ranging control of their docket. Each year, the justices hear increasingly fewer cases even though the number of petitions for certiorari increases (Murphy et. al. 87-89).

Size of the Court

Over about one hundred years, the Court evolved into the institution it is today. Just as the duties and jurisdiction of the Court have changed, the size of the Court has also fluctuated. When Washington made his first appointments, only six justices comprised the Supreme Court. In 1807, Congress created a seventh seat on the Court due

⁷ *Certiorari* is a Latin term that literally means “to be shown.” When the Supreme Court issues a Writ of Certiorari, they are essentially asking a lower court to send up the records of a particular case for review.

to the growing U.S. population (Abraham 67). Again in 1837, Congress created two more seats, increasing the number of justices to nine. With the creation of the tenth circuit, a tenth justice was added to the Court in 1863 (Federal Judicial Center, “Supreme”). The number of justices remained at ten until 1866, when Congress reduced the size of the Court in a blatant attempt to prevent President Andrew Johnson from appointing any justices (Federal Judicial Center, “Supreme”; Shnayerson 129; Frank). This meant that no appointments would be made until the number of sitting justices fell below seven; however, the Court’s membership only declined to eight justices before Congress again increased the size of the Court to nine justices in 1869 (Federal Judicial Center, “Supreme”). The Court has since had nine justices.

Only once since 1869 has the size of the Court been threatened with change. During the Second Hundred Days of President Franklin Roosevelt’s New Deal, Roosevelt addressed the public and presented what became known as the Court Packing Plan. Much of the New Deal legislation had made its way to the Supreme Court, and the justices were consistently ruling against most of that legislation, often by a very fractured, slim majority. Roosevelt decided to propose the Court Packing Plan to Congress to change the size of the Court. The Plan would allow Roosevelt to appoint one justice for every sitting justice who was over the age of seventy. If passed, the Court membership would increase to fifteen members. Obviously, the justices did not support and sincerely opposed the Plan; Chief Justice Hughes even lobbied against the proposed legislation (Shnayerson 196).

Public opinion following Roosevelt’s address also opposed his plan. The public understood the intention of the legislation—to allow appointment of New Deal friendly

justices to create a new majority that would no longer strike down the economy-stimulating legislation. Needless to say, Congress made no attempts to pass such legislation, but the Court did heed the presidential warning. The Court changed their perspective of New Deal regulations and began allowing such regulations to stand. In an otherwise largely unimportant case,⁸ the Court officially changed their stance and provided the justification for doing so. A footnote in that opinion explained that the Court would use a strict standard when deciding cases involving personal liberties and freedoms, mainly cases involving the Bill of Rights, but would use a lesser standard of scrutiny for economic regulation cases. Although Roosevelt's plan never passed through Congress, he still achieved the desired ends he sought and the Court began to rule in favor of almost all New Deal legislation (Shnayerson 196). That episode was the last time the Court membership was in danger of changing. Since then, Congress has left the size of the Court alone, and most people are unaware of the fact that the Court ever comprised more or less than nine justices.

The Role of Congress

In addition to regulating the size and jurisdiction of the Court, Congress also plays a role in Supreme Court confirmation. While Article III largely controls or provides a base for the judiciary, Article II (about the executive branch) contains an important clause known as the "advice and consent" clause. This particular section of the Constitution talks about how judges and justices are nominated and appointed. Largely the result of compromise, Article II says the president "shall nominate, and by and with the advice and

⁸ *Carolene Milk Products* (1938) involved the transportation of tainted milk across state lines.

consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for” (US Const., art. 2, sec. 2). Through interpretation, although still often debated, this means that when a vacancy occurs, the current president formally nominates a candidate of his choice, but senators may give the president input on that decision. Over time, the advice and consent clause has been interpreted to mean the only formal role of senators is that of confirmation; however, there are many informal ways that senators contribute to the nomination process (Abraham 20). For example, senators often help presidents gather names that eventually comprise a list of possible nominees.

Senators are not the only ones who aid the president in this way, though. Almost anyone with some connection to the president can help with name-gathering. The Department of Justice often provides the most help. White House aides sometimes also suggest candidates, as was the case in the nomination of David Souter. Allegedly, White House Chief of Staff, John Sununu, suggested that President Bush consider fellow New Hampshire resident (“David”). Souter was formally nominated and eventually confirmed. Finally, the American Bar Association and sitting justices⁹ may also provide their input.

Once a candidate is chosen, the president formally nominates that person by sending their name to the Senate. Since its creation in 1816, the nomination is first received by the Senate Judiciary Committee (Maltese 88). The Committee receives the

⁹ Taft would often give the current president his opinion of nominees, even when such opinions were unsolicited (Abraham 23).

name and starts an investigation into the qualifications and background of the candidate.¹⁰ To make their assessment, they gather and analyze all of the nominee's past writing, including written opinions if the nominee had previously served on another court. Often, written opinions from lower courts are the most helpful in deciding the jurisprudential philosophy of the nominee.

After the Committee finishes their investigation, they vote and make a recommendation to the full Senate about whether or not to approve the nominee. Next, the full Senate votes to approve the nominee. If the nominee receives a majority of votes, he or she becomes a Supreme Court justice. If the nominee does not receive a majority number of votes, the nomination fails and the process starts over. In addition to voting to confirm, the Senate can vote to return the nomination to the Committee. If that happens, then the Committee often takes no further action, and the nomination dies, requiring the president to make another nomination (Maltese 3, 10-11).

Although Article II provides the basic mechanism for how a nominee becomes confirmed as a justice, nowhere in the Constitution are qualifications for nominations listed. The lack of explicit qualifications is not oversight, but instead, probably results from the many compromises made between Federalists and Anti-Federalists during the Constitutional Convention and debates prior to ratification (Abraham 20). Despite the absence of qualifications in the Constitution, most nominees have had several things in common.

¹⁰ The FBI also conducts an invasive, exhaustive background check. The American Bar Association used to issue a report to the Senate and the President prior to formal nomination. Now, however, the ABA is not informed of candidates before formal nomination. Instead, the ABA issues their report after the Senate receives the formal nomination.

Geographic Diversity

George Washington, being the first president to nominate justices, had specific criteria that all of his appointees met. Many of his original criteria are still used by modern presidents when choosing their nominees. These criteria included supporting the Constitution, serving in the Revolution, political participation, and “love of country” (Abraham 57). Unlike current nominations, Washington deliberately sought men who had military backgrounds. To him, military service was the only way to ensure that those he put on the Court truly supported the Constitution in the whole-hearted fashion he needed. No modern president has had such criteria because it is not a needed prerequisite. Because the Constitution was so new, Washington needed some criteria to assure that the individuals he chose truly supported it. Today, though, the Constitution has become such an integral part of the United States that they are essentially one in the same and, potential nominees no longer need to serve in the armed forces to prove that they support the Constitution (Murphy et. al. 539-541).

Starting with Washington and continuing into the latter part of the nineteenth century, most presidents considered the geographic diversity that their candidate would contribute to the Court prior to formal nomination (Abraham 57). At first, the geographic suitability of a candidate was a logistical issue. Until 1891, when circuit riding officially ended, Supreme Court justices were required to ride around the country, or at least their assigned part of it, to sit on circuit courts (Shnayerson 152). Washington and many presidents following him considered that requirement and made a conscious effort to nominate from the general area in which that justice would ride. This also meant that a custom developed where the person nominated was from the same circuit, if not the same

state, as the justice they were nominated to replace. Not all presidents followed this trend, however. President Hayes, for example, nominated John Marshall Harlan I., from Kentucky, to replace Justice David Davis from Illinois (Abraham 106). The two were not from the same state and certainly not from the same circuit.

Once circuit riding officially ended in 1891, the geographic diversity requirement did not completely disappear. Although locality, as far as circuits were concerned, was no longer the issue, the country was quickly expanding westward. While that was happening, it was important to have justices on the Court that were from those newly acquired territories. It would not have made sense, representatively, if all the justices on the Court came from only the east coast. For that reason, presidents took care to nominate justices from a variety of states.

Geography continued to be a consideration, while an increasingly less important one, through the nineteenth and into the mid-twentieth centuries (Abraham). With advancements in communications technology, the United States started to become a cohesive unit and states were less disconnected than before. Because of that, the home-state geography of a candidate mattered less. The United States, while becoming geographically connected, became more diversified. With the Civil War amendments (13th, 14th, and 15th) and the civil rights movement marking advancements in equal rights for all persons, the Court needed to “represent” that expanded citizen base in a different way. Currently, presidents take into account a candidate’s race, sex, and religion, nominating justices based on those characteristics, instead of geography. Because of white ethnic hegemony, nominations by Washington and other early presidents, were arguably less complicated. Focusing on geographic diversity alone, presidents had only

to pick among qualified white males from the several states, instead of from both male and female candidates representing various racial groups.

Race, defined by the Court as a protected class, may arguably be the most controversial of those considerations, however.¹¹ For example, when Justice Thurgood Marshall resigned, President George H.W. Bush felt pressure to nominate another African-American to the vacancy. Complicating this, though, was a quota bill that the executive branch was currently fighting (Abraham 295). Bush nominated Clarence Thomas to fill the Marshall vacancy, and the nomination sparked a controversy that fed a media frenzy. In fact, the Thomas confirmation hearings gained so much media attention that his televised hearing had more viewers than the World Series game that was broadcast at the same time (Maltese 93).

Senatorial Courtesy

While the president plays the largest role in finding a candidate to nominate, the Senate takes their “advice” power, granted by the Constitution, seriously. The most prevalent exercise of such power is what senators call “senatorial courtesy.” This means that the senators from the nominee’s home state must minimally support that candidate (Abraham 21). If they do not support the nominee, however, those senators may exercise senatorial courtesy and the nomination is almost guaranteed to fail. This practice began during the Washington administration with the failed nomination of a naval officer who was opposed by his home-state senators (Abraham 21). When exercising this power, senators are required to give a reason why they oppose the nominee, although the most

¹¹ Race-based classifications were first ruled unconstitutional in *Shelley v. Kraemer* (1948) in which the Court said that racially restrictive covenants cannot be enforced by any court.

cited reason is that they find the nominee to be ““personally obnoxious”” (Abraham 21). When making a nomination, presidents must heed the advice given to them by the Senate, especially that which is coming from the nominee’s home-state senators, or otherwise face strong opposition to the nomination. With so many other factors potentially threatening the nomination, the president needs the support of his party and the nominee’s home-state senators in order for the nominee to have even a fighting chance at confirmation.

Senate Judiciary Committee

After the Senate Judiciary Committee receives the formal nomination, they fully research the background and qualifications of the nominee. Although the Committee was formed in 1816, it did not play a large role in the confirmation process until after the 1950s, when nominees regularly began to testify in front of the Committee (Maltese 5). In preparing their recommendation, the Committee often asks nominees to appear before them for questioning. These sessions may be short, lasting only a few hours, but may also extend for days. The testimony during Robert Bork’s senate hearings, in 1987, lasted twelve days, and the confirmation hearings of Louis Brandeis were successfully delayed for over four months (Abraham 282; 141). During the hearings, the Committee Senators interrogate the nominee in an effort to discover their jurisprudential philosophy. Through questioning, the Senators try to discover how the justice will vote on specific issues in order to gauge how conservative or liberal that nominee is. Justice Blackmun explained what testifying in front of the Committee is like in his oral history project:

One’s sitting out there at a table all by himself. There’s a ring of senators around with the Democrats on one side and the Republicans on the other. They question you by seniority. Down one side first, then the other side. It bothered me a little bit until all of a sudden it dawned on me that some

of the comments that were being made by the senators were not so much directed at me as they were at their counterparts on the other side of the political aisle, so to speak. Once I realized that, I could relax a little. I think the experience of that hearing before the Senate Judiciary Committee will remain in my memory very vividly. I almost don't have to look at the transcript. I remember exactly what happened and what each senator said. This was political hardball at the time. I thought it was not an easy day. Of course it was nothing compared with what Justice Thomas had to go through (Blackmun 27).

Changes in the Confirmation Process

When examining the history of Supreme Court nominations, nominations prior to 1930 functioned differently than nominations after 1930. While the process largely stayed the same, the types of people nominated changed. At the beginning of the Court, Washington explicitly sought well-known, publicly active men to nominate to the Court. He hoped that by choosing well-known men with established good reputations and public respect, such positive attributes would transfer to the infant Supreme Court; in time, this did happen. Such nominees, though, would not be confirmed in the current era. Before examining this change, it is important to understand how the nomination and the confirmation process developed.

After the ratification of the Constitution, George Washington first made all of his other executive nominations before making nominations to the Supreme Court. He understood that the Supreme Court was an important institution and, likewise, took his nomination duties seriously. Like most presidents, Washington had specific criteria for his nominees. Although not known for certain, it is highly probable that Washington knew his nominees on a personal level (Abraham 58). Even today, most presidents are familiar with their nominees before considering nominating them. Additionally, the current trend is for presidents to nominate sitting appellate judges to the Supreme Court.

Because of that, the presidents have a stronger idea about how the nominee will decide certain cases once on the Court.

Washington made the most appointments—fourteen nominated, twelve confirmed, eleven actually served (Abraham 57). Of all his requirements, advocacy of the Constitution was, by far, the most important to Washington. In fact, seven of his nominees were present at the Constitutional Convention of 1787 (Abraham 58). Although his Court appointees were strong members of the politic, they did not come without problems,¹² but those did not occur until after confirmation. Like most of the confirmations through the 1800s, the Senate confirmed Washington's nominees with relatively little debate or controversy. Assembling the first Court, however, was no easy task and took much persuasion from Washington. The United States Court system was loosely based on that of England, but had developed its own set of precedents in state (or colonial, rather) courts. Those state courts carried prestige and authority that the federal Supreme Court did not yet have. To staff the Court, Washington needed figures who themselves had prestige and authority so that those characteristics would vicariously carry to the establishment. Few qualified men of such influence were willing to leave the state governments for the fledgling federal government (Abraham). In an effort to make the transition smoother, and as another bargaining tool, Washington and the Senate all but guaranteed approval before the candidate was even formally nominated.

¹² Justice John Rutledge, confirmed in 1791, stepped down from the Court before it actually convened. His mental state was rumored to be unstable, and he even attempted suicide (Abraham 58-59). James Wilson wrote to President Washington to propose his own nomination, hoping that Washington would nominate him to the Chief Justice chair (Abraham 59). Salmon Portland Chase was impeached by the House of Representatives, but the Senate was unable to get enough votes to impeach (Abraham 62).

Chief Justice John Jay, for example, the youngest person ever to be nominated to the Court (he was 44 years old), was confirmed unanimously only two days after being nominated (Abraham 58). His nomination and confirmation experience is rather ordinary and characteristic of the time. Typically, the president, be it Washington or any other up until approximately the 1930s, would make a formal nomination and the Senate would vote to confirm or deny, the nominee in just a few days time (Abraham). There were exceptions to this rule, of course, although more often than not, the confirmation process was relatively simple.

Like Chief Justice Marshall, Chief Justice Roger Taney was well known by his nominating president. After Chief Justice Marshall died, President Jackson wasted little time before nominating Roger Taney to fill the Chief Justice vacancy. Like Washington before him, geographic diversity was important, although for Jackson, political loyalty was the overriding criteria (Abraham 78). Actually, Taney was nominated twice for a seat from the Supreme Court. First nominated to an associate justice chair, the Senate stalled confirmation and tried to remove that seat on the Court. Luckily, that legislation failed to pass in the House of Representatives (Abraham 81). Because no action was taken on the initial Taney nomination, shortly after Chief Justice Marshall's death, Jackson renominated Taney to the Chief Justice position. Following all of the drama in the Senate tied to his previous nomination, Taney's second nomination passed relatively easily.

Although both were Chief Justices, Marshall and Taney's pre-Court experiences, while greater than average, were typical of most justices prior to the mid-1930s. The justices of that earlier era were well known public figures. More often than not, they held

some sort of political, public office before coming to the Court, and some even continued those political careers despite being on the bench. Justice John McLean, for example, was a presidential candidate four times while sitting on the Court (Abraham 79). Justice Melville Fuller is one of a very small number of anomalies. Called “the most obscure man ever nominated as Chief Justice,” Fuller was the first person nominated to the Supreme Court who had not previously held some sort of public office (Shnayerson 150; Abraham 113). He most closely resembles the nominees of the current era.

Major changes in the Senate and advances in technology and communication drastically changed the way Supreme Court nominees progressed through the confirmation process. Although individually, the changes made little impact, collectively these changes revolutionized the confirmation process, causing a change in who is nominated in the first place. First, the seventeenth amendment was ratified in 1913 and required the direct election of U. S. senators (Maltese 52). Previously, senators were chosen by state legislatures. Direct elections made senators accountable to the public. Suddenly, they were required to pay attention to what the public wanted. Nominees who would have previously been easily approved would now face more difficult confirmation processes or even rejected nominations.

In addition to the Seventeenth Amendment, a 1929 Senate rules change also affected the confirmation process. Among other things, the rules change opened the Judiciary Committee debates to the public (Maltese vii). The public could now watch the debates and confirmation testimony. In addition, because the sessions were now open, journalists were more readily able to report on the hearings, making information more accessible. Because the public now had more information about the nominees and public

opinion mattered in terms of the election of senators, public perception of nominees mattered more than ever before (Maltese 86).

