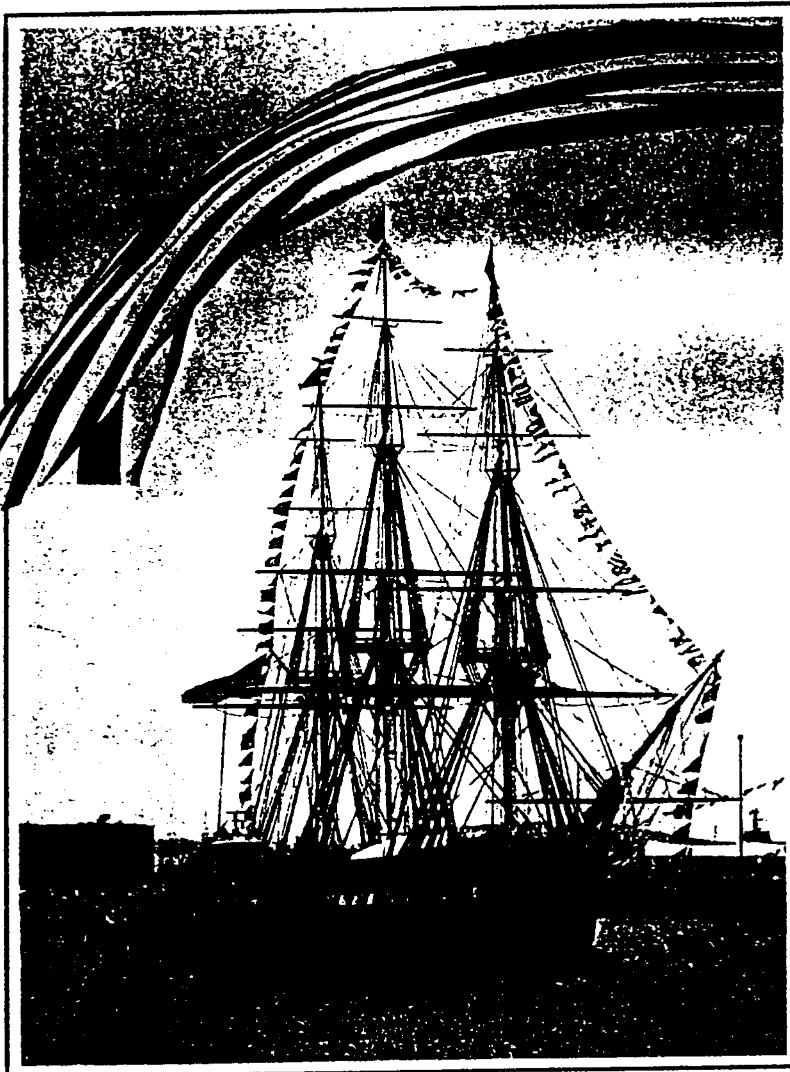
LC Paper No. CB(2)2176/99-00(02)

AMERICAN GOVERNMENT

1997 EDITION



Continuity and Change

KAREN O'CONNOR
LARRY J. SABATO

precedent: Prior judicial decision that serves as a rule for settling subsequent cases of a similar nature.

stare decisis: In court rulings, a reliance on past decisions or precedents to formulate decisions in new cases.

Although decisions of any court of appeals are binding on only the district courts within the geographic confines of the circuit, decisions of the U.S. Supreme Court are binding throughout the nation and establish national **precedents.** This reliance on past decisions or precedents to formulate decisions in new cases is called ***stare decisis*** (a Latin phrase meaning "let the decision stand"). The principle of *stare decisis* allows for continuity and predictability in our judicial system. Although *stare decisis* can be helpful in predicting decisions, at times judges carve out new ground and ignore, decline to follow, or even overrule precedents in order to reach a different conclusion in a case involving similar circumstances. In one sense, that is why there is so much litigation in America today. Parties know that one cannot always predict the outcome of a case; if such prediction were possible, there would be little reason to go to court.

The Supreme Court

The U.S. Supreme Court is often at the center of the storm of highly controversial issues that have yet to be resolved successfully in the political process. As the court of last resort at the top of the judicial pyramid, it reviews cases from the U.S. courts of appeals and state supreme courts and acts as the final interpreter of the U.S. Constitution. It not only decides many major cases with tremendous policy significance each year, but it also ensures uniformity in the interpretation of national laws and the Constitution, resolves conflicts among the states, and maintains the supremacy of national law in the federal system.

Since 1869 the U.S. Supreme Court has consisted of eight associate justices and one chief justice, who is nominated by the president specifically for that position. There is no special significance about the number nine, and the Constitution is silent about the size of the Court. Between 1789 and 1869, Congress periodically altered the size of the Court. The lowest number of justices on the Court was six; the most, ten. Since 1869, the number has remained at nine. Through 1996, only 108 justices had served on the Court, and there had been fifteen chief justices (see Table 10.2).

The chief justice presides over public sessions of the Court, conducts the Court's conferences, and assigns the writing of opinions (if he is in the majority; otherwise, the most senior justice in the majority makes the assignment). By custom, he administers the oath of office to the president and the vice president on Inauguration Day (any federal judge can administer the oath, as has happened when presidents have died in office).

Unlike the president or even members of Congress, the Supreme Court operates with very few support staff. Along with the clerks, there are only 300 staff members at the Supreme Court.

HOW FEDERAL COURT JUDGES ARE SELECTED

Although specific, detailed provisions in Articles I and II specify the qualifications for president, senator, and member of the House of Representatives, the Constitution is curiously silent on the qualifications for federal judges. This may have been because of an assumption that all federal judges would be lawyers, but to make such a requirement explicit might have marked the judicial branch as too elite for the tastes of common men and women. Also, it would have been impractical to require formal legal training, given that there were so few law schools in the nation, and the fact that most lawyers became licensed after clerking or apprenticing with another attorney.[13]

The selection of federal judges is often a very political process with important political ramifications because judges are nominated by the president and must be confirmed by the U.S. Senate. During the Reagan–Bush years, for example, 553 basically conservative Republican judges were appointed to the lower federal bench (see Figure 10.5). The cumulative impact of this conservative block of judges led many liberal groups to abandon their efforts to expand rights through the federal courts (see Highlight 5.1: The American Civil Liberties Union). The politicization of the bench also has made the selection and confirmation process a hotbed of interest group activity as groups lobby for or against particular nominees based on their politics and apparent ideological bent.

Typically, federal district court judges have held other political offices, such as those of state court judge or prosecutor, as illustrated in Table 10.3. Most have been involved in politics, which is what usually brings them into consideration for a position on the federal bench. Griffin Bell, a former federal circuit court judge, once remarked, "For me, becoming a federal judge wasn't very difficult. I managed John F. Kennedy's presidential campaign in Georgia."[14]

Presidents