Looking at the Law

Selecting Supreme Court Justices: A Dialogue

Justice Sandra Day O’Connor’s announcement of her plans to retire from the Supreme Court, followed shortly by the death of Chief Justice William Rehnquist, ended 11 years of stability in the Court’s membership. This fall, a new chief justice, John Roberts, was confirmed following politically charged hearings that focused, among other things, on the Court’s decisions involving federalism and the right to privacy.

Chief Justice Roberts’ hearings were followed by the nomination, and then the withdrawal, of White House counsel Harriet Miers for Justice O’Connor’s seat on the Court. Judge Samuel Alito of the Third Circuit Court of Appeals was then nominated for O’Connor’s seat; his confirmation hearings were held in January. As expected, Alito’s hearings were fraught with political tension, given O’Connor’s role as a “swing vote” on some of the most controversial issues before the Court.

Earlier this year, the ABA Division for Public Education asked a panel of experts to respond to questions about the judicial nomination process. These questions touched on the balance between the president and the Senate, the role of interest groups, and the possibility of reform in the confirmation process. Their answers were posted to an online discussion board where panel members could read each other’s remarks and respond if they chose. Excerpts from those discussions are recorded here. The full discussion appears in the Division for Public Education newsletter Focus on Law Studies, which is available free of charge at www.abanet.org/publiced/focus/spring05.pdf.

Part I: The President versus the Senate
Under the Constitution, presidents nominate justices “by and with the advice and consent of the Senate.” Has the balance of power between the president and the Senate changed on judicial nominees? If so, when? How?

John Maltese: At the Supreme Court level, the balance of power between the president and the Senate has ebbed and flowed. Historically, presidents have been weaker when they are unelected, in their terminal year in office, or face a Senate controlled by the opposition party.

If one looks just at the numbers, there were 20 failed Supreme Court nominations in the nineteenth century and only six in the twentieth century. Why? One could argue that in the nineteenth century the Senate was relatively unaccountable for its actions and thus more powerful. Two factors led to that unaccountability. First, senators were not popularly elected but were chosen by state legislatures. Second, Senate consideration of Supreme Court nominees took place in almost absolute secrecy.

All of this changed in the twentieth century. The 1913 passage of the Seventeenth Amendment to the Constitution provided for the direct election of senators, and Senate rules changes in 1929 opened floor debate on nominations. Likewise, the Senate Judiciary Committee began to open its hearings to the public on a regular basis. These changes made the Senate

Respondents in this dialogue included:

Joyce Baugh, Professor of Political Science, Central Michigan University
Mary Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School
Michael Gerhardt, Hanson Professor of Law, William & Mary School of Law

Timothy Johnson, Assistant Professor of Political Science, University of Minnesota
John Maltese, Associate Professor of Political Science, University of Georgia
Mark Moller, Senior Fellow in Constitutional Studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review

Jason Roberts, Assistant Professor of Political Science, University of Minnesota
Elliot Slotnick, Professor of Political Science and Associate Dean of the Graduate School, Ohio State University
David Yalof, Associate Professor of Political Science, University of Connecticut
more accountable to public opinion and, therefore, increased the power of interest groups in the process.

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

Mark Moller: I find it interesting that the Constitution deems to the Senate nearly unilateral authority to regulate the balance of power between the political branches over the appointment process. It does this by virtue of Article I, Section 5, which gives each house of Congress unqualified power to set rules regulating how its “consent” is given legal effect (the “Rules Power”). And it gives the Senate—and the Senate alone—almost unilateral authority to dictate how many hurdles the president must jump to get judges confirmed.

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

Timothy Johnson and Jason Roberts: It does seem that the process has changed fundamentally in the wake of the Robert Bork nomination. Presidents seem less willing to make risky nominations. This indicates a shift in power towards the Senate, but in most instances senators, too, are not
RESOURCES

The ABA Division for Public Education has a new “Conversations on the Constitution” website. Featured are conversation starters for topics that explore key concepts and clauses of the Constitution, including the advice and consent power of the Senate. Also featured on the site are several interactive activities, including an “Is This Constitutional?” feature that draws upon Supreme Court cases affecting student rights. www.abaconstitution.org

The PBS NewsHour Extra website offers a lesson plan for grade levels 10-12 on “Advice and Consent—The Senate Considers the President’s Supreme Court Nominations.” www.pbs.org/news-hour extra/teachers/lessonplans/social-studies/scotus_confirm_update.html

The U.S. Senate offers an online essay providing an historical overview of the Senate’s role in confirming the president’s nominations for judicial and executive branch offices. The essay links to a table showing the outcomes of Supreme Court nominations officially submitted to the Senate. www.senate.gov/artandhistory/history/common/briefing/Nominations.htm

National Public Radio’s website provides a “Taking Issue” feature on judicial filibusters with articles offering “pro” and “con” perspectives on the Senate’s use of filibusters to block nominations to federal judicial positions. www.npr.org/takingissue/20050324_takingissue_judicial.html

(or the prospect of such battles) to raise money and to cultivate public sentiment. Ultimately, the degree of interest groups’ influence over the selection process has turned on how successfully they have signaled the costs of noncompliance with their objectives and succeeded in exchanging their support for or against particular nominations for presidential or senatorial favors.