After the Committee meetings were opened to the public, Supreme Court nominees began testifying, publicly, in front of the committee. In 1925, Harlan Fiske Stone became the first nominee to testify publicly in front of the committee, although justices would not regularly testify until 1955 (Maltese 93). The United States had officially entered the age of the television, and nightly news broadcasts needed visual clips to show their viewing audience.¹³ Because these sessions were already open to the public and the media, the testimony served entertainment as well as informational purposes. This officially signaled the beginning of the movement towards the stealth nominee. Before this greater level of public involvement, it was relatively easy for nominees to hide or bury certain parts of their past that could hinder their confirmation process. Once these changes occurred, more actors became involved with, and had a stake in, the outcomes.

Interest Groups

Interest groups also began taking a more visible and influential role in the confirmation process. Before committee hearings were opened to the public, interest groups were largely unable to influence the confirmation process. Instead, these groups tried to influence who the president nominated, instead of who was actually confirmed (Maltese 52). They did this much the same way any other participant did—by sending names and recommendations directly to the president. This method was largely

¹³ Starting in 1981, the Judiciary Committee hearings have been broadcasted for almost all nominations (Maltese 89).

unsuccessful, though. With so many people sending names to the president, from staff within the White House to members of the legal community, interest group efforts were ineffectual. Once senate hearings were opened, and especially after nominees began to testify, interest groups then had the opportunity for large-scale involvement in confirmations.

Labor and business interest groups were the first such interest groups to participate in Supreme Court nominations in the early 1900's (Maltese 49).

Traditionally, after a Supreme Court justice resigned, retired, or died, a short period of time would lapse between when the president would officially nominate his candidate and when the Judiciary Committee hearings would begin (Maltese 54). Interest groups would use this time to launch public campaigns, using the media as their main source to educate and influence public opinion. The groups would also lobby individual senators. In 1912, liberal and labor interest groups mounted a campaigning against Mahlon Pitney, who was nominated by President Taft; this delayed his confirmation for almost an entire month (Abraham 137). Eventually, though, interest groups took a more direct approach to informing senators and actually began testifying before the Judiciary Committee, just like the actual nominees did.

The American Federal of Labor and the National Association of the Advancement of Colored People were the first interest groups to testify before the Committee against the nomination of John J. Parker in 1930 (Maltese 57; Abraham 158). The AFL opposed Parker because he allowed yellow dog contracts¹⁴ and ruled against the formation of

¹⁴ A yellow dog contract is an agreement between employer and employee where the employee agrees not to become a member of a labor union.

unionization in a lower court ruling (Maltese 56); Parker publicly defended himself by claiming that he was following Supreme Court precedent and that the decision did not reflect his personal philosophies. The NAACP opposed Parker because of supposedly racist statements he made during a North Carolina gubernatorial race (Maltese 59).

Parker never responded to the accusations that he was racist and the NAACP took the lack of defense as proof that he, in fact, was racist. Although eventually successful, the AFL and NAACP never combined forces; they each fought separately against the Parker nomination.

From this episode until 1971, interest groups continued using the public forum and traditional lobbying techniques to influence confirmations, while only sporadically testifying in the Senate; however, from 1971 forward, interest groups have testified in all nominations (Maltese 86). During this time, interest groups began using the judicial system to advance their causes in other areas as well. Often, interest groups are formed to support a minority viewpoint that receives little recognition elsewhere. The judicial branch, by design, is set up to defend such minority rights that those interest groups also seek to protect. It was only a matter of time before interest groups would use the courts to advance their causes. This was especially true during the Warren Court era (1953-1969).

The Warren Court is, historically, the most liberal Court, and its opinions focused on expanding individual rights and liberties. Interest groups began actively sponsoring test cases to bring before the Court during that time. One of the first successful of such cases, *Shelley vs. Kraemer* (1948), was argued by the NAACP (Abraham 194; Williams 150). The NAACP pioneered the judicial branch approach to gain the ends they sought.

At the same time, the NAACP knew they needed sympathetic justices on the Court in order to continue winning their cases. Because of such, they continued, along with barrages of other interest groups, lobbying senators and testifying before the Senate Judiciary Committee.

In addition to lobbying senators, interest groups often also launch campaigns in the public sector. By influencing public opinion, the interest groups hope that the senators will be forced to acknowledge their objection, especially when threatened with the possibility of failing reelection. During the Parker nomination, senators were overwhelmed by the outcry from black voters because of the campaign launched by the NAACP (Maltese 62). In a study testing the influence of organized interest groups on nominations, Gregory Caldeira and John Wright found that interest groups have a “statistically significant effect on senators’ confirmation votes” (Caldeira and Wright). Because of such past successes, interest groups will likely continue to influence senators and Supreme Court confirmations for years to come.

Presidents and the Media

Historically, presidents had a habit of staying out of the confirmation process. Before the Reagan Presidency, the Press Secretary or a representative of the Justice Department made formal nominations (Maltese 113). Even though presidents understood the difficulty of the confirmation process, speaking publicly on behalf of the nominee was considered too political for a process that was supposed to be removed from all politics (Maltese 112). Several changes within the executive branch contributed to the more public role that presidents now play in the confirmation process. For example, the Reorganization Act of 1939 institutionalized the executive branch, which enabled the

president to formulate and implement policy more efficiently (Maltese 119). Although not having a direct influence on nominations, presidents began to formalize how names were gathered to make their nominations. Unfortunately, because many more people within the executive branch now played a role in name-gathering process for nominations, it is easier for internal power struggles to garner negative media attention (Maltese 124). To aid in spinning the media attention a nomination receives, President Nixon created the Office of Communications in 1969 (Maltese 129). Among its other duties, this office controls the information given to the public about nominations and coordinates media blitzes on behalf of the nominee.

As the confirmation process shifted to become more public, the types of people nominated also needed to change. The confirmation process required a different type of nominee, in order to be confirmed. Whereas before, the Senate and president largely controlled the confirmation process, now the public and interest groups had a vocal role, although a substantially less formal one. Interest groups, especially ones without the ability to lobby Congress strongly, not only began testifying in front of the Committee, but the groups also used the media, including print and radio sources, to campaign for or, more often, against a particular nominee. Although the Senate Judiciary Committee had long been looking into the background of nominees, interest groups and the public now also had access to such records. In the past, senators would more readily overlook certain characteristics in a nominee's past, but now that the public had access to the same records, such damning histories would not be overlooked. One misstep in a speech given decades before being nominated could easily derail a nomination.

Controversial Nominations

The media became so pervasive that often several players were affected. For example, the 1968 nomination of Justice Abe Fortas for elevation to Chief Justice by President Johnson largely affected the subsequent nomination of Clement F. Haynsworth. Although when making the nomination, the Senate seemed favorable, the nomination was filibustered on the floor and Fortas later asked Johnson to withdraw his nomination (Abraham 228). While Fortas surely thought the trouble was over, in 1969 Bob Woodward published an article in *Life Magazine*, claiming that Fortas had improper ties to the Wolfson family (Maltese 71). While on the Court, Fortas had received a payment from the Wolfson Family Foundation of about \$20,000 for consulting services. The Foundation agreed then to pay Fortas another \$20,000 annually for his services. Although this transaction was never found to be illegal, it looked like a payoff in the public eye. After the article was published, Fortas broke ties with the Wolfson family and returned the initial payment he received (Maltese 71). Then in May of 1969, Fortas resigned (Abraham 10). This was the only time a justice resigned because of information available in the media.

Following the Fortas resignation, President Nixon nominated Clement F. Haynsworth, Jr. from the Fourth Circuit Appeals (Abraham 10). Although the Senate may have confirmed Haynsworth under other conditions, his nomination failed because of the similarities between him and Fortas. Haynsworth was the first nominee rejected since John J. Parker was rejected in 1930 (Maltese iv). The Senate could not approve a candidate who had a background similar to that of a justice who was just forced out. Several interest groups mobilized attacks against Haynsworth. Civil rights groups

claimed Haynsworth was insensitive towards minorities because he voted against desegregation (Maltese 72). Despite all of the comments and allegations carried by the media, Haynsworth made no public statements that could be used against him. The administration, though, did little to help clear his name and never made any public statements defending the nomination (Maltese 74). Although this nomination occurred just prior to the onset of presidents publicly defending nominations, it is unclear whether the outcome would have changed any if Nixon had made some public appeal.

Another not-so-stealth nominee, Robert Bork, had a much worse confirmation experience. A by-product of his confirmation hearings was a new verb—“to bork”—meaning, “to unleash a lobbying and public relations campaign of the kind employed successfully against Robert Bork” (Maltese vii). In 1987, following Justice Lewis Powell’s retirement, President Reagan nominated Robert Bork to the Supreme Court (Abraham 282). Justice Powell was clearly a moderate on the Court, and Bork was perceived to be strongly conservative. That contrast in ideology sparked major concern.

During his Senate Judiciary Committee hearings, Bork was almost immediately attacked by Senator Kennedy (Abraham 282). Not only were the senators quick to attack his record, but large numbers of interest groups also mobilized large campaigns against him; left-wing interest groups spent over \$1 million to fight his nomination (Caldeira and Wright). Bork was a pronounced conservative originalist, and liberal and women’s rights interest groups feared the way he would vote in abortion cases. These numerous interest groups flooded the media with anti-Bork information, and leaders of several groups also testified at his confirmation hearings, which lasted a record of twelve days (Abraham 283). Responding to his confirmation experience, Bork said that “a president who wants

to avoid a battle like mine, and most presidents would prefer to, is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial” (Eastland). Bork’s extensive, conservative body of opinions and writings clearly led to his eventual rejection by providing ample fuel not only for the liberal senators, but also for vocal interest groups.

Unknown Nominees

Sandra Day O’Connor, on the other hand, was much more easily confirmed. Nominated in August of 1981 by President Ronald Reagan to replace Justice Potter Stewart, O’Connor was confirmed by a unanimous vote (Shnayerson 257). Long before joining the Court, O’Connor and Rehnquist were old colleagues. The two first met when they attended Stanford Law School together (Smith). Both graduated at the top of their class. Rehnquist went on to the Attorney General’s office at the U.S. Department of Justice before his nomination, whereas O’Connor had a more difficult road. Even though she was competitive with Rehnquist while in law school and equally qualified upon graduation, O’Connor could only find corporate jobs as a legal secretary, for which she was seriously overqualified. These positions offered no opportunities for advancement. This prompted her move towards the public sector, which was more progressive and forward-thinking than the male-dominated white collar, corporate world. The public sector allowed her to achieve the experience and recognition, which eventually led to her nomination to the Supreme Court.

Importantly, the jobs and positions O’Connor had prior to her nomination provided little opportunity for her to establish a controversial paper trail. This, combined with the political climate of the time, enabled an easy confirmation process. Although

Judge Mildred Lillie was the first women to be formally considered for nomination some years before, O'Connor was the first women officially nominated¹⁵ (Maltese 14). The Court was ready for a female member. Some would even argue that the Court was actually overdue. All of these factors, combined with a little luck assured her confirmation. The senate voted 99:0 to confirm; the only senator absent from the vote was an established supporter (Abraham 268).

While O'Connor's path to the Court is an interesting but covert one, David Souter is arguably even more of a stealth nominee. Souter's credentials and professional career clearly qualify him, but little was known about his jurisprudential philosophy. Described as "unpretentious" and "non-controversial," Souter attended Harvard both as an undergraduate and as a law student—his education there bifurcated by a brief stint at Oxford University on a Rhodes scholarship ("David"). After graduating, he started working in a private firm, but soon found public sector work more suitable. In 1978, Souter started his judicial career on the New Hampshire state Superior Court, followed by the state Supreme Court, before being appointed to the United States First Circuit of Appeals ("David"). Souter had only been on the Court of Appeals for three months and had not written anything when President H.W. Bush nominated him to the United States Supreme Court (Abraham 290).

Considering the Bork fiasco, Bush needed to find a candidate that appealed to conservative and liberal senators alike. Such a candidate would need to appear politically moderate and lack any sort of condemning written record. Souter fit that profile; he was "conservative enough to allay right-wing suspicions that he ha[d] been insufficiently

¹⁵ President Richard Nixon considered nominating Lillie to the Supreme Court in 1971.

sympathetic to their causes but at the same time unknown enough to keep liberals from finding anything on which to hand another bruising confirmation fight” (“David”). In fact, most left-wing interest groups were slow to respond to the nomination not only because of Souter’s lack of record, but also because they feared losing their valuable credibility if they initiated another knee-jerk, Bork-like attack (Morganthau). The slow, low-key involvement of interest groups and lack of a written record made identifying Souter difficult for senators on both sides of the aisle. This made everyone a little nervous; the goal of any Senate Judiciary Committee hearing is to determine where a nominee stands on critical issues, such as abortion,¹⁶ and Souter gave no indication in any of his past cases or written opinions from state court decisions to make that evaluation any easier.

In fact, during his hearings, Souter carefully navigated through and successfully avoided all questions regarding specific cases, but he would answer and concede a little of his philosophy on doctrinal-type questions. These answers gave something to both camps: Souter supported the idea of enumerated rights (where the right to privacy is found), which Democratic senators use as their litmus test, but also repeatedly said he was an originalist (a constitutional philosophy involving discerning the Founders’ original intentions), which is traditionally a conservative approach to constitutional

¹⁶ Currently, abortion is the most divisive, controversial issue that the Supreme Court decides. Nominees are too careful to answer directly questions about his personal stance on abortion, so Senators try instead to get answers to questions about specific cases, such as or *Griswold v. Connecticut* (1965) *Roe v. Wade* (1973). In *Griswold*, the Court held that a Connecticut law banning the use of contraceptives was an unconstitutional violation of privacy. In *Roe*, the Court held that a Texas law preventing anyone from helping a woman get an abortion was an unconstitutional violation of guaranteed due process.

interpretation (Eastland). Because Souter lacked anything damaging in his past writings and was able to gain significant approval from both Democratic and Republican senators, his confirmation was relatively simple. The Senate eventually approved Souter with a vote of 90:9 (Eastland). Not even the ever-invasive liberal interest groups could find any significant reason to fight the Souter nomination. To date, Souter¹⁷ is the most “stealth” nominee.

Summary

Being nominated to the Supreme Court is no easy feat, but actually being confirmed is even more difficult. Many factors affect a nominee’s confirmation, from past record to their social acquaintances, but as Justice O’Connor once said, luck is the most important factor (Abraham 3). Not only must the timing of the Supreme Court vacancy be right, but the nominee must also lack any sort of damaging past. The nominees during the early history of the Supreme Court were political giants in their own right. Many members of the first Court fought in the Revolution and were well known in political circles, as well as to the public. Nominees in that mold would most certainly not be confirmed today. Instead, today’s nominees must appear to be as politically neutral as possible. Several factors contributed to this change.

First, the Seventeenth Amendment ended the election of U.S. senators by state legislatures. Now, public opinion mattered in that senators were directly responsible, by means of popular elections, to their constituents. If they had any hope of being reelected, senators had to pay attention to how the public felt about a nominee. Even if the senator

¹⁷ Although thought to be conservative and nominated by a Republican president, Souter has become one of the Court’s most reliable liberals. Because of this, Bush considers Souter’s nomination as one of his worst mistakes as president (Smith).

felt that the nominee should be confirmed, if his state population felt otherwise, he would be moved to vote accordingly. This constitutional change provided the first opportunity for the public to have a say in the confirmation of Supreme Court nominees.

Previously, when state legislatures chose their senators, the states indirectly held power in the federal government. Through direct elections, the state-federal connection was broken. Senators no longer had to heed the wishes of legislatures. In addition to following public opinion, senators were now free to support a nominee who may be anti-state government, which began paving the way for the liberal Warren Court era. Nominees could support interests other than those favored by states, including individual rights. Without this shift, the Warren Court's focus on building and cementing individual liberties could not have occurred.

A rules change in 1929 added to the public nature of confirmations. The Senate Judiciary Committee used to meet in closed sessions to debate the confirmation of nominees, if they debated at all. After the rules change, those sessions were opened to the public. While most of the public did not travel to the Capitol to see them, reporters could now disseminate information more accurately and efficiently to the public. Next, senators began requesting that nominees appear to testify in front of the Committee. Although this did not happen regularly at first, from the mid 1950s onward, every nominee has publicly testified. This was taken one step further in the 1980s, when these sessions were televised. Now, there is no more lag time between the debates and the public's awareness of information about the nominee; the public can watch and decide for themselves the fate of a nomination.

In essence, all of these changes meant that a nominee could no longer leave their buried past buried. Some news station or newspaper reporter is bound to reveal every detail about each nominee. In addition to the media, interest groups now play an influential role in confirmations. Before the Senate's hearings were opened to the public, interest groups could only try to influence whom the president nominated in the first place. Now, interest groups have the ability to influence the actual confirmation process. During Judiciary Committee testimony, in addition to the nominee, interest groups testify. This first occurred with the AFL testifying during the confirmation hearings for Parker (Maltese 57). In the current era, interest groups testify about every nominee.

In order to have any hope at getting a nominee confirmed, presidents needed to reevaluate whom they nominated; thus, the concept of a stealth nominee emerged. Recent nominees lack any political experience, and even a substantive judicial record, although they must have some experience on a lower court bench. This significantly limits the pool of potential nominees. If a potential nominee has had the misfortune of deciding a case involving any topical or controversial issue, especially that of abortion, he or she has no hope of being confirmed. Because of the invasive nature of the current confirmation process, current nominees are essentially unknown.

~ Chapter 3 – Methodology ~

The nomination and confirmation process of Supreme Court justices has changed slowly over the last two hundred and twenty years. The current process barely resembles that of the earliest justices. It seems that in more recent times, presidents nominate people who were largely unknown to both the legal and political communities, as well as to the general public. Although it is more difficult to test how well a nominee is known in legal and political circles, public recognition is easily determined through newspaper articles published during the nomination process. Newspapers provide the best evidence of public sentiment at the time of the nomination because they are published daily and without the wisdom and bias of hindsight. Recognition of the nominee by legal and political scholars may also be determined from newspaper articles, depending on their content.

Population and Sample

Throughout the entire history of the Supreme Court, there have been 115 terms,¹⁸ with 110 unique justices,¹⁹ which is the population from which the sample was chosen. For the sake of the sample, only the 110 unique justices were considered, and only their

¹⁸ Here, term is used in its most broad sense. Supreme Court justices have life tenure, although few of the earliest justices ever served more than a few years. A Supreme Court term beginning in October and lasts one year.

¹⁹ Five justices served twice on the Court: John Rutledge (1790-1791; 1795), Edward White (1894-1910; 1910-1921), Charles Evans Hughes (1910-1916; 1930-1941), Harlan Fisk Stone (1925-1941; 1941-1946), and William Rehnquist (1972-1986; 1986-2005). Rutledge left the Court, but later returned as Chief Justice in a recess appointment; Congress rejected the nomination a few months later. White, Stone, and Rehnquist all originally served as associate justices, but were subsequently nominated and elevated to Chief Justice. Unlike Rutledge, they did not leave the Court prior to their elevation.

first nominations were considered. The sample consisted of 50 justices, approximately half of the Supreme Court membership.

First, a list of the entire Court membership was adapted from Appendix C of Henry J. Abraham's *Justices, Presidents, and Senators*. Justices were listed in order from the time they took the oath of office, with the earliest justices first so that the list began with James Wilson and ended with Samuel Alito. A modified stratified sampling procedure was used to ensure even distribution. Because the justices were randomly chosen, it was important to take measures to ensure that all time periods were represented so that one time period was not disproportionately represented. Based on the literature review, 1930 was hypothesized to be the turning point in history, after which nominees would be considerably less recognized at the time of their nomination²⁰.

This turning point in nominations and confirmations resulted from the ratification of the 17th amendment, ratified in 1913, and the 1929 Senate rules change, which opened hearings to the public. This change did not happen immediately, though. In addition, no justices were nominated between 1925 and 1930, allowing the 1930 split to be both relevant and convenient. By splitting the population at this point, 75 members were in the pre-1930 group and 40 members in the post-1930 group. For sampling purposes, 30 justices were chosen from before 1930 and 20 were chosen after 1930. Because more justices were appointed in the pre-1930 group, the sample included more justices from

²⁰ This study examined only the successful nominations of eventual Supreme Court justices. There have been twenty-seven failed Supreme Court nominations (Maltese 3). Although researching the history of nominations from well-known nominees to unknown nominees, this research is specifically about nominations as a prerequisite to confirmation and excludes failed and trial-balloon nominations.

that group as well. To ensure an even distribution within the pre-1930 group, 15 justices were chosen before 1861 and 15 justices were chosen between 1862 and 1929.

These breaks in the Court membership resulted in three groups: the pre-1861 group, the 1862-1929 group, and the post-1930 group. In each group, justices were numbered, starting with one (1). Once numbered, a random number generator was used to pick the sample from the population. The random number generator function on a TI-83 graphing calculator was used to pick the sample. The calculator was programmed to choose a number between 1 and 34 for the pre-1861 group, between 1 and 39 for the 1862-1929 group, and between 1 and 37 for the post-1930 group. This function was repeated until enough justices from each group were chosen (15, 15, and 20 respectively). If the calculator chose the same number more than one, the justice to whom that number corresponded was counted only once. This process continued until the required numbers of unique justices were chosen. This process resulted in a sample of 50 justices spanning from James Wilson (1789) to David Souter (1990).

Biographies

Due to time constraints, it was not possible to research fully the backgrounds of each of the 50 justices in the sample. Instead, in an effort to learn more about the individual justices, short biographical sketches from *The Oxford Companion to the Supreme Court of the United States* were read. Some biographies were not much more than a few paragraphs, while others continued for several pages. Because this study focused on the public awareness of the justice during his nomination and confirmation, the biographies were read for information about the justice prior to taking the oath of office.

Biography Coding

A code sheet was prepared for the biographies.²¹ The code sheet provided a way to condense and organize the information found in the biographies. Variables in the code sheet covered work experience prior to justiceship. Such work experience could include holding the following positions: state congressman, state senator, United States Congressman, United States Senator, as well as other elected offices. Some of the earliest justices had political experiences that did not fit under any defined variable. For example, James Wilson and John Blair, Jr. both served in some capacity in the ratifying conventions prior to the ratification of the Constitution. No defined variables were included on the code sheet for such unique types of work, so that type of information had to be added by hand, as their own category.

A variable for well-known relatives was also included on the code sheet. In this section, if the biography stated that a particular family member was well known, or held a job that would mean the family member was well known, a notation was made. A variable also identified the amount and type of education that the nominee received prior to nomination to the Supreme Court. Almost every biography gave information about the education of the nominee. At the bottom of the code sheet, there was room to record important quotations from the biographies. Finally, after reading each biography, a preliminary decision was made as to whether the justice was well known or largely unknown at the time of their nomination. Determinations were made based mostly on the kinds of experiences the justice held. For example, a U.S. Senator or a governor would be more well known than a district attorney or law school dean.

²¹ For an example of the code sheet, see Appendix C.

Newspaper Articles

In addition to examining biographical sketches from a secondary source, an original qualitative analysis of newspapers articles was conducted to understand and test the public's awareness of a nominated justice. First, the newspaper articles had to be found. Two databases,²² available through Lycoming College's Snowden Library, were used. The *America's Historical Newspapers* database contains newspapers from 1690-1876, most of which were published on the east coast. The *New York Times Historical Newspapers* database contains newspaper articles originally published in the *New York Times* newspaper from 1851 to three years ago, which at the time of the study was 2006.

Similar search methods were used for both databases. The justice's name (in most cases, the justice's last name sufficed) was always used as the first search term. Different forms of the words nominate, confirm, or appoint were often used as the second search term.²³ Finally, results for each justice were limited to one year prior to taking the oath of office, and one year after taking the oath. For example, because Souter took the oath of office in 1990, results were limited to between 1989 and 1991. Search results were sorted using functions available in both databases so that the most relevant results appeared first. Almost every search returned more results than were relevant. Each article was opened and skimmed. If the article had something to do with a particular justice's nomination or confirmation, the article was printed to be coded later. If the article did not have anything to do with the justice's nomination or confirmation, it was excluded. The number of relevant articles found for each justice varied greatly, with zero

²² For an example of an article from each of the two databases, see Appendix B.

²³ For example: nominated, nominates, nomination, etc.

articles for Stephen J. Field and thirty-four (34) for Antonin Scalia. A total of 410²⁴ newspaper articles were coded for the 50 justices sampled.

Newspaper Coding

In a similar fashion to the biographies, a code sheet was prepared for the newspaper articles.²⁵ Each article was numbered, starting with 1 through 410, and the corresponding number was placed on the code sheet for identification purposes. Every article came from one of two databases, although news articles from the *America's Historical Newspapers* database came from several different newspapers. The top of the code sheet identified the newspaper source as “*New York Times*” or “other.” For “other” newspapers, the newspaper name and publishing state were noted.

The code sheet included four variables. The first variable identified the purpose of the article and included the following: introduction of the nominee, statement of fact, question qualifications, support nominee, reject nominee, and an “other” variable. If the article was identified as “other,” further explanation was written. It was possible for articles to be identified as having more than one purpose. For example, an article could introduce the nominee and support them. Articles identified as being “statement of fact” articles tended to be very short and only stated that a person had been nominated. These articles lacked any sort of elaboration, and details were largely nonexistent.

²⁴ Although more than 410 articles were found, only 410 were coded. Because of the sheer number of articles found for justices in the post-1930 group, the number of articles for justices with twenty or more articles was systematically reduced prior to coding. This occurred in seven instances. Articles were put in date order, with the earliest articles first. Every other article was chosen. Only the chosen articles were coded.

²⁵ For examples of blank and completed code sheets, see Appendix C.

The second variable examined the background or contextual information given about the nominee. Articles either mentioned the nominee without contextual information, or with such information. If contextual information was given, the number of times this occurred in the article was noted. Contextual information was defined as any identifying information given shortly after the nominee's name, which served to explain who that person was. For example, an article may say, "Mr. Whoever, from Ohio, was nominated today." In this example, "from Ohio" was counted as one piece of contextual information. In most cases, contextual information consisted of where the nominee was from or what job(s) he previously held.

The third variable identified the type of article. In each article, either the nominee was the sole focus of their article, or information about the nominee was imbedded in other news. Articles easily fit into one of these two types.

The last variable provided a place to identify any other notable figures mentioned within the articles. The most common of which included mention of the justice the nominee would be replacing, the nominating president, and the Senate. An article would be counted as mentioning the nominating president even if the president was not identified by name. For example, an article could say, "Today, the President announced his nomination of Mr. Whoever." Such an article would be counted as mentioning the nominating president, even though the president's last name was not given. Mention of a vote, the Senate Judiciary Committee, hearings or the Senate in general, were also noted on the code sheet. Additionally, if any judge, law professor, or other notable person was mentioned in article, that was also noted. While it was rare for such people to be

mentioned in older articles, mention of law professors and other judges was especially prominent in the articles for the post-1930 group of justices.

As with the biographical sketch code sheets, after reading each article, an assessment was made as to whether the justice was well known or unknown as the time of his nomination. Key words from the articles helped make this determination. For example, a *New York Times* article said that Melville W. Fuller had “never been in public life [...] but [was] by no means an unknown man”; another *New York Times* article said that Earl Warren was “favorably known throughout the country.” Phrases such as those pushed Warren and Fuller into the “well known” category. On the other hand, a *New York Times* article said that Antonin Scalia was “largely unknown to the general public” and that David Souter was “virtually unknown even to scholars.” Those phrases placed Scalia and Souter in the “unknown” category. Other justices were placed in one category or another in similar fashion. The bottom-half of the code sheet provided space to write important quotations from the articles. While quotations were not taken from every article, most articles had at least one important quotation noted on the corresponding code sheet.

Data Table

After all biographies and articles were read and coded, a table was constructed to display important summary information about them. The chart, in Appendix A, contains all sampled justices, grouped into one of two categories: well known or unknown. Every justice was categorized into one of these two categories, based first on their articles. The quotations from each article carried the most weight when deciding in which category to place a justice. Next, the amount of contextual information provided in the articles for a

particular justice was examined. The more contextual information provided, the more likely the justice was not known at the time of their nomination.²⁶ If a justice could not be confidently placed in one category based on information from the newspaper articles, information from the biography was consulted. In the few cases where biographies needed to be consulted, the types of jobs held prior to nomination helped place a justice in a group. Only one justice could not be confidently placed in either the “well known” or “unknown” category after consulting their biographical sketch (Justice Fred Vinson). Ultimately, Justice Vinson was placed in the “unknown” category based on the little information found in his biography.

In each category, the justices are listed chronologically based on the year they started on the Court, with the earliest justices at the top. Quotations and important information found in the biographies and newspaper articles are listed for each justice. Article quotations also appear chronologically, with quotations from the earliest articles at the top. Newspaper articles for each justice were published over a range of time. That date range is noted in the chart for each justice. Additionally, the total number of articles and total number of pictures in those articles are also listed. Because the number of

²⁶ Quantitative word counts of the articles would not be an appropriate measure of the public awareness of each nominee. Although this assessment counters logic, for Supreme Court justices, it makes sense. When the public is less familiar with a nominee, more is written about them to introduce them to the public. Pictures function the same way—the less known a nominee is, the more pictures accompany their articles. On the other hand, when the public is widely familiar with a nominee, printing several pictures is not needed.

articles was reduced for the post-1930 group²⁷, the total number of articles found and the total number of articles coded are both listed. In a few cases, some pictures were not reprinted, because they were blocked by copyright. The number of pictures positively identified as the nominees are listed first, with the number of total possible pictures listed in parentheses (meaning those pictures positively identified as the nominee plus the pictures blocked by copyright). Only pictures that appeared in coded articles were counted.

Limitations

As with any study, these results are limited by several methodological considerations. First, only one source was consulted for judicial biographies. Each of the biographical articles was written by a different author; each article contained slightly different information about the justices. Some focused more on the justice's life prior to ascension to the Court, while others only briefly mentioned such information and focused on the person's accomplishments while on the Court. Because of this, there was no consistency in the information found. If a particular fact was not mentioned in the article, it could not be analyzed.

In a similar way, for justices nominated after 1864, only one newspaper, the *New York Times* was searched for articles. This provided no crosscheck of information. Although the *New York Times* is a nationally recognized newspaper and usually a reliable source of information, it cannot be read without recognizing some possibility of bias.

²⁷ The number of articles was reduced for the post-1930 group to conserve time. The effect on the results is not significant. Coding more than twenty articles for a justice would not have changed how the justice was categorized.

By using contemporaneous newspaper articles as a measure of public knowledge of nominees, the assumption is made that newspapers, at least partly, function to inform the public. Newspapers, though, may have been more interested in selling newspapers, especially with the earliest nominees. Although nothing suggests that more current newspapers are less interested in selling newspapers, articles about more current newspapers tend to focus on the process of confirmation and less on the individual nominee.

Additionally, post-1930 nominations are reported through numerous media sources including newspapers. Although only newspapers were examined, and other news sources (such as internet news or blogs) were excluded from study, impact on the results would be minimal. It is highly unlikely that a nominee would be depicted as well known by newspaper articles, but depicted differently by other types of news sources.

Finally, all of these results are based on sometimes difficult judgment calls. In an effort to increase validity of the results, the biographies were added to the study, to supplement the newspaper articles.

~ Chapter 4 – Results ~

Each of the 50 sampled justices was placed into one of two categories—well

known or unknown,
reflecting the probable
level of public
recognition of the
nominee at the time of
nomination. As noted

Table 1 Categorization of Sample n=50		
	WELL KNOWN	UNKNOWN
PRE-1930 n=30	96.7% n=29	3.3% n=1
POST-1930 n=20	15.0% n=3	85.0% n=17

in the methodology chapter, justices were categorized based primarily on their treatment by newspaper articles. Seven justices could not be categorized based on articles, alone,²⁸ and their biographies were consulted for additional information.

Table 1 displays how the justices were categorized, according to time period and public recognition. Of the justices nominated prior to 1930, 29 justices were classified as well known and one justice was classified as unknown. Stated another way, of all justices nominated prior to 1930, 96.7% were well known. Of the justices nominated after 1930, 3 were classified as well known and 17 were classified as unknown—15.0% and 85.0%, respectively.

Political Office

As alluded to in the introduction and literature review, justices from the earlier period tended to have more political experience than justices nominated later. To test this

²⁸ John Blair, Jr.; Thomas Todd; Joseph Story; David J. Brewer; William H. Moody; Fred M. Vinson; Potter Stewart

assumption, the careers of justices prior to their confirmation were examined, and the results largely support this assumption. Table 2 displays the percentages of justices who

had various political experience.²⁹ In each political experience category (except for executive-US experience),

	Executive-US	Executive-State	Legislative-US	Legislative-State
Pre-1930 n=30	26.7% n=8	10.0% n=3	26.7% n=8	50.0% n=15
Post-1930 n=20	40.0% n=8	5.0% n=1	20.0% n=4	10.0% n=2

justices nominated prior to 1930 had considerably more political experience. In the case of state legislative experience, justices in the pre-1930 group were considerably more likely to have such experience, when compared to the post-1930 group of justices.

Although the post-1930 group had more federal, executive experience (40.0% compared to 26.7% for the pre-1930 group), that result may be slightly misleading. Executive-US experience included positions such as Attorneys General and Solicitors General, who must be qualified lawyers, even though they work in the executive branch. This result shows that among justices in the post-1930 group, when they had political experience, such experience was most likely in the executive branch and was related to the law in some capacity. On the other hand, when justices in the pre-1930 group had political experience, it was most likely in the form of state legislative experience.

Because the earliest justices in the sample participated in the U.S. Constitution's

²⁹ Executive-US experience includes federal Attorneys General and Solicitors General, as well as various cabinet positions. Executive-State experience also includes Attorneys and Solicitors General, as well as state governors. Legislative-US experience includes Senators and Congressmen, as well as experience in the early Continental Congresses. Legislative-State experience includes state senators or representatives, as well as participation in state ratifying conventions or participation in state assemblies.

ratification process via state ratifying conventions, the prevalence of state legislative experience among the pre-1930 group is high.

Judicial Experience

In contrast to the earlier justices' political experience, later justices had more judicial experience; the current Court is the first to be comprised of only federal appellate court judges. Although, throughout history, some members of the Court have always been former judges, only recently has the number of former judges on the Court outnumbered members with other, usually political, experience. To test this assumption and to check the validity of the sample, the mean number of years of total judicial

experience (for both state and federal courts) was found for the entire population, and then compared to the mean years of judicial experience for the

	Total Judicial Experience		Federal Judicial Experience	
	Population n=110	Sample n=50	Population n=110	Sample n=50
Pre-1930	6.1	6.2	2.0	0.8
Post-1930	4.7	3.8	3.3	3.2

sample.³⁰ The results are displayed in Table 3. This was repeated for mean number of years of federal judicial experience for both the population and sample. By this measure, the sample is roughly representative of the entire population.