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

Poll any random assortment of “conservative” lawyers and academics on Lawrence v. Texas. Reactions will range from enthusiastic (Randi Barnett) to highly critical (Nelson Lund); who is “moderate” and who is the “extreme conservative”? What is the “extreme conservative’s” position on last term’s enemy combatant cases (Hamdi v. Rumsfeld and Rumsfeld v. Padilla)? In these cases, “conservative” Justice Scalia and “liberal” legal scholar Neal Katyal are in more agreement than disagreement: both oppose President Bush’s assertion of broad executive power to detain enemy combatants without a judicial hearing.

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

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

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

Mark Moller: Partisan groups involved in the nomination process aim to “advance their cause”—or, more accurately, the cause of one of the major political parties. I agree with Tim and Jason that they have a lot—I’d say a near monopoly—of influence on the process. I’m just not convinced these actors are translating their intent and influence into a straightforward political pay-off.

I’m not sure the jury is in with respect to empirical research findings on judicial voting patterns. Some studies face methodological problems. For example, Frank Easterbrook criticizes the work of Cass Sunstein et al., because their data set included many unanimous panel decisions. Unanimous decisions may reflect that the case is easy, perhaps because it’s governed by clear controlling precedent. A good study should focus on hard, divided cases with vigorous dissents, since hard cases open the door to partisan judging. Easterbrook’s critique also suggests why the surprising positions of “conservatives” in controversial cases—be it support for judicial review in Hamdi or for equal protection in Lawrence—deserve our attention. If Easterbrook is right, these cases aren’t,
Advice and Consent

In Federalist Paper No. 76, Alexander Hamilton defended the Constitution's grant to the president of power to nominate individuals for Supreme Court (and other) positions “by and with the advice and consent of the Senate.”

Ask your students to read Federalist Paper No. 76 (available from the Avalon Project at Yale Law School at www.yale.edu/law-web/avalon/federal/fecl76.htm). Then divide them into small groups of five or six students and ask each group to discuss and answer the following questions.

After their discussions, reconvene the class and ask the groups to report on their answers to these questions. Discuss any disagreements between the groups. Ask the class if, based on their small group discussions, they would recommend retaining the current system for selecting Supreme Court justices. Why or why not?

1. Why does Hamilton think that a single individual, the president, would be better able to make good nominations than a “collective body” such as the Senate?

2. If the president is better able to make good nominations than the Senate, why does Hamilton think the Senate should have a role in the process?

3. Hamilton cautions against the influence of party interests in the nomination process. If a party seeks victory, Hamilton says that “the qualifications best adapted to uniting the suffrages [or votes] of the party, will be more considered than those which fit the person for the station.” What do you think Hamilton means by this statement? What dangers does Hamilton see in attempts by parties to compromise on a nomination?

4. By most accounts, the framers of the Constitution thought that the president would remain above the party politics of the Congress. Today, presidents are closely identified with either the Republican or the Democratic party. What effect do you think the affiliation between president and political party has on the arguments Hamilton makes in Federalist Paper No. 76?

5. Hamilton dismisses the notion that the people should be directly involved in selecting Supreme Court justices (and other nominated public officers) as “impracticable” because of the time that would be required to make such choices. Do you think that the people’s interests in the selection of Supreme Court justices are adequately represented by the Constitution’s system of presidential nomination and Senate advice and consent? Why or why not?

6. Can you think of any other reasons why appointment of Supreme Court justices would be preferable to popular elections? Why do you think the framers tried to insulate justices from the influence of political parties by giving the nomination power to the president?

Swing Vote

Judge Samuel Alito of the Third Circuit was nominated to replace retiring Supreme Court Justice Sandra Day O’Connor. Confirmation hearings for Judge Alito were particularly intense because Justice O’Connor had been a “swing vote” in many cases that closely divided the Court. This means that, in these cases, Justice O’Connor has provided the vote needed for a five-member majority opinion on the nine-member Court.

Ask students to research Supreme Court cases over the past ten years (beginning with the 1995 term) in which Justice O’Connor contributed a swing vote (i.e., was one of a five-member majority). Possible cases, all available at www.oyez.org, include Morse v. Republican Party of Virginia, 517 U.S. 186 (1996; Voting Rights Act); Stenberg v. Carhart, 530 U.S. 914 (2000; Abortion rights); Grutter v. Bollinger, 539 U.S. 306 (2003; Affirmative action); McConnell v. Federal Election Commission, 540 U.S. 93 (2003; Campaign finance reform); and McGarvey County v. ACLU of Kentucky, Docket No. 03-1693 (2005; Establishment of religion). What are the names of the cases? What was the issue involved? What was the majority’s decision? Record this information (case name, issue, and majority’s decision) for the class.

Ask the class to review the list of issues and majority decisions. Which of these issues do they think are the most politically controversial today? Which of the issues were discussed in Judge Alito’s confirmation hearings? Did any senators cite any of these issues in their decisions to vote for or against Judge Alito’s confirmation?