Although it was assumed that justices nominated after 1930 would have more years of total judicial experience, this was not found to be the case. Interestingly, justices nominated prior to 1930 had more total years of experience, in both the population and the sample. In fact, pre-1930 justices were significantly less likely than post-1930

³⁰ Table 2, found in Henry J. Abraham's *Justices, Presidents, and Senators* (42) listed years of judicial experience for all justices, and was used to find the mean years of judicial experience.

justices, to have any judicial experience. If they did have experience, however, they had many more years of experience. Therefore, although the results show that pre-1930 justices had a greater mean number of years of experience, they were still less likely to have any judicial experience. On the other hand, justices nominated after 1930 had more federal³¹ judicial experience.

Pre-1930

Well-known Justices

Of the four groups of justices, this group spanned the great length of time—1789 to 1922, 133 years—and contained the most justices—29 total.³² Predictably, because of that range, articles about the first justice (James Wilson) barely resemble that of that last justice (George Sutherland); however, taken chronologically, several trends and unifying characteristics are apparent. The first five justices in this group participated, in one form or another, in the ratification of the Constitution. Surprisingly, though, only one of these five fought in the Revolutionary War. Even more surprisingly, that justice was Alfred Moore, who is probably the shortest Supreme Court justice ever to serve. Of the first five, all received some sort of higher education. John Marshall attended William and Mary Law School, which is noteworthy considering that few lawyers at the time were

³¹ Although federal judicial experience represents service on both district (trial) and appellate courts, experience on district, not appellate, courts is rare. Most justices with judicial experiences earned that experience on appellate courts, not district courts.

³² Newspaper articles found for this group of justices ranged in their content as well as their length. Articles came from both databases. An average of 6.8 articles were found and coded for each justice, although the number of articles ranged from 0 to 24. The mode was also 6. Only one picture, of George Sutherland, published in 1922, was found for this group. Unfortunately, pictures cannot be used to make any evaluations about the justices in this group because the technology required to print pictures was not largely available, especially not to local newspapers, as many of the articles from this came from.

trained in the formal setting of a college. In almost all cases, prospective lawyers served as secretaries or clerks for practicing lawyers. They would then study legal texts on their own time and eventual start practicing on their own.

The career-of-choice for this group was political, although after 1888 (Justice Lamar), political experience was less prevalent and judicial experience took its place. All of the justices except one³³ nominated prior to 1888 (Wilson through Lamar) had some political experience. As mentioned above, several participated in ratification, many were senators or congressmen for either their home state or the United States. Surprisingly, only three justices worked as Attorneys General prior to the Court. Justice Taney served as both the Attorney General of Maryland and Attorney General of the United States. William Moody was also a state Attorney General, then U.S. Attorney General. Similarly, James C. McReynolds served as Assistant United States Attorney General prior to taking his seat on the Court.

This group of justices contain four Chief Justices—John Marshall, Roger Brooke Taney, Salmon Portland Chase, and Charles Evan Hughes. Twelve articles were found for Taney, fourteen for Marshall, and seventeen for Hughes. Only one associate justice had more than seventeen articles. Chase, on the other hand, had only one article. Only one justice had fewer (zero) articles. President Abraham Lincoln nominated Chase in 1864, following the death of Taney. The lack of newspaper articles found about Chase is not surprising, considering that the country was still actively engaged in the Civil War, at the time. Just a few years prior to Chase's nomination, Taney had successfully destroyed

³³ Thomas Todd had judicial experience more characteristic of later (post-1930) justices. See his data in Appendix A for more information.

public trust and respect in the Court, so public demand for news about the Court was most likely low,³⁴ and therefore, the lack of articles about Chase's nomination is not unpredicted.

Justices Field and Brandeis had the least and most articles, respectively. Field's lack of articles, discussed above, was probably due to limited access to newspapers from his home state, as well as the timing of his nomination in the middle of the Civil War. Brandeis, on the other hand, had the most articles of any justice in this group. His nomination was also the most controversial of this group. President Woodrow Wilson nominated Brandeis in 1916. The *New York Times* published stories about his nomination for a period lasting just under six months (from the end of January 1916 through the beginning of June 1916). At the time of his nomination, Brandeis was definitely well known. According to his biography, he began the practice of pro-bono³⁵ representation, even though his fellow lawyers thought he was eccentric. Prior to his nomination, Brandeis was also one of the highest paid lawyers in the country, making considerably more each year than the average lawyer.

Debate about Brandeis's nomination was as much about his judicial philosophy as it was about his religion. Those fighting his nomination pointed towards his extensive record as an advocate. Opponents called Brandeis a "socialist and an impracticable

³⁴ During the Civil War, President Lincoln suspended habeas corpus, which made it impossible for the Supreme Court, or any court for that matter, to hear litigation regarding the war. As a result, because the Supreme Court could not be actively involved in current events, and the Court was less relevant. Unlike today, the Supreme Court in the 1800s hesitated when hearing political issue cases, which anything related to the Civil War would have been, and often refused to hear them.

³⁵ Taking a case pro-bono means that the attorney argues the case without payment.

theorist,” while proponents defended Brandeis, saying that it would be “un-American [...] to hold [his] race or religion” against him. Throughout the nomination process, as opponents attacked Brandeis’s jurisprudence and record, proponents framed the debate to make the opponents look like they were fighting Brandeis’s confirmation based on his race, not his beliefs. Notwithstanding the fact that he was very well known, Brandeis’s nomination and subsequent confirmation battle looks more like those of the post-1930 justices, rather than any other in the pre-1930 group. Although slow to respond at first, Wilson did eventually publically defend Brandeis. Almost no presidents made statements of this sort before Wilson defended Brandeis. The trend certainly was not apparent in this sample.

Although this group spanned 133 years and contained over half of the entire sample, very few of the nominations or confirmations presented any real controversy. As discussed above, Brandeis’s nomination presented the only significant challenge to confirmation. Taney, nominated in 1836, was slightly controversial because he had been nominated a year before and rejected; however, the nomination leading to his ultimate confirmation presented no real challenges, certainly none of the sort Brandeis experienced. In fact, concessions were often made to nominees who had imperfect records. For example, Melville Fuller was nominated by Grover Cleveland in 1888. From the West, Fuller was a well-known and influential figure. A *New York Times* article stated that “While it was quite likely that in his younger days Mr. Fuller might have done some things to which he did not look back with special pride, no good reason could be found for refusing to confirm him,” without much reference to what those prior actions were. Such a statement would not be found among the post-1930 justices.

Until the mid-1800s, articles about the nominations generally lacked much detail. In most cases, these articles simply stated who was nominated and the state from which they came. In fact, a prominent newspaper from Massachusetts announced the nomination of Samuel Nelson in a small column where the availability of fresh peas in the market was listed just below Nelson's notice. Placement of the article says more about the nomination than the article itself. Clearly, the nomination was considered only slightly more important than fresh peas. Articles about some of the earliest nominations were not more than a few words, in stark contrast to the articles of the justices in the post-1930 group, which were more likely to span multiple newspaper columns, if not pages.

Although many articles mentioned the Senate, very few talked about the Senate Judiciary Committee. Starting in 1888, though, with the nomination of Lucius Q.C. Lamar, concern rose about the secretive Senate sessions. A *New York Times* article called these closed sessions "absurd," saying that "they ought to be abolished," because "What was said [in committee] can never be known." While discussion of the closed sessions was evidently important during Lamar's nomination, no nominations following his presented the issue in the same way, if at all.

Two justices were placed in this group for reasons different than the other justices. One justice, Stephen J. Field, was placed in this group based solely on information from his biography, because no articles were found about his nomination or confirmation. Field was nominated to the Court by President Lincoln in 1863—the height of the American Civil War. Additionally, the *America's Historical Newspapers* database largely covers newspapers from the east coast of the United States and does not have any newspapers from California, the state that Field was from. Understandably,

news about the Civil War may have taken precedence over Field's nomination in the papers. The lack of access to geographically appropriate papers probably also contributes to the lack of articles about Field.

One justice, David Brewer, was placed in this based largely on the fact that he was the nephew of sitting Supreme Court justice Stephen J. Field. While the public may not have recognized Brewer immediately following his nomination, he was surely recognized quickly thereafter, due to his family's connections.

Unknown Justices

Only one justice nominated prior to 1930 was classified as unknown. President Benjamin Harrison nominated George Shiras in 1892. Only four articles were published, spanning only four days in July of 1892. Very little can be said about Shiras's nomination; his biography accurately sums up his nomination by simply calling him "obscure." The Senate wasted no time confirming him, either. According to a *New York Times* article, the Senate "took but five minutes [...] to dispose of his and other nominations." No pictures of Shiras accompanied his articles—not surprising considering the first picture found was printed in 1922, thirty years later. Although Shiras "descend[ed] from one of the pioneer families of" Pittsburg, it is safe to say that in 1892, he was not widely known by the public.

Post-1930

Unknown Justices

In contrast to the pre-1930, well known group, this group contained fewer justices (17 compared to 29) and spanned a considerably shorter period of time (60 years compared 133). Of all justices nominated in 1930 or later, 85% were classified at

unknown. Similarly, only 3.33% of justices nominated prior to 1930 were classified as unknown. Spanning only 60 years (1930 to 1990), articles for the post-1930 justices are all very similar. These articles are considerably longer than articles for the pre-1930 group, sometimes continuing over several pages. Additionally, many more pictures accompanied the articles in this group. Of the 17 justices in this group, 13 justices had at least one picture printed in their articles. Three justices (Powell, Scalia, and Souter) each had five pictures³⁶ in their articles, the maximum number found for any justice in the entire sample. Although the number of pictures found in their articles ranged from 0 to 5, the average number of pictures found was 2.2, with 2 as the mode.

Articles in this group spanned a mere 60 years, unlike the pre-1930, well known justices, which spanned 133 years. The number of articles found for this group ranged from 4 to 34, with 13.8 articles being the average and 9 articles being the mode. Categorized as unknown, some may expect fewer articles for this group, especially considering that all articles came from one newspaper only, the *New York Times*, unlike the pre-1930, well known group, whose articles came from a number of various newspapers. Although there was a significant range in the number of articles found, the content of those articles was surprisingly similar for most justices in the group. While the circumstances of each nomination differ, regardless of when the nomination occurred, reporting of the nomination and confirmation process was relatively similar throughout the group. Because little was known about these justices, the press served as a place to

³⁶ Picture counts may not be entirely accurate because several pictures were blocked due to copyright laws. For more information about the way pictures were counted, refer to the discussion in Chapter 3. Here, only pictures that were positively identified as the individual justice were analyzed.

discover and evaluate their records. Not only were justices introduced to the public through these articles, but some articles also read more like short biographies, recounting everything from previous jobs to parent's occupations. Legal experience replaced political experience as the career path of choice. Of the seventeen justices in this group, twelve worked as Attorneys General, Solicitors General, or judges on a federal appellate court. Earlier justices in this group were more likely to work in the Justice Department, while judicial experience was more likely with the later justices.

This group also contained two Chief Justices. President Truman nominated Fred M. Vinson in 1946—six articles were found about his nomination. Vinson was not a controversial nominee like Brandeis was, but the Court gained more attention than it typically does during confirmations. At the time, the sitting justices did not hide the fact that the Court was marked by dissension. Newspaper articles spoke of Vinson as the solution to that problem. One *New York Times* article said that it was “apparent that he was selected largely to settle this controversy ‘in chambers.’” Another article said “he must pull the Court together and restore its dignity,” because “It does not stand as high in popular respect as it did.” Clearly, Vinson's nomination did not have the controversy that is characteristic of other justices in this group, because discussion of the state of the Court was the center of debate and speculation.

President Nixon nominated Warren Burger, the other Chief Justice in this group, in 1969. Even while the public may not know who a nominee is, officials in Washington are usually, at least, familiar with who a nominee will be before the president makes the official announcement. This was not the case for Burger. A *New York Times* article describes the announcement by saying that “His appointment took most of official

Washington by surprise.” As has become the norm, President Nixon announced Burger’s nomination during a press conference in the White House. As the President made the announcement, Burger stood next to him. One reporter covering the event stated that “the man at [Nixon’s] side was Judge Burger—tall, white-haired, and virtually unknown to most of the newsmen and many of the cabinet members and Government officials assembled for the announcement.” When few in Washington know who a nominee is, that nominee can safely be classified as unknown at the time of their nomination.

With the fewest number of articles for this group, Harold H. Burton’s confirmation was controversial only in the fact that he lacked the judicial experience that has almost become a prerequisite for nomination. Despite that, though, the Senate unanimously confirmed his nomination “less than twenty-four hours after” his nomination was submitted.

With 34 articles, Antonin Scalia had the most articles not only in this group, but also of any sampled justice. Prior to his nomination, Scalia had worked in various legal capacities in both the Nixon and Ford administrations, taught law at the University of Virginia and the University of Chicago, and was a sitting judge on the District of Columbia Court of Appeals.³⁷ Following the death of Chief Justice Burger, President Reagan had the opportunity to nominate the next Chief Justice. He chose to elevate associate justice William Rehnquist to Chief Justice, and then nominated Antonin Scalia to take Rehnquist’s seat as associate justice; therefore, their nominations were tied together. If the Senate failed to confirm Rehnquist, then Scalia’s nomination would also

³⁷ While all federal appellate courts are equal, the D.C. Circuit is considered somewhat more prestigious than the other eleven circuits because of the number of federal law cases that court hears, as well as its logistical proximity to the Supreme Court.

fail. While Scalia's nomination, in itself, was not very controversial, because he was linked with Rehnquist's elevation, his nomination gained much more media attention than it probably would have otherwise. The *New York Times* noted that Scalia was "largely unknown to the general public" and that during his confirmation hearings he was "overly cautious in his efforts to avoid expressing a view on any issue that might come before" the Court.

While the Senate Judiciary Committee was rarely mentioned in articles for justices in the pre-1930 group, the Committee was mentioned in almost every article among the post-1930 group, especially in the latter half of the group. In some articles, the work the Committee, and hearing in particular, were supported as a necessary and important part of the confirmation process. In the overwhelming number of instances, though, hearings were seen as detrimental to the process at most and useless at least. During the confirmation of Vinson, the *New York Times* stated that "Confirmation hearings in the Senate would result in a great further loss of United State Supreme Court prestige," which was already steadily declining prior to Vinson's nomination. During Minton's confirmation, a Michigan Senator "said he did not know of current objection to Judge Minton [but] considered [that] full hearings should be conducted to ascertain the nominee's 'legal ability and background'" anyway. Potter Stewart, a recess appointment in 1958, "came under a barrage of crucial questions from Southern Senators" during his hearings. In the 1800s, it was not unusual for the Senate to act on a nomination within days of receiving it from the President. By 1962, "the custom of the Senate Judiciary Committee [...] to wait at least a week before holding a hearing on any judicial nominee" replaced that former quick action.

Committee hearings are difficult for the Senators who conduct them, as well as for the nominee. Antonin Scalia's hearings were considerably less brutal than they otherwise would have been because the Committee held hearings on Rehnquist immediately prior to Scalia's nomination. By the time the Senators began hearings on Scalia, they "seemed worn out and distracted," and the Committee was "divided, doubtful, and tired." Although nominees do not have to answer every question asked of them, Senators will ask just about everything. For example, Anthony Kennedy was asked "whether he had ever smoked marijuana,"³⁸ to which he answered, saying "No, firmly no." Clearly, no questions are off limits. Of all the mentions of Committee hearings, only one, that of Burger, was described as "friendly." Whatever Burger said in the hearings ultimately assured his nomination as "the Committee voted its approval in a five-minute private session" following the nomination.

Of the eighteen justices (out of the total sample of 50) classified as unknown, David Souter was the least known of them all. Nominated in 1990 by President George H.W. Bush, the term "stealth" was first used to describe Souter. A cartoon published in the *New York Times* even depicted Souter as a Stealth Bomber plane because of his "relative lack of experience" and "almost blank slate as a record of substance." In an effort to assure an easy confirmation, Bush nominated Souter largely because "His record reveal[ed] next to nothing about the values he brings to constitutional questions."

³⁸ Before nominating Kennedy, President Reagan announced his intention to nominate Douglas Ginsburg to the Court. Ginsburg withdrew his name before being officially nominated after negative press appeared about how he used to smoke marijuana with students while teaching at Harvard Law School.

One justice in this group could not be placed confidently in either category. Ultimately, Fred M. Vinson was placed in the unknown category based upon the assumption that the lack of available information meant that the justice was probably not well known at the time of his nomination; however, based his impressive résumé (including Congressman, Secretary of the Treasury, and District Attorney of Kentucky, among other things), the public may have known who Vinson was. Because of the selected methodology, only one news source, the *New York Times*, was searched for articles. Limited results from the search resulted in a lack of information that made placing Vinson sufficiently difficult. A reading of only Vinson's biographical sketch probably would place him in the well-known category, but his newspaper articles failed to support that result. In fact, the newspapers, unlike those for most other justices, failed to give any indication of whether Vinson was well known or unknown at the time of his nomination.

Well Known Justices

Only three justices nominated after 1930 were classified as well known, constituting 15% of the post-1930 nominations. The circumstances of each of their nominations are unique, and they are similar only in that they had high visibility careers prior to nomination. Earl Warren, nominated in 1953, was a popular California governor, who "had a high reputation for administrative ability." Byron White, nominated in 1962, "played for the Lions [a Detroit football team] and attended the Yale Law School in his spare time." White also played for the Pittsburgh Steelers for a season.

The nomination of John M. Harlan, II, nominated in 1955, encountered the most controversy of the three. Harlan's grandfather was also a Supreme Court Justice and his

family had many connections. Nominated only months after the Court released the first *Brown v. Board of Education*³⁹ decision, the country knew that the new justice would have an impact on further school segregation cases, and there would be many. Harlan's qualifications were not attacked. Instead, Senators who fought his nomination were actually fighting against the Court. A *New York Times* article stated that "All of the Senators who voted against confirmation came from states where opposition to integrated schools is strong." Of the justices sampled, Harlan's confirmation hearings may have been the most difficult. Another *New York Times* article, covering the hearings, noted that "The Senate Judiciary Committee hearing [...] reached the height of nonsense on Friday—and dangerous nonsense at that." Harlan's nomination was nothing more than a forum for Southern Senators to express their animosity towards the Court's decision.

Summary

A sample of 50 justices, from the population of 110 justices, was examined to determine if the public was less familiar with nominees nominated after 1930 than nominees nominated prior to 1930. Primarily using contemporaneous newspapers, supplemented by short biographical sketches of each sampled justice, the results largely supported this widely held assumption. Using this method, 96.7% of sampled justices nominated before 1930 were well known, whereas 85.0% of sampled justices nominated after 1930 were unknown.

³⁹ In May of 1954, the Supreme Court issued an opinion in the consolidated case of *Brown v. Board of Education*, which essentially ruled that separate but equal was inherently unequal, specifically relating to public schools. The Court issued the opinion in two parts, the second of which was issued in June of 1955, after Harlan had taken his seat. The second opinion, known as *Brown II* said that schools must integrate with "all deliberative speed."

~ Chapter 5 – Conclusion ~

This study evaluated newspaper reports published during various Supreme Court confirmations. Although several precautions were taken to ensure objective, valid, and reliable results, some limitations prevent accepting the results without some question. The *America's Historical Newspapers* database, which was one of two sources used to find newspaper articles, primarily covers northeastern states. Although some results came from newspapers from southern states, western states were entirely left out. This presented a problem in the case of Stephen Field from California, as no newspaper articles were found about him. Additionally, only one newspaper source provided most of the found articles. Because of this, results may not reflect public knowledge of the nominee, but, instead, reflect the reporting biases of the *New York Times*. Despite this, though, the *Times* is a nationally read, widely-recognized newspaper, which reflects and shapes the opinion of many Americans. While the sample only encompassed less than half of the entire Supreme Court membership, precautions were taken when establishing the sample to ensure that the sample represented the population as much as possible. Finally, early research on a fairly new topic, such as this, is usually and most appropriately conducted using qualitative research methods and data analysis.

While legal historians and political scientists have held for some time that early Supreme Court nominees were considerably well known and more recent nominees are considerably unknown, no contemporaneous empirical evidence has been examined to evaluate that fact. This research contributes that missing link and supports the generally held assumption that prior to 1930, high profile nominees faced low-key confirmations and after 1930, confirmations marked by controversy demanded low-profile nominees.

Several factors contributed to this change. As discussed above, changes within the Senate provided the essential catalyst. The effects of the ratification of the seventeenth amendment and a 1929 rules change largely contributed most to this shift; however, other contributing factors effected this change as well. Immediately following its creation, the Supreme Court commanded little more than public suspicion. As a new institution functioning so differently than the British courts with which the colonists were familiar, the infant Supreme Court needed justices whom the public trusted and respected. As George Washington clearly understood, because the institution lacked those needed characteristics, its justices must possess them. Stated another way, because the public knew little about the Court, it was imperative that they not only knew the justices that comprised the Court, but that they also respected and supported them.

In the founding era, the political arena supplied the well-known, well-respected individuals that the early Court needed. Many early justices served in various political capacities prior to their nominations, but most worked in state legislatures. The state legislature allowed the early nominees to remain close to their states in order to gain public recognition and gain entry into the political circles that were largely responsible for recommending possible nominees to the Court. As the federal government grew, both in size and prestige, public recognition of nominees became less important, eventually even becoming a hindrance to confirmation. Once the Court yielded enough authority and esteem to stand on its own, nominees with the same characteristics were no longer required.

With the growth of the federal government and change within the Senate, the stealth nominee surfaced. Not only did presidents want unknown nominees, but they also

needed them to be unknown in order to combat the growingly antagonistic confirmation process. After 1930, significantly fewer nominees served in state legislatures. In fact, few nominees served in any politically elected office. Instead, post-1930 nominees' "political" experience tended toward executive appointed positions, usually as an Attorney General or Solicitor General. Such an office allowed them to develop their legal credentials, while remaining distant enough to avoid public prominence or controversy. Unlike early nominees with state judicial experience, recent nominees have more federal (appellate) judicial experience. Presidents began to see the value in prior judicial experience, not only in how it relates to the work of the Supreme Court, but also in the lack of public attention that federal judges receive. Relatively junior appellate judges, at least as far as Presidents are concerned, have become the ideal nominee. The public knows little to nothing about them, and if nominated before serving too much time on the lower bench, they lack a written record to condemn them.

The current Roberts Court, sitting together only since 2005, comprises only former appellate justices. No other Court has included only former judges, and not enough time has passed to evaluate accurately the effect of such membership. No doubt, former judicial experience is valuable, but judicial experience to the exclusion of all other experience may negatively affect the Court in unforeseen ways. Scholars have long acknowledged the difficult nature of judging. The Supreme Court justices are special people who give up much to accept the job given them. They must leave behind close friends in the name of avoiding conflicts of interest. Justices must decide extremely difficult and often politically charged, controversial issues based on the excessively ambiguous Constitution. Such a job requires an unusually intelligent and talented

individual, but the current confirmation process virtually excludes many qualified, potentially great, candidates.

Given that senators on the Judiciary Committee and media journalists dig deep into a nominee's background, it is a wonder that anyone would subject themselves to such a process. The threat is that this process may fail to choose the great minds that the legal community has to offer, in favor of less controversial, mediocre candidates. If such a pattern continues, the Court may not have another great justice in the vein of Marshall, Story, or Taney. Currently, making it through the confirmation process is nothing short of remarkable. The current process almost requires nominees to be undistinguished and less qualified to be confirmed. An individual so devoid of controversy—so as to have any chance of confirmation—virtually had to make a conscious effort to avoid making any damaging decision, in legal cases or in life. Such a person almost has to make a concerted effort to remain a potential nominee from the time they graduate law school throughout their entire legal career. Unlike politicians, judges do not campaign for their jobs; they are a select few who are chosen for their qualifications. Rewarding non-distinct individuals with justiceships is counter-intuitive. This current trend threatens the makeup of the Court and threatens to diminish the public respect that the institution requires for continued success.

What this will mean for the future of the judiciary is difficult to say, but continuing on this current trend may prove hazardous. A justice on the Court often has a significant and qualified résumé before even being considered for nomination. Their résumés should include jobs and professions that forced them to establish opinions and philosophies about the critical issues of the day (such as abortion, capital punishment,

and defendant's rights). While opinions about those issues were forged long beforehand, they will most likely change once justices ascend to the Court; they have to.

Before taking the job, little constrains great lawyers and lower court judges. Much praise is given for forward thinkers in those positions. Such forward thinking, however, can prove detrimental to justices. Once on the Court, a justice is constrained by long established precedent. Even when they may personally disagree with the philosophies and ideologies established, the justice must decide current issues along the lines set by relevant precedents. Additionally, an individual is free to keep and hold whatever opinions he wishes, without debate. A Supreme Court justice, on the other hand, is only one of nine. The justice is not an individual, but instead a member of a nine person institution. Whichever opinion receives the most votes become the opinion of the Court. An individual opinion no longer matters.

The danger with a controversial nominee is that such controversy may prevent confirmation; however, there is also danger in choosing a candidate just to avoid controversy. Controversy means that the nominee has accomplishments, often resulting from deciding high profile, or at least somewhat public issues. This is not to say, though, that lack of controversy equals lack of accomplishment. Many lesser-known justices have accomplished as much as, if not more than, any other well-known justice. The problem arises from the automatic elimination of potential candidates based solely on their recognizability. For such an important position as a Supreme Court justice, it is important to ask why any nominee would be non-controversial. Controversy during confirmation almost guarantees that the nominee did something noteworthy during their career; it means that the nominee has not been afraid to make a decision or give an

opinion. The job description of a Supreme Court justice requires an accomplished legal mind, of both significant political and jurisprudential expertise. Past confirmations have shown that some of the more difficult confirmations have produced some of the most established and greatest justices. Brandeis, for example, suffered through a six-month confirmation struggle (Frank), and the Senate rejected Taney's first nomination.

The Senate Judiciary Committee has evolved into a dangerous institution, which resembles more of a hurdle to confirmation than it was ever intended to be. Starting as just another committee in Congress, the Judiciary Committee now thoroughly attacks all Supreme Court nominees. Controversy of the current sort was almost nonexistent prior to 1930. The Committee's mission, now, is to find some sort of damaging record about every nominee. Interest groups help the Committee accomplish this task. Broadcasting confirmation hearings only encourage the already bloodthirsty senators to dig deeper into the backgrounds of nominees in an effort to create even more drama. The media coverage that current hearings receive helps senators win reelections⁴⁰ but damages the respect that the public has for both the nominee and the Court as an institution.

The public is as unforgiving as senators are. Today, citizens are very unwilling to accept that people with less than perfect personal records still make acceptable, or even admirable, public officials. So much has changed so quickly. Just one hundred years ago, in 1910 when Horace Lurton became an associate justice, Northern senators voted for his confirmation despite him being from a Southern slave state (Tennessee). Now,

⁴⁰ Because the more visible a senator is, the more likely his reelection will be. In other words, senators try to get as much media coverage as they can because the more familiar their constituents are with them, the more likely individual constituents are to vote for the senator—name recognition matters (Herrnson).

senators and the public alike not only refuse to overlook an imperfect record, but they also make it a point to seek out as many flaws as possible with each nominee.

Fixing the somewhat broken confirmation process should not result in presidents choosing “stealth” nominees over more qualified, more contentious nominees. Instead, the Senate’s role in confirmations should be quelled. The Founders gave the Senate “advice and consent” power over confirmation. They did not, however, intend the current circus that is a Senate confirmation hearing. Senators are perfectly capable of deciding a nominee’s potential as a Supreme Court justice without the testimony of agenda-driven interest groups. Interest groups do not have the best interest of the Court in mind when they testify. Instead, they are fighting against the decisions a nominee may make in certain issue-specific future cases. Additionally, if the power of the Senate Judiciary Committee was reigned in, presidents would have more freedom to nominate the most qualified candidate, instead of searching for the most obscure, barely qualified person available. Hearings do not need to be televised, either; confirmation hearings only breed unnecessary drama. Frankly, when void of controversy, the public does not watch the hearings anyway. If the opportunity to create a sound bite is taken away from senators on the Senate Judiciary Committee, they will focus more on their job of investigating the nominee’s potential as a justice, and focus less on grandstanding for the sake of the media.

The current trend is indeed a dangerous one. The already near-impossible nature of judicial confirmations is compounded with even more difficulty as the media and the general public become even more unforgiving of a nominee’s past. While not all aspects of a nominee’s record should be overlooked or forgiven, sidelining a confirmation based

solely on a statement the nominee made when only twenty years old makes no sense and threatens the future nature of the judiciary. Continuing to publicize confirmations and allowing increasing amounts of interest group participation will most likely force presidents to look for candidates without a strong judicial record and certainly without any type of political record. This may result in the decreased quality of the judiciary and threaten the public respect for the institution, which are so essential to the Supreme Court's authority.

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~ Appendix A – Data Chart ~

In the following chart, all information in the “Biography” column comes from *The Oxford Companion to the Supreme Court of the United States*. Information from the “Articles” column comes from various newspapers. Newspaper titles were shortened to conserve space. The alphabetical key to newspaper titles appears below.

BP – *Baltimore Patriot*, published in Maryland
 CG – *Cumberland Gazette*, published in Maine
 CH – *Connecticut Herald*, published in Connecticut
 CTG – *Connecticut Gazette*, published in Connecticut
 EP – *Evening Post*, published in New York
 FC – *Farmer’s Cabinet*, published in New Hampshire
 IC – *Independent Chronicle*, published in Massachusetts
 MN – *Morning News*, published in Connecticut
 NHG – *New-Hampshire Gazette*, published in New Hampshire
 NHP – *New Hampshire Patriot*, published in New Hampshire
 NHS – *New Hampshire Sentinel*, published in New Hampshire
 NPM – *Newport Mercury*, published in Rhode Island
 NYT – *New York Times*, published in New York
 PA – *Public Advertiser*, published in New York
 PR – *Philadelphia Repository*, published in Pennsylvania
 PS – *The Pittsfield Sun*, published in Massachusetts
 RE – *Richmond Enquirer*, published in Virginia
 RIR – *Rhode-Island Republican*, published in Rhode Island
 SCG – *Carolina Gazette*, published in South Carolina

WELL-KNOWN JUSTICES

JUSTICE	BIOGRAPHY	ARTICLES	DATE RANGE	ARTICLE COUNT	PICTURE COUNT
James Wilson	<ul style="list-style-type: none"> - “achieved fame and fortune” - widely identified as a lawyer and investor - helped frame Constitution - in 1787 Convention – second only to Madison - contributed significantly to idea of separation of power - Second Continental Congress - published “Lectures on Law” 	- “with singular pleasure” (CG, 2 Apr. 1789)	4-2-1789 to 10-1-1789	3	0
John Blair, Jr.	<ul style="list-style-type: none"> - delegate in ratifying conventions - legal education 	- “The President made the following Nominations to the Hon. Senate, of Judicial Officers—which the Senate will take into consideration to-morrow” (NHG, 1 Oct. 1789)	10-8-1789 to 10-1-1789	3	0
Oliver Ellsworth	<ul style="list-style-type: none"> - reputation in New England for being able lawyer - main author of Judiciary Act of 1789 - helped negotiate “Great Compromise” - Senator 	- “The Hon. Oliver Ellsworth, of Windsor, Connecticut, now a Senator in Congress, is appointed Chief Justice of the United States” (CTG, 17 Mar. 1796)	3-17-1796 to 3-17-1796	2	0

Alfred Moore	<ul style="list-style-type: none"> - helped with NC's ratification - served in Revolutionary War - father was one of only three judges in NC 	- "We hear from Philadelphia, that the President of the United States has nominated to the senate, Alfred Moore, esq. to supply the place of James Iredell, esq. as an associate justice of the supreme court of the United State" (SCG, 2 Jan. 1800)	1-2-1800 to 3-20-1800	7	0
John Marshall	<ul style="list-style-type: none"> - "well placed connections" - VA ratifying convention of 1788 - Minister to France - Council of State - House of Delegates 	- "The Senate has sanction the nomination of Gen. Marshall, as Chief Justice of the United States" (PR, 7 Feb. 1801)	2-7-1801 to 2-5-1801	14	0
Henry B. Livingston	<ul style="list-style-type: none"> - "notable anti-federalist" - brother-in-law to John Jay - father was governor of NJ - John Jay's secretary 	<ul style="list-style-type: none"> - uses the name "Brockholst" instead of "Henry" because of large family (CH, 2 Dec. 1806) - "Ever since the death of judge Paterson, and even for some time before, the public have been considering with solicitude, who was the probable candidate for this office in the eyes of the President" (EP, 26 Dec. 1803) 	12-2-1806 to 6-24-1807	5	0
Thomas Todd	<ul style="list-style-type: none"> - reputation for untangling land claims - took newly created 7th seat on Court - clerk for conventions in KY - Chief Justice of KY's highest Court 	<ul style="list-style-type: none"> - in list of appointments, listed just below Meriwether Lewis for Gov. of Louisiana (NHG, 17 Mar. 1807) - "THOMAS TODD, of Kentucky, is appointed Justice of the Supreme Court of the U. States for the new circuit recently established" (PA, 10 Mar. 1807) 	4-3-1807 to 3-10-1807	4	0

Joseph Story	<ul style="list-style-type: none"> - “New England’s rising legal star” - prominent member of Democratic-Republican party 	<ul style="list-style-type: none"> - “We understand that JOSEPH STORY, Esq of Salem, has been nominated by the President to the Senate of the U. States as a Judge of the Supreme Judicial Court” (IC, 21 Nov. 1811) 	11-30-1811 to 11-30-1811	11	0
Smith Thompson	<ul style="list-style-type: none"> - “enjoyed sufficient political clout” - father-in-law was Justice Livingston - state assemblyman - New Jersey Supreme Court 	<ul style="list-style-type: none"> - nomination “strongly reported” (NHG, 1 Aug. 1823) - “The Hon. Smith Thompson, Secretary of the Navy, has been appointed Judge of the Supreme Court, vice Judge Livingston deceased.” (NHS, 1 Aug. 1823) - “popular and esteemed” (BP, 4 Aug. 1823) 	4-1-1823 to 12-24-1823	10	0
James M. Wayne	<ul style="list-style-type: none"> - Capitan in War of 1812 - Mayor of Savannah - Savannah Court of Common Pleas - Savannah’s Board of Aldermen - state representative 	<ul style="list-style-type: none"> - “Hon. James M. Wayne of Georgia, has been appointed by the President one of the Associate Justice of the Supreme Court of the United States, in place of Wm. Johnson, deceased” (RIR, 21 Jan. 1835) 	10-3-1834 to 1-21-1835	5	0
Roger B. Taney	<ul style="list-style-type: none"> - “one of Maryland’s foremost attorneys” - “leader of Maryland’s Federalist party” - “reputation as a loyal Jacksonian” - Secretary of the Treasury - Attorney General (Maryland) - U.S. Attorney General 	<ul style="list-style-type: none"> - “The nomination of Roger B. Taney, as a Judge of the Supreme Court, was taken up, and indefinitely postponed.—<i>Nat. Int.</i>” (RE, 12 Mar. 1835) - “president could not have made a more judicious selection” (NHP, 11 Jan. 1836) - “certainly nothing except the recklessness and wanton hostility of an unprincipled majority of that body can prevent their [Taney and Philip Barbour] ultimate confirmation” (NHP, 11 Jan. 1836) 	1-21-1835 to 3-26-1836	12	0