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as Tim and Jason suggest, outliers to be ignored. Instead, they open a window on the complexity of the law—and the stubborn, encouraging independence of many who devote their careers to it.

Timothy Johnson and Jason Roberts: We do not disagree with Mark that many, maybe even most, judges are principled decision makers. Indeed, they were trained in the law to think in a particular way about making decisions and to base decisions as much as possible on legal authority. But the literature that Mark cites pales in comparison to the empirical literature political scientists have brought to bear on the questions of how legal and extra-legal factors affect judges’ decisions.

Here is what we know. The overwhelming empirical evidence spanning many decades suggests that Supreme Court justices are very consistent in how they vote. Thus, with exceptions like Justices White and Blackmun, most other justices vote overwhelmingly in a liberal or conservative manner. Another line within this literature demonstrates quite clearly that justices take into account factors other than the law when they make decisions. The social scientific models show that ideology, the preferences of other actors (Congress, the president, the public), and institutional rules and norms all affect how judges decide. We do not disagree that the law matters, but ideology plays a key role in the process. This is exactly why we have a nomination and confirmation process that is highly partisan and ideological.

Part III: Are Reforms in the Confirmation Process Needed?

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

Michael Gerhardt: The system is not broken, but it is not working well. Even if we discount for some posturing, relations among senators from opposing parties are not good. I am sure neither Democrats nor Republicans would agree with my belief that the parties are probably equally to blame. Republicans point to the Senate’s rejection of Robert Bork and unseemly contest over Justice Thomas’s nomination as watershed events, while Democrats point to the filibuster against Abe Fortas’s nomination as chief justice (and particularly President Nixon’s involvement in getting Fortas off the Court) and the Republicans’ efforts to thwart a number of President Carter’s judicial nominees.

Under these circumstances, it is hard to know what could be done to inject more civility and cooperation into the process. It seems that the leaders of both political parties seek to control the ideological composition of the courts, and this explains much of the current impasse in the Senate.

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

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

The current system may have “warts,” but it is still the best system we have for attempting to achieve judicial independence as well as executive and legislative accountability. I don’t think that the process is over politicized, but even if it were, the proposals for reform are unlikely to alleviate the perceived problems.

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

I think it is somewhat easier to make generalizations about lower court federal selection. Here, the answer may still run both ways. The process is a good one because the numbers, even in a divisive setting like the one we have witnessed in the past few years, document that an overwhelming proportion of vacancies get filled and they are usually occupied by individuals whose appointments are credible and whose judicial service will be praiseworthy.

The system gets off track where there is a blunting of advice and consent processes in invisible ways with “anonymous” holds placed on nominees that keep them from having Judiciary Committee hearings or, after a hearing,
when the Committee simply doesn’t act on a nomination. One might argue that the process went awry for some nominees during the Clinton years, who went four years without receiving Judiciary Committee hearings.

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

The most troubling procedural aspect of the process today is “tracking the filibuster” in the Senate, which has made it much easier for the minority party to bring the confirmation process to a halt without having to shutdown the entire Senate. As such, the filibusters of Bush nominees have run in the background, while Senate business goes on as usual. This tracking procedure means that the filibusters do not force compromise. Tracking helps keep meaningful debate over nominees largely out of the public eye. The public discourse is about obstruction, not the rationale for being for or against particular nominees.

If, as Chief Justice Rehnquist asked many times, all nominees were given an up or down vote, then the process would be more open, senators would be held more accountable, and the debate would be about judicial qualifications rather than about which senators are obstructing which judicial nominees.

**Mark Moller:** I’m a fan of an active judiciary, one that protects individual autonomy and political pluralism from central, majoritarian incursion. An active judiciary depends on traits that don’t necessarily come naturally to lawyers-boldness, imagination, rhetorical flair, and a propensity for risk-taking. Yet, according to John Lott, judges who rate highly under these measures have become rarer since the Carter administration. This suggests that the nomination system seems to favor inert, quiescent judges, who are the least likely to step outside the path set by the political branches.

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

**Mary Dudziak:** It’s helpful to compare our judicial selection system with the systems in other countries. In civil law countries, the judiciary is commonly a long-term career. Individuals are appointed as lower court judges shortly after they complete their legal education. They then move up the ranks, so that appointment to a high court is a form of promotion. This doesn’t lend itself to the sort of vision that Mark eloquently describes as a feature of an ideal justice.

Compared to other models, the U.S. system looks pretty good. It enables the president to select independent thinkers rather than simply promote technocrats. While the degree of politicization may sometimes be unseemly, it does not fundamentally undermine judicial independence. Instead, judicial independence is a value that other nations often see in the American system. I believe it is protected not only by insulating justices from electoral politics, but also by maintaining a role for the minority party through the filibuster. That check on majoritarian politics limits the president’s ability to pack the Court with justices who will support his agenda, thereby protecting the Court’s independence vis-à-vis the president.

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**Notes**


3. See, for example, Lee Epstein and Jack Knight, *The Choices Justices Make* (Congressional Quarterly Press, 1998).


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