(Taney, cont'd)	<ul style="list-style-type: none"> - State representative (Maryland) - State senator (Maryland) 				
John Catron	<ul style="list-style-type: none"> - managed Van Buren's presidential campaign 	<ul style="list-style-type: none"> - "Among the nominations to the Senate; made on the last night of the session of Congress, and which have since been confirmed, was that of [...] John Catron, of Nashville" (NPM, 11 Mar. 1837) 	3-11-1837 to 3-18-1837	4	0
Samuel Nelson	<ul style="list-style-type: none"> - NY state constitutional convention - Chief Justice of NY Supreme Court 	<ul style="list-style-type: none"> - "Judge Nelson of New York, has been nominated as Judge of the Supreme Court from the New York district, in place of Chancellor Walworth, whose name has been withdrawn from the consideration of the Senate" (MN, 11 Feb. 1845) - nomination listed in daily news shorts just above statement about availability of fresh peas in market (PS, 20 Feb. 1845) 	2-11-1845 to 3-13-1845	6	0
Robert C. Grier	<ul style="list-style-type: none"> - non-controversial and almost unknown - Allegheny County District Court 	<ul style="list-style-type: none"> - "The nomination of Judge Grier, of Pittsburgh, to the vacant bench of the Supreme Court, was sent into the Senate on Monday, and referred to the Judiciary Committee" (PS, 6 Aug. 1846) 	8-6-1846 to 8-20-1846	4	0
Nathan Clifford	<ul style="list-style-type: none"> - worked in all branches of government - Ambassador to Mexico 	<ul style="list-style-type: none"> - "<i>Hon. Nathan Clifford, of Maine</i>, has been nominated by the President for Associate Justice of the Supreme Court of the United States in place of Judge Curtis resigned" (PS, 17 Dec. 1857) - "head of the Maine bar for many years" (FC, 20 Jan. 1858) - "Managed some of the most difficult criminal cases that have transpired" (FC, 20 Jan. 1858) 	12-3-1857 to 1-28-1858	6	0

Stephen J. Field	<ul style="list-style-type: none"> - controversial character” - “enviable reputation” - “well regarded” but constantly made enemies - state judge – California Supreme Court - major contributor to CA’s Civil and Criminal laws, passed in 1851 - brother (David Dudley Field) well known lawyer - CA state representative 	--	--	--	--
Salmon P. Chase	<ul style="list-style-type: none"> - a lot of political experience, especially in Ohio - influential to both Lincoln and Congress - compiled The Statues of Ohio - was a one-time presidential candidate - Secretary of Treasury - Ohio Senator and Governor 	<ul style="list-style-type: none"> - “contrast to the storm of wrath raised by Gen. Jackson’s appointment” (NYT, 6 Dec. 1864) - “even his political opponents [...] concede that the President could have made no better selection” (NYT, 6 Dec. 1864) 	12-6-1864	1	0
William Strong	<ul style="list-style-type: none"> - Congressman - state judge, Pennsylvania Supreme Court 	<ul style="list-style-type: none"> - “They [Bradley and Strong] are sound and strong men, with personal and professional characters so free from reproach that their elevation to the Bench will win for it increased confidence and respect” (NYT, 15 Feb. 1870) 	2-10-1870 to 2-15-1870	3	0

<p>Lucius Q.C. Lamar</p>	<ul style="list-style-type: none"> - Secretary of the Interior - Congressman - Senator - law professor, University of Mississippi - started case method of teaching 	<ul style="list-style-type: none"> - “no man in the entire South could be selected for a place on the Supreme Bench who would so admirably meet all requirements of the place as Sec. Lamar” (NYT, 21 June 1887) - “probable that the summer will pass before the justiceship is filled” (NYT, 21 June 1887) - “Mr. Lamar’s appointment will be more widely acceptable than that of any man whom he might choose from Louisiana” (NYT, 14 Oct. 1887) - “in heart and principle [...] a traitor” (NYT, 22 Dec. 1887) - “not a fit person to interpret the Constitution” (NYT, 22 Dec. 1887) - “secret sessions of the Senate are absurd and that they ought to be abolished” (NYT, 4 Jan. 1888) 	<p>6-21-1887 to 1-10-1888</p>	<p>10</p>	<p>0</p>
<p>Melville W. Fuller</p>	<ul style="list-style-type: none"> - first Chief Justice with legal training - father in law headed largest bank in Chicago - grandfather served as Chief Justice of Maine Supreme Court 	<ul style="list-style-type: none"> - “never been in public life [...] but by no means an unknown man” (NYT, 1 May 1888) - “stands second to no man in the West” (NYT, 1 May 1888) - “high character and uncompromising honesty” (NYT, 1 May 1888) - “great influence in the West” (NYT, 1 May 1888) - “While it was quite likely that in his younger days Mr. Fuller might have done some things to which he did not look back with special pride, no good reason could be found for refusing to confirm him” (NYT, 9 May 1888) - “Senators have received letters suggesting that the 	<p>4-30-1888 to 6-21-1888</p>	<p>5</p>	<p>0</p>

(Fuller, cont'd)		<p>nomination should be carefully considered before it is finally disposed of" (NYT, 9 May 1888)</p> <ul style="list-style-type: none"> - "Mr. Evarts [a senator] snarled at the nomination" (NYT, 21 June 1888) - "What was said [in committee] can never be known" (NYT, 21 July 1888) 			
David J. Brewer	<ul style="list-style-type: none"> - state judge – Supreme Court of Kansas - largely overshadowed on Court by Field, Harlan, and Holmes 	<ul style="list-style-type: none"> - "Judge Brewer's mother was a sister of Justice Stephen J. Field, and as a result of yesterday's nomination will occur the unusual circumstance of an uncle and a nephew occupying at the same time seats on the bench of the Nation's highest tribunal" (NYT, 5 Dec. 1889) - "It seems that Brewer's selection was a dead cut at Gresham [another possible candidate]" (NYT, 11 Dec. 1889) 	12-5-1889 to 1-1-1890	4	0
Oliver Wendell Holmes, Jr.	<ul style="list-style-type: none"> - father popular writer in England and US - grandfather prominent judge - professor Harvard Law - edited James Kent's <i>Commentaries</i> - wrote <i>The Common Law</i> which had impact on tort and contract law in US and England - state judge, Chief Justice Supreme Court of Massachusetts 	<ul style="list-style-type: none"> - "appointment of Justice Holmes is not a surprise" (NYT, 12 Aug. 1902) - "Undoubtedly President Roosevelt's appointment of Judge Holmes [...] will be extremely popular" (NYT, 13 Aug. 1902) - "Is it true that he's the son of Sherlock Holmes" (NYT, 19 Aug. 1902) - "no opposition and the nomination was not discussed" (NYT, 5 Dec. 1902) 	8-12-1902 to 12-5-1902	7	0

<p>William R. Day</p>	<ul style="list-style-type: none"> - appointed to Court after President McKinley's assassination to bolster support of Ohio Republicans - was personal confidante of Pres. McKinley - Secretary of State - federal judge – 6th Court Appeals 	<ul style="list-style-type: none"> - “both of the grandfathers of Judge Day were justices in the Supreme Court of Ohio” (NYT, 27 Jan. 1903) 	<p>1-27-1903 to 2-24-1903</p>	<p>4</p>	<p>0</p>
<p>William H. Moody</p>	<ul style="list-style-type: none"> - prosecuted Lizzie Borden - Secretary of the Navy - Attorney General 	<ul style="list-style-type: none"> - “The President returned to Washington from his Summer home at Oyster Bay determined to appoint Mr. Moody to the Supreme Court bench regardless of the fact that that appointment would mean two Justices from Massachusetts” (NYT, 8 Nov. 1906) - “If Mr. Moody is to become Supreme Court Justice it is because Mr. Taft has declined it, and if Mr. Taft has declined it, it is only because Mr. Roosevelt has succeeded in convincing him that he should be a Presidential candidate instead” (NYT, 9 Sept. 1906) - “There will not be the least doubt that in Mr. Moody the President would have a most friendly Justice of the Supreme Court” (NYT 25 Oct. 1906) 	<p>9-9-1906 to 12-18-1906</p>	<p>5</p>	<p>0</p>
<p>Horace H. Lurton</p>	<ul style="list-style-type: none"> - State Chancellor - Chief Justice, Tennessee Supreme Court - federal judge, 6th Circuit Appeals - Dean of Vanderbilt Law School 	<ul style="list-style-type: none"> - “big enough for presidential chamber, but he probably has no political ambition” (NYT, 15 May 1903) - “it would not damage him in the opinion of sensible people of the North able to rise above old prejudices” (NYT, 18 May 1903) - “one better equipped for service in that greatest of all 	<p>5-18-1903 to 1-3-1910</p>	<p>11</p>	<p>0</p>

(Lurton, cont'd)		<p>courts—the Supreme Court—could not be found” (NYT, 14 Dec. 1909)</p> <ul style="list-style-type: none"> - “one by one the Democratic senators have seen the President at the White House, and promised to support the nomination.” (NYT, 14 Dec. 1909) - “The chief object to Judge Lurton on the part of the Republican senators is his age” (NYT, 14 Dec. 1909) - “Judge Lurton is accused of having aided in the attempt to take Vanderbilt University from the Methodist Church” (NYT, 15 Dec. 1909) - “his age is the only argument advanced against him” (NYT, 20 Dec. 1909) - “the new justice will probably be known as the handsomest man on the Supreme bench” (NYT, 3 Jan. 1910) - “his step is springy and vigorous” (NYT, 3 Jan. 1910) 			
Charles H. Hughes	<ul style="list-style-type: none"> - “major reputation as a leader of the corporate bar” - “nationally known figure” - gained attention for ability to sort through financial ratemaking and price gouging - NY state governor - law professor Cornell - “head of New York ‘gas inquiry’” 	<ul style="list-style-type: none"> - “There is a strong impression that the President really favors Gov. Hughes” (NYT, 17 Apr. 1910) - “there would be no objection whatever to the confirmation of Gov. Hughes” (NYT, 21 Apr. 1910) - “We in this state have come to know him very well” (NYT, 26 Apr. 1910) - “He is, perhaps, the best-known Governor in the Union” (NYT, 26 Apr. 1910) - “The Supreme Court will be strengthened by his appointment” (NYT, 26 Apr. 1910) - “It will be remembered also that he was the first prominent man to oppose the income tax, and his 	4-7-1910 to 12-6-1910	17	0

(Hughes, cont'd)		<p>opposition came after Mr. Rockefeller had announced hostility to the income tax amendment” (NYT, 26 Apr. 1910)</p> <ul style="list-style-type: none"> - “Regulars and insurgents alike, in both Senate and House, unite in praising the selection and felicitation over its acceptance” (NYT, 26 Apr. 1910) - “Public opinion, however, has been manifesting its approval of the President’s selection of the late Justice Brewer’s successor” (NYT, 3 May 1910) - “the impression is growing that Justice Hughes will be named as Chief Justice of the Supreme Court” (NYT, 26 Nov. 1910) 			
James C. McReynolds	<ul style="list-style-type: none"> - secretary of Senator Jackson - Assistant Attorney General - law professor, Vanderbilt 	<ul style="list-style-type: none"> - “But it is said that the President regards the Attorney General as about the most promising of the available material for the Supreme Court Justiceship” (NYT, 27 July 1914) - “friends of the appointees expect them to be confirmed without serious opposition” (NYT, 19 Aug. 1914) - “While it is known that there will be some opposition to confirming the appointment of Mr. McReynolds, a poll of the Senate showed that it would be limited to a handful of radicals who already have demonstrated their ability to stop the wheels of legislation” (NYT, 19 Aug. 1914) 	7-14-1914 to 8-25-1914	7	0

<p>Louis D. Brandeis</p>	<ul style="list-style-type: none"> - earning \$50k/yr when most lawyers were earning \$5k/yr - first to do pro-bono work = caused people to think he was eccentric - by 1912, reputation as the “people’s attorney” 	<ul style="list-style-type: none"> - ““Mr. Brandeis is especially well known among manufacturers in the garment and cloak industries and their employees because he served as mediator in many controversies”” (NYT, 29 Jan. 1916) - ““I believe he has in him the ability to make him as great a justice as Justice Hughes”” (NYT, 29 Jan. 1916) - “Mr. Brandeis is a man of ability, and I am glad to learn of his appointment. It give evidence that President Wilson does not consider creed or nationality in selecting men for public service” (NYT, 29 Jan. 1916) - “The impression is general that the longer a vote on Mr. Brandeis’s nomination is delayed the greater will be his strength, as pressure from the President and other sources will be brought to bear in his favor” (NYT, 30 Jan. 1916) - ““Opponents of Brandeis are making his confirmation a national necessity”” (NYT, 31 Jan. 1916) - “The general opinion now is that, while there will still be a fight against Mr. Brandeis in the Senate, he will ultimately be confirmed by a safe majority” (NYT, 31 Jan. 1916) - “The past performances of Mr. Brandeis stamp him as a socialist and an impracticable theorist, hostile to vested rights, and given to promoting class hatreds and social unrest” (NYT, 1 Feb. 1916) - “To put such a man as Mr. Brandeis in the Supreme Court would so shake the confidence of our people in that tribunal that its power and influence as a co- 	<p>1-29-1916 to 6-3-1916</p>	<p>24</p>	<p>0</p>
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(Brandeis, cont'd)		<p>ordinate branch of our Governments, and conservator of all rights and interests we hold dear, would be seriously impaired, if not utterly destroyed” (NYT, 1 Feb. 1916)</p> <ul style="list-style-type: none"> - “Senator Walsh of the sub-committee conducting the hearing has received a petition, signed by more than 1,000 Harvard students, protesting against the action of President Lowell of Harvard in opposing Mr. Brandeis and urging favorable consideration of his nomination” (NYT, 3 Mar. 1916) - “He is of the material that makes good advocates, reformers, and crusaders, but not good or safe judges” (NYT, 4 Apr. 1916) - “It is in evidence that there was a systematic campaign of advertisement to injure him in the estimation of the public” (NYT, 5 Apr. 1916) - “Mr. Brandeis’s name has been before the full committee several weeks, since the extended hearings on his fitness for the bench were concluded. At each meeting final action was postponed” (NYT, 25 Apr. 1916) - “The gauntlet Mr. Brandeis’s nomination has had to run is almost unique in the history of the Supreme Court” (NYT, 25 May 1916) - “This whole case has been illuminative of old party politics. It has been a fine example of the mud that is in the wheels of the old machines. It is a tribute to their unfairness” (NYT, 3 June 1916) 			
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George Sutherland	<ul style="list-style-type: none"> - “active in politics” - state Senator - Congressman and Senator 	<ul style="list-style-type: none"> - “The Senate paid a complement to ex-Senator Sutherland by confirming his nomination immediately in open session” (NYT 9 Sept. 1922) 	9-5-1922 to 5-10-1922	4	1
Earl Warren	<ul style="list-style-type: none"> - “popular three-term governor” - served in WWI - California state governor - District Attorney (Alameda County) - Vice Presidential candidate - was offered Solicitor General position just prior to Justice Vinson’s death 	<ul style="list-style-type: none"> - “And it was also noted that he had a high reputation for administrative ability, an important part of the duties of a Chief Justice” (NYT, 29 Sept. 1953) - “Speculation centered on the California Governor for the first Supreme Court vacancy even before Chief Justice Fred M. Vinson died on Sept. 8” (NYT, 29 Sept. 1953) - “Some consideration also was given to delaying appointment of a new Chief Justice until Congress reconvened in January, because no Chief Justice since 1796 has ascended the Supreme Bench in advance of Senate confirmation” (NYT, 30 Sept. 1953) - “his name is favorably known throughout the country” (NYT, 1 Oct. 1953) - “He will certainly dignify and humanize the office, as Justice Vinson did before him” (NYT, 1 Oct. 1953) - “There is no question, however, of the Chief Justice’s firm and loft personal integrity, though like all politicians he had made compromises that fell short of his ideal” (NYT, 4 Oct. 1953) 	7-31-1953 to 10-17-1953	26/13	6
John M. Harlan, II	<ul style="list-style-type: none"> - “family’s impeccable social connections” - “one of nations foremost litigators in antitrust and related actions” 	<ul style="list-style-type: none"> - “Confirmation would not appear to be several weeks away, depending on when the hearings begin, how long they last, and when the Senate acts on the committee’s recommendation” (NYT, 21 Jan. 1955) - “[Senator William Langer] said he had no personal 	1-11-1955 to 3-18-1955	16	1

<p>(Harlan, cont'd)</p>	<ul style="list-style-type: none"> - father controversial lawyer and politician - grandfather Supreme Court justice - served in WWII, Army Air Corps' Operation Analysis - federal judge 2nd Circuit Appeals - U.S. attorney for NY's Southern District, Chief Counsel, Crime Division 	<p>objection to Judge Harlan, but would oppose the nomination in an effort to force President Eisenhower to appoint men from 'small state' to high federal posts" (NYT, 21 Jan. 1955)</p> <ul style="list-style-type: none"> - "Senator Kilgore said that most of the opposition of Judge Harlan came from the north, but that six of eight letters from Southern states asked that the nominee be questioned on segregation" (NYT, 1 Feb. 1955) - "He [Kilgore] declared that none of the protests questioned Judge Harlan's integrity or reputation, but that some attacked his views on public matters" (NYT, 1 Feb. 1955) - "Judge Harlan has been invited to appear, and other witnesses may testify in person" (NYT, 3 Feb. 1955) - "Officials of the Eisenhower Administration likewise have not waged an openly aggressive fight to obtain confirmation of Judge Harlan" (NYT, 20 Feb. 1955) - "He [Harlan] held that it would be 'gravely inappropriate' for him to give a forecast of his decisions in cases that might come before him as a member of the Supreme Court" (NYT, 26 Feb. 1955) - "Judge Harlan was before the committee for almost three hours" (NYT, 26 Feb. 1955) "The Senate Judiciary Committee hearing [...] reached the height of nonsense on Friday—and dangerous nonsense at that" (NYT, 27 Feb. 1955) - "Bipartisan foot-dragging has delayed floor action on the nomination" (NYT, 13 Mar. 1955) 			
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(Harlan, cont'd)		<ul style="list-style-type: none"> - “All of the Senators who voted against confirmation came from states where opposition to integrated schools is strong” (NYT, 17 Mar. 1955) - “Senator Eastland of Mississippi devoted three hours to stating why he opposed Judge Harlan. The reasons given were obviously not compelling” (NYT, 18 Mar. 1955) 			
Byron R. White	<ul style="list-style-type: none"> - played football with the Steelers and the Detroit Lions - served in WWII - Deputy Attorney General - chaired “Citizens for Kennedy” 	<ul style="list-style-type: none"> - “Mr. White is 44 years old, an unusually young age for a Supreme Court appointee” (NYT, 31 Mar. 1962) - “Senate confirmation appears to present no problem” (NYT, 31 Mar. 1962) - “Senator Ervin contended that Supreme Court appointees should have judicial experience, as Mr. White does not” (NYT, 12 Apr. 1962) - “He was a great star, a real Whizzer” (NYT, 1 May 1962) - “White played for the Lions and attended the Yale Law School in his spare time” (NYT, 1 May 1962) 	3-31-1962 to 5-1-1962	6	3

UNKNOWN JUSTICES					
JUSTICE	BIOGRAPHY	ARTICLES	DATE RANGE	ARTICLE COUNT	PICTURE COUNT
George Shiras, Jr.	- “obscure”	- “descends from one of the pioneer families of the city [Pittsburg]” (NYT, 20 July 1892) - “took but five minutes for the Senate to dispose of his and other nominations” (NYT, 27 July 1892)	7-20-1892 to 7-24-1892	4	0
Owen J. Roberts	- Assistant District Attorney (Philadelphia) - Special US Attorney, Tea Pot Dome	- “relatively inconspicuous practice in Pennsylvania” (NYT, 10 May 1930) - “the only signs of opposition came from dry leaders” - “many telegrams urging his confirmation have been received from eminent lawyers” (NYT, 11 May 1930) - “The flare-up against Mr. Roberts on the part of the dries subsided quickly and has not kindled again” (NYT, 19 May 1930) - “only a brief discussion preceded the favorable report” (NYT, 20 May 1930)	5-10-1930 to 5-21-1930	9	1
Stanley F. Reed	- served in WWI - State Assemblyman - special assistant to Attorney General - counsel for Federal Farm Board - Solicitor General	- “The law of averages would give Mr. Reed almost sixteen years to serve on the Court. That has been the average time justices have served since the Court met in 1790” (NYT, 16 Jan. 1938) - “The name had been secret, and except for a little flurry when Maurice C. Latta, Executive Clerk, left the White House, there was no intimation of what was coming” (NYT, 16 Jan. 1938) - “Unlike the nomination of Justice Black, however, the name of Mr. Reed was type written instead of	1-6-1938 to 1-21-1938	7	0

(Reed, cont'd)		<p>being in the President's handwriting" (16 Jan. 1938)</p> <ul style="list-style-type: none"> - "Mr. Reed had a sense of humor. After a session of an hour and a half with news photographers today he walked away from the blazing flood light whistling—"The Battle Hymn of the Republic"" (NYT, 16 Jan. 1937) - "I don't think he's ever had much fun because he has worked to hard" (NYT, 21 Jan. 1938) 			
James F. Byrnes	<ul style="list-style-type: none"> - counseled Roosevelt against Court Packing Plan - gained political experience, most visible rolls occurring after leaving Court - South Carolina Senator and Congressman 	<ul style="list-style-type: none"> - "Those who believed Senator Byrnes would be the ultimate choice, pointed out that as a Southerner he was geographically suitable to succeed Mr. McReynolds, a Tennessean" (NYT, 23 Jan. 1941) - "In keeping with Senatorial Courtesy, the Senate unanimously confirmed the appointment of Mr. Byrnes as its first order of business today" (NYT, 13 June 1941) - "slightly built, nimble-witted and an indefatigable worker, Mr. Byrnes has long been one of the most popular members of the Senate" (NYT, 13 June 1941) - "The appointment of Senator James F. Byrnes of South Carolina to the Supreme court has 'shocked' members of the National Association for the Advancement of Colored People" (NYT, 14 June 1941) 	1-23-1941 to 5-13-1941	11	2

Robert H. Jackson	<ul style="list-style-type: none"> - Democratic state committeeman - Attorney General - Solicitor General - general counsel, Bureau of Internal Revenue 	<ul style="list-style-type: none"> - “Mr. Jackson is well known in New York state politics, where Franklin D. Roosevelt, as Governor, appointed him as a member of his commission to investigate the administration of Justice” (NYT, 13 June 1941) - “Mr. Jackson was comparatively unknown in Washington when he went there from Jamestown, N.Y” (NYT, 13 June 1941) - “Mr. Tydings, Maryland Democrat, who declared that Mr. Jackson ‘should be tried for impeachment’ rather than elevated to the Supreme Bench, was the only dissenter” (NYT, 8 July 1941) 	3-18-1941 to 7-1-1941	9	2
Harold H. Burton	<ul style="list-style-type: none"> - WWI captain - father was Dean of MIT - confirmed within one day - no testimony at hearing - unanimous confirmation vote - Mayor of Cleveland - chief legal official of Cleveland 	<ul style="list-style-type: none"> - “If any criticism can be made of the nomination, it lies in the fact that Mr. Burton’s active and distinguished career lacks experience as a judge” (NYT, 19 Sept. 1945) - “While the Burton nomination was popular in many places, there were growing indications of a stern opposition by labor forces” (NYT, 19 Sept. 1945) - “confirmed unanimously [...] less than twenty-four hours after President Truman submitted his nomination” (NYT, 20 Sept. 1945) 	9-19-1945 to 9-20-1945	4	2
Fred M. Vinson	<ul style="list-style-type: none"> - Congressman, served on Appropriations and Ways & Means Committees - Secretary of the Treasury - Director of Economic Stabilization - federal judge, D.C. Circuit 	<ul style="list-style-type: none"> - “extraordinary legislative, administrative and judicial experience” (NYT, 9 June 1946) - “The bench on which he sat for six years is the highly important Circuit Court of Appeals for the District of Columbia, ranking just below the Supreme Court itself” (NYT, 11 June 1946) - “Without any question as to his professional 	6-6-1946 to 6-22-1946	6	0

(Vinson, cont'd)	<p>Appeals</p> <ul style="list-style-type: none"> - District Attorney (Kentucky) 	<p>qualifications, it now is apparent that he was selected largely to settle this controversy ‘in chambers’” (NYT, 18 June 1946)</p> <ul style="list-style-type: none"> - “Confirmation hearings in the Senate would result in a great further loss of United States Supreme Court prestige” (NYT, 18 June 1946) - “Nobody doubts that he was appointed to do an administrative job, necessary but incidental to the judicial job. He must pull the Court together and restore its dignity” (NYT, 22 June 1946) - “It [the Court] does not stand as high in popular respect as it did” (NYT, 22 June 1946) 			
Sherman Minton	<ul style="list-style-type: none"> - Indiana Public Counselor - advisor in charge of military agencies - federal judge, 7th Circuit Appeals - Senator 	<ul style="list-style-type: none"> - “Once again the President seems to have allowed personal and political friendship to influence his choice, rather than a considered evaluation of judicial capacity” (NYT, 16 Sept. 1949) - “‘Just another example of government by crony’” (NYT, 16 Sept. 1949) - “Senate approval of Judge Minton appears assured despite scars of old wounds inflicted during his Senate term of 1835-41, and particularly during the bitter fight over the familiarly termed ‘court packing’ program” (NYT, 16 Sept. 1949) - “While the Michigan Senator [Homer Ferguson] said he did not know of current objection to Judge Minton, he considered full hearings should be conducted to ascertain the nominee’s ‘legal ability and background’” (NYT, 21 Sept. 1949) - “Committee members, however, said there was no 	9-16-1949 to 10-5-1949	9	1

(Minton, cont'd)		discussion of the possibility that Judge Minton would be called to testify” (NYT, 21 Sept. 1949)			
Potter Stewart	<ul style="list-style-type: none"> - served in WWII - federal judge, 7th Circuit Court of Appeals - law professor, University of Chicago and Northwestern University 	<ul style="list-style-type: none"> - “The newly designated Associate Justice of the Supreme Court has participated in only one integration case before the appeals court” (NYT, 8 Oct. 1958) - “The new justice received a recess appointment from the President” (NYT, 8 Oct. 1958) - “News of the appointment came in a surprise news conference this afternoon” (NYT, 8 Oct. 1958) - “Justice Potter Stewart of the Supreme Court came under a barrage of crucial questions from Southern Senators today as the long-delayed hearings on his confirmation began” (NYT, 10 Apr. 1959) - “Justice Potter Stewart’s long and somewhat rocky road to senate confirmation has evoked new critical questions about the wisdom of recess appointments” (NYT, 20 Apr. 1959) - “The delay in committee consideration, and then the manner of the hearings, have served to increase the concern previously [had] by some critics of recess judicial appointments” (NYT, 20 Apr. 1959) - “no man should be required to decide cases—especially the inevitably difficult and controversial cases which reach the Supreme Court—while he has to worry about Senatorial reactions to what he may decide” (NYT, 20 Apr. 1959) - “The Southern opposition seemed to be impersonal, judging by what had been said at two open hearings 	10-8-1958 to 5-8-1959	15	4

(Stewart, cont'd)		<p>on the nomination. It was directed at the Supreme Court in general rather than Justice Stewart in particular” (NYT, 21 Apr. 1959)</p> <ul style="list-style-type: none"> - “Two Southern members of the Senate Judiciary Committee filed a report today opposing confirmation of Supreme Court Justice Potter Stewart on the principle ground of his having served as a recess appointment” (NYT, 30 Apr. 1959) - “the confirmation process in his [Stewart’s] case also had some less gratifying aspects” (NYT, 8 May 1959) - “The embarrassments of an interim appointee were multiplied in Justice Stewart’s case by the lackadaisical performance of the Senate Judiciary Committee” (NYT, 8 May 1959) 			
Arthur J. Goldberg	<ul style="list-style-type: none"> - general counsel for United Steelworkers and Congress of Industrial Relations - Secretary of Labor - 2 years military service 	<ul style="list-style-type: none"> - “Reaction on Capitol Hill indicated that confirmation of Mr. Goldberg would be forthcoming” (NYT, 30 Aug. 1962) - “A friend made the point also that, more than most nominees to the Supreme Court, he would be close to the common man’s feelings” (NYT, 30 Aug. 1962) - “Perhaps his most difficult adjustment will be to chain his restless energy to the reflective life of a judge exercising the fateful and timeless responsibilities of the high court” (NYT, 30 Aug. 1962) - “The custom of the Senate Judiciary Committee is to wait at least a week before holding a hearing on any judicial nominee” (NYT, 31 Aug. 1962) - “It is hazardous . . . to try to predict the course a man will follow when he dons the robes of a Supreme 	8-30-1962 to 9-14-1962	10	0

(Goldberg, cont'd)		<p>Court justice” (NYT, 2 Sept. 1962)</p> <ul style="list-style-type: none"> - “The appointment ... will stand as one of the great acts of this administration” (NYT, 2 Sept. 1962) - “Then a passenger [on an airplane] leaned over, grasped Mr. Goldberg’s hand and said admiringly, ‘I want to tell you what a great job you are doing, Senator Javits’” (NYT, 3 Sept. 1962) - “A little-noticed irony of Arthur J. Goldberg’s appoint to the Supreme Court is that, thanks to a President from Massachusetts, the court is about to enter one of its rare periods without a justice from Massachusetts” (NYT, 3 Sept. 1962) - “Mr. Goldberg spent two hours before the committee explaining his beliefs, his experience, and his qualifications” (NYT, 14 Sept. 1962) 			
Abe Fortas	<ul style="list-style-type: none"> - argued two well-known pro-bono cases (Gideon v. Wainwright and Durham v. United States) - worked in Dept. of Interior, advising L.B. Johnson - taught at Yale Law School - worked at SEC with William O. Douglas 	<ul style="list-style-type: none"> - “The search has developed into a Johnsonian ritual with certain predictable ingredients: suspense, secrecy, an unexpected and praiseworthy result, and political dividends” (NYT, 22 July 1965) - “a notable protégé at the Securities and Exchange Commission of his old professor and new colleague, Justice William O. Douglas” (NYT, 29 July 1965) - ““Oh, he demands perfection. He would rework the Lord’s Prayer if it came in a brief”” (NYT, 29 July 1965) - “Confirmation [...] seemed likely today, despite scattered sniping from Republican and right-wing sources” (NYT, 31 July 1965) 	7-22-1965 to 8-12-1965	10	2

(Fortas, cont'd)		<ul style="list-style-type: none"> - “terribly serious man; hardly humorless, but always with a somber, determined eye” (NYT, 8 Aug. 1965) - “Debate centered around a Republican charge involving Mr. Fortas’s role in the Walter Jenkins episode” (NYT, 12 Aug. 1965) 			
Warren E. Burger	<ul style="list-style-type: none"> - attracted national attention while on Court for “jousts” with civil libertarians - Assistant Attorney General, Claims - federal judge, D.C. Circuit Appeals 	<ul style="list-style-type: none"> - “His appointment took most of official Washington by surprise” (NYT, 22 May 1969) - “But when President Nixon strode into the East Room at 7 o’Clock this evening, the man at his side was Judge Burger—tall, white-haired, and virtually unknown to most of the newsmen and many of the cabinet members and Government officials assembled for the announcement” (NYT, 22 May 1969) - “More people than the crossworders were puzzling tonight whether Warren Earl Burger would be the reverse of Earl Warren” (NYT, 22 May 1969) - “Mr. Burger is experienced, industrious, middle-class, middle-aged, middle-of-the-road, Middle-Western, Presbyterian, orderly and handsome” (NYT, 23 May 1969) - “This history of the Supreme Court emphasizes the treachery of trying to decide how new Supreme Court judges will act on the basis of what they have said and done in the past” (NYT, 23 May 1969) - “There is a different standard for a Chief Justice than there is for a justice” (NYT, 23 May 1969) - “After a friendly hearing, at which only Judge Burger testified, the Committee voted its approval in 	5-4-1969 to 6-10-1969	20/6	2

(Burger, cont'd)		<p>a five-minute private session” (NYT, 4 June 1969)</p> <p>- “In contrast to the acrid Supreme Court confirmation hearings of recent years, today’s proceedings were marked by gentle questions and laudatory remarks toward the calm, white-haired nominee” (NYT, 4 June 1969)</p>			
Harry A. Blackmun	<ul style="list-style-type: none"> - “little-known federal judge” - lawyer for Mayo Clinic - judge – 8th Circuit Appeals 	<ul style="list-style-type: none"> - “The striking feature about Mr. Blackmun, according to the lawyers who have studied his decisions, is his similarity to Mr. Burger as a judge” (NYT, 12 Apr. 1970) - “Last Monday, the Supreme Court overturned a criminal decision by Judge Blackmun, and Mr. Burger issued one of his strongest dissents since he became Chief Justice” (NYT, 12 Apr. 1970) - “President Nixon’s nomination of Judge Blackmun to the Supreme Court offers a promising opportunity to end the unseemly political bickering over the Court appointment and to restore public confidence in the independent judiciary and the Presidency” (NYT, 17 Apr. 1970) - “Attempting to predict in advance how an open-minded jurist will react to these questions is all but impossible” (NYT, 19 Apr. 1970) - “So far, the committee [...] has received no requests to testify in opposition.” (NYT, 26 Apr. 1970) - “breezed through an almost perfunctory one-day Senate Judiciary Committee hearing” (NYT, 10 May 1970) 	4-12-1970 to 5-13-1970	12	4

Lewis F. Powell	<ul style="list-style-type: none"> - “influential position in community” - served in WWII, Armed Forces Intelligence Officer - Chairman of Richmond’s Public School Board 	<ul style="list-style-type: none"> - “Mr. Powell once asked the Nixon Administration not to offer his name as a candidate for the Supreme Court” (NYT, 22 Oct. 1971) - “political considerations had not entered into their selection by the President this morning” (NYT, 22 Oct. 1971) - “There has been no indication of opposition to Mr. Powell’s nomination” (NYT, 19 Nov. 1971) - “he [Sen. Fred Harris] opposed Mr. Powell because he is ‘an elitist’ who ‘has never shown any deep feelings for the little people’” (NYT, 7 Dec. 1971) 	10-18-1971 to 1-7-1972	20/10	5
John Paul Stevens	<ul style="list-style-type: none"> - father, Mayor of Cincinnati - served in Navy - federal judge, 6th Circuit Appeals 	<ul style="list-style-type: none"> - “earned him a reputation as a man with a thoughtful intellect and a solid and scholarly, if unspectacular, approach to the law” (NYT, 29 Nov. 1975) - “His cases, as a lawyer and as a judge have not been widely publicized” (NYT, 29 Nov. 1975) - “crafted an enviable career” (NYT, 29 Nov. 1975) - “Judge Stevens’ legal outlook may also prove unexpected” (NYT, 30 Nov. 1975) - “seemingly safe and respectable choice” (NYT, 30 Nov. 1975) - “he [Pres. Ford] needed someone who could be confirmed easily” (NYT, 30 Nov. 1975) - “But it is risky business, applying instant labels to a judge” (NYT, 4 Dec. 1975) - “difficult to put in a category” (NYT, 4 Dec. 1975) - “His rulings show a concern for established procedures rather than for any particular ideology” 	11-29-1975 to 12-18-1975	25/12	2

(Stevens, cont'd)		<p>(NYT, 9 Dec. 1975)</p> <ul style="list-style-type: none"> - first mention of FBI background checks (NYT, 11 Dec. 1975) - “two days of questioning by the Committee” (NYT, 11 Dec. 1975) - “The swearing-in will also conclude one of the briefer nomination-and-confirmation proceedings in the Court’s recent times” (NYT, 18 Dec. 1975) - “One of the main factors in Mr. Ford’s choice [...] was the likelihood that he could be confirmed easily” (NYT, 18 Dec. 1975) 			
Antonin Scalia	<ul style="list-style-type: none"> - federal judge, D.C. Court of Appeals - law professor, University of Virginia and University of Chicago - various legal work for both Nixon and Ford Administrations 	<ul style="list-style-type: none"> - “most closely promises the judicial philosophy of the president” (NYT, 18 June 1986) - “largely unknown to the general public” (NYT, 19 June 1986) - “graceful writers [Scalia and Rehnquist] with the intellectual firepower to plant seeds of legal change even in dissent” (NYT, 22 June 1986) - “blends analytical rigor with visceral intensity” (NYT, 22 June 1986) - “first academic on the Court since Frankfurter” (NYT, 26 June 1986) - “Senator Lugal asserted: ‘There is obviously a battle going on in this country over judicial nominations, and this is a critical juncture’” (NYT, 20 July 1986) - “‘We want to set in motion a process that looks carefully at Supreme Court nominees’” – Nan Aron, Alliance for Justice (NYT, 20 July 1986) 	6-18-1986 to 9-25-1986	34/15	5

(Scalia, cont'd)		<ul style="list-style-type: none"> - “could become embroiled in a dispute between a bipartisan group of senators and the Regan Administration over access to internal documents of the Office of Legal Counsel” (NYT, 5 Aug. 1986) - “Democrats may try to force a vote on issuing a subpoena for the documents” (NYT, 5 Aug. 1986) - “The hearings on Judge Scalia are expected to last about two days” (NYT, 5 Aug. 1986) - “overly cautious in his efforts to avoid expressing a view on any issue that might come before him as a judge” (NYT, 7 Aug. 1986) - “Rights and feminist groups assailed Judge Antonin Scalia as hostile to the concerns of minority groups” (NYT, 7 Aug. 1986) - “By the time Judge Scalia came before the committee, the senators seemed worn out and distracted” (NYT, 10 Aug. 1986) - “The Senate Judiciary Committee, divided, doubtful and tired, rendered its decisions last week” (NYT, 17 Aug. 1986) - “Several senators made a point of saying they were voting for him despite his views” (NYT, 17 Aug. 1986) - Scalia at Macalester College – “I hazard to guess that no nominee to the Supreme Court has been so foolish as to give a substantive public address — not to mention an address on as controversial an area as the First Amendment — while his nomination was pending” (NYT, 12 Sept. 1986) 			
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<p>Anthony M. Kennedy</p>	<ul style="list-style-type: none"> - largely compared to Bork during confirmation process - law professor, McGeorge School of Law of the University of the Pacific - federal judge, 9th Circuit Appeals 	<ul style="list-style-type: none"> - “general expectation that Judge Kennedy would be confirmed, as well as collective relief that another bruising battle could probably be avoided” (NYT, 12 Nov. 1987) - “Judge Kennedy, asked today whether he had ever smoked marijuana, said, ‘No, firmly no.’” (NYT, 12 Nov. 1987) - “But despite Judge Kennedy’s voluminous record little has been gleaned so far about his views on key issues on which the Supreme Court is closely divided” (NYT, 12 Nov. 1987) - “Judge Anthony M. Kennedy’s resignation from an all-male club here came after its members refused to admit women despite a threat of a lawsuit by the city” (NYT, 14 Nov. 1987) - “can expect a friendlier reception than his defeated forerunners” (NYT, 14 Dec. 1987) - “an able, conscientious judge who has said little about many basic issues” (NYT, 14 Dec. 1987) - “Judge Kennedy’s views are difficult to discern from a reading of his judicial record” (NYT, 14 Dec. 1987) - “it is all the more crucial for the Senate to use the hearings to question Judge Kennedy at length and in detail” (NYT, 14 Dec. 1987) - “answered senators’ questions for more than seven hours today” (NYT, 16 Dec. 1987) - “the extraordinary seven-month battle over the vacant seat on the Supreme Court ended without a 	<p>11-10-1987 to 2-7-1988</p>	<p>24/12</p>	<p>2(4)</p>
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(Kennedy, cont'd)		<p>dissenting vote” (NYT, 4 Feb. 1988)</p> <p>- “testified for two days” (NYT, 4 Feb. 1988)</p>			
David H. Souter	<ul style="list-style-type: none"> - Attorney General (New Hampshire) - state judge, New Hampshire Supreme Court - federal judge, 1st Circuit Appeals 	<ul style="list-style-type: none"> - “little evidence about his approach to critical issues” (NYT, 25 July 1990) - “almost blank slate as a record of substance” (NYT, 25 July 1990) - “relative lack of experience” (NYT, 25 July 1990) - “Requiring a nominee to fill out a scoreboard on particular issues would be contemptuous of the Court and of the judicial process” (NYT, 27 July 1990) - just under one article headline, pictured as a cartoon stealth bomber (NYT, 29 July 1990) - “close questioning of Judge Souter could produce a dogfight between supporters and opponents of abortion rights, and that could doom the nomination” (NYT, 29 July 1990) - “he [the President] chose a nominee without a ‘paper trail’ and insisted that he didn’t know how Judge Souter would vote” (NYT, 29 July 1990) - “The Senate’s right, and duty, is to search out the whole person” (NYT, 29 July 1990) - “his rulings revealed little of his views on major legal and constitutional issues” (NYT, 2 Sept. 1990) - “Judge Souter’s two days before the committee were a masterly exercise in self definition from a nominee who began the process as a virtual unknown” (NYT, 15 Sept. 1990) - “His record reveals next to nothing about the values 	<p>7-22-1990 to 9-28-1990</p>	<p>24/12</p>	<p>5(8)</p>

(Souter, cont'd)		<p>he brings to constitutional questions” (NYT, 16 Sept. 1990)</p> <ul style="list-style-type: none"> - “No one can predict, or should be able to, how Judge Souter will vote in specific cases” (NYT, 21 Sept. 1990) - “Judge Souter does not offer a compelling judicial and philosophical record” (NYT, 27 Sept. 1990) - “virtually unknown even to scholars” (NYT, 27 Sept. 1990) - “The Judiciary Committee did not do its job well enough to permit supporting Judge Souter’s nomination with full confidence” (NYT, 27 Sept. 1990) 			
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~ Appendix B – Article Example ~

America's Historical Newspapers

This represents as illustrative example from an electronic database, to which authorized access was enjoyed while a Lycoming student.

America's Historical Newspapers

Page 1 of 1

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To print, select from the options below. First choose what to print: image only, image and citation, or citation only. Next choose a paper size and page layout, making sure your printer settings match. Then click your browser's **Print** function.

Headline: Philadelphia, March 11; **Article Type:** News/Opinion
Paper: Cumberland Gazette, published as Cumberland Gazette.; **Date:** 04-02-1789; **Page:** [2]; **Location:** Portland, Maine
 This entire product and/or portions thereof are copyrighted by NewsBank and/or the American Antiquarian Society, 2004.

PHILADELPHIA, March 11.

It is with singular pleasure we hear that James Wilson, Esq. of this State, is destined by the voice of many thousand federalists, to fill the station of Chief Justice of the United States.

A gentleman of the law, of this city, has declared that, if a soldier who had sold his certificate to a speculator for 2s. 6d. in the pound, should upon seeing it funded, and thereby raised to its full value in his hands, sue him in a court of chancery in England, he would certainly recover the certificate. The bargain would be considered as founded in necessity on the part of the soldier, and injustice on the part of the speculator.—It is to be hoped similar humanity and justice will distinguish the laws and courts of the United States, under the new federal constitution.

New York Times Historical Backfile

This represents as illustrative example from an electronic database, to which authorized access was enjoyed while a Lycoming student.

New York Times (1857-Current file); Jul 25, 1990; ProQuest Historical Newspapers The New York Times (1851 - 2005) pg. A19

THE NEW YORK TIMES, WEDNESDAY, JULY 25, 1990

Souter's Blank Slate Just Won't Do

By Ann F. Lewis

In unveiling his nomination of Judge David Souter to the United States Supreme Court, President Bush announced with pride that he was ignorant of his candidate's attitudes toward such fundamental principles as the constitutional right to privacy.

The President says he knows all he needs to know about Judge Souter: that he had a great record at Harvard University, was appointed to the New Hampshire bench by John Sununu and served on the Federal appeals court.

That may be enough for the President. It raises very serious questions for the rest of us — including, I believe, for the United States Senate. Judge Souter's service on the New Hampshire bench and his very brief

Ann F. Lewis is a Democratic political consultant and contributing editor of *Ms. Magazine*.

stay on the Federal bench produced little evidence about his approach to critical issues. It will be up to the Senate to develop that record through the confirmation process.

We are all glad to know that Judge Souter did so well at school. But remembering candidate Bush's frequent criticisms of Harvard leaves me skeptical that his academic record determined this nomination.

I do wonder about his sponsor, the supposedly anti-choice White House chief of staff. Is it really credible that Governor Sununu has no idea about this nominee's attitude on politically significant issues? We can expect to hear support for Judge Souter from the more moderate Senator Warren Rudman of New Hampshire. But Governor Sununu's flatterers are not so easily camouflaged.

It is difficult, if not impossible, to believe that Governor Sununu, who served as the forceful hands-on chief executive of New Hampshire, chose a candidate for his state bench in blissful ignorance of the decisions that judge was likely to make on issues close to Governor Sununu's heart.

The judge must be pressed on abortion.

What is it that the White House staff knows that leads it to recommend a candidate to the United States Supreme Court that the rest of us have to wait until after he's on the Court to find out?

The Senate, which has the constitutional responsibility to advise and consent to this nomination, will now have to decide what that responsibility entails.

Are senators prepared to accept an almost blank slate as a record of substance, and will they accept Judge Souter's relative lack of experience as evidence of suitability for the nation's highest court? Or will they use

their authority to develop a record on which this nomination can be judged?

Within the framework already provided by the requirements of the confirmation process, senators have the opportunity to fill in the blanks and develop substantive information about David Souter that will enable them to cast their votes knowledgeably. In so doing, they will meet their responsibilities to their constituents and to the Constitution.

Senators can, and I believe should, ask the questions that Judge Souter's brief record avoids. They will thereby establish for this and future nominations that appointments to the U.S. Supreme Court are too important to be decided in a substantive vacuum.

I have heard the judgment arguments of those who claim it would be wrong to ask Judge Souter to tell us whether he concurs with the reasoning of *Roe v. Wade*, or whether he believes there is a constitutional right of privacy, or what he thinks about *Brown v. Board of Education* and other landmark Supreme Court decisions. But these are decisions that have opened up equality and opportunity for so many Americans, and we have the right to know where he stands.

As I hear some commentators weigh in, it seems that they believe it would be wrong to ask a prospective judicial nominee any serious question to which the answers might be interesting — or relevant. But the Constitution doesn't say it would be wrong. Not even the strongest advocate for Presidential authority can cite the Constitution as saying senators cannot ask substantive questions of judicial nominees or that nominees are barred from answering.

After years of political dialogue dominated by 30-second spots and negative advertising, the Senate has the opportunity to engage in political debate of the highest order: a discussion of constitutional principles and legislative responsibilities.

Such a debate would command the attention and the respect of Americans, who know the impact that future decisions by the Supreme Court will have on their daily lives, including their right to decide whether and when to bear a child.

And it would enable the members of the Senate to fulfill their constitutional responsibility to advise and consent. They would cast their votes on this nomination after having determined for themselves the answer to the question that President Bush's announcement has raised: Besides the faint footprints, and John Sununu's recommendation — should David Souter be confirmed to fill the seat on the United States Supreme Court left vacant by Justice William Brennan? □

~ Appendix C – Code Sheets ~

Blank Article Code Sheet

Article Number _____

Name of Nominee _____

Source of Article:

- New York Times
 Other: _____

State: _____

Type of Article:

- Justice sole focus of article
 Imbedded in other news

Purpose of Article:

- Introduction of nominee
 Statement of Fact
 Question qualifications
 Support nominee
 Reject nominee
 Evaluates Court as institution
 Positive
 Negative
 Other: _____

Other Notable Figures:

- Mentions justice replacing
 Mentions nominating president
 Mentions Senate
 Vote
 Committee
 Hearings
 Other judge: _____
 Law professor: _____
 Other: _____

Nominee — Background

- Mentions nominee without contextual information
 Mentions nominee with contextual information
 Number of times _____

Qualitative Reactions:

- Famous
 Stealth
 Undecided / Borderline

Completed Article Code Sheet

Article Number 44Name of Nominee JAMES WILSON

4-2-1989

Source of Article:

- New York Times
 Other: Amherst Gazette
 State: MASS

Type of Article:

- Justice sole focus of article
 Imbedded in other news

Purpose of Article:

- Introduction of nominee
 Statement of fact
 Question qualifications
 Support nominee
 Reject nominee
 Other: _____

Other Notable Figures:

- Mentions justice replacing
 Mentions nominating president
 Mentions Senate
 Vote
 Committee
 Hearings
 Other judge: _____
 Law professor: _____
 Other: _____

Nominee - Background

- Mentions nominee without contextual information
 Mentions nominee with contextual information
 Number of Times 1

Qualitative Reactions:

- Famous
 Stealth
 Undecided / Borderline

"with singular possessive"

Blank Biography Code Sheet

Name of nominee _____

Nominating president _____

Education:

- Undergrad: _____
- Law School: _____
- Significant public service during schooling

Description: _____

Public Offices Held (Non-judicial):

- State Elected Office
- State assembly
- State representative
- State senator
- State governor
- Other: _____
- State non-elected office
- _____
- Federal Elected Office
- Congressman
- Senator
- Other: _____
- Federal Non-elected office
- Executive branch
- Cabinet member
- Other

Armed Services Work:

- Enlisted
- Appointed: _____
- War service: _____

Well-known relatives:

- Nuclear family member:
- Relationship: _____
- Known for: _____
- Extended family
- Relationship: _____
- Known for: _____

- Event prior to S. Ct. that gained media attention

Description: _____

Judicial Experience (non-private sector)

- State Attorney General
- Federal Attorney General
- Federal Solicitor General
- State judgeship
- Court: _____
- Federal judgeship
- Court: _____

Qualitative Reactions:

- Famous
- Stealth
- Borderline / Undecided

Legal Experience:

- Private lawyer
- Assistant District Attorney _____
- District Attorney _____
- Law professor _____
- Other legal work:
- Description: _____
- _____

Completed Biography Code Sheet

Name of nominee Wilson

Nominating president Washington

Education:

- Undergrad: George Washington University
- Law School: Georgetown University
- Significant public service during schooling

Description: _____

Political
 - helped frame const.
 - 1787 convention
 ↳ secondary to Madison
 - contributed to idea of separation of powers

Public Offices Held (Non-judicial):

- State Elected Office
 - State Assembly
 - State representative
 - State senator
 - State governor
 - Other
- State Non-Elected Office
- Federal Elected Office
 - Congressman
 - Senator
 - Other: 2nd Commercial Congress
- Federal Non-Elected Office
 - Executive Branch
 - Cabinet member
 - Other: _____

Armed Services Work

- Enlisted
- Appointed _____
- War Service _____

Well Known Relatives:

- Nuclear family member
 Relationship: _____
 Known for: _____
- Extended family member
 Relationship: _____
 Known for: _____

Event prior to S. Ct. that gained media attention

Description: _____

Judicial Experience (Non-private sector)

- State Attorney General
- Federal Attorney General
- Federal Solicitor General
- State Judgeship
 Court: _____
- Federal Judgeship
 Court: _____

Qualitative Reactions:

- Famous
- Stealth
- Borderline/Undecided

"achieved fame & fortune"
 "quickly identified as lawyer and minister"

Legal Experience:

- Private Lawyer
- Assistant District Attorney _____
- District Attorney _____
- Law Professor College of Philadelphia
- Other legal work

Description: project "Learn to Law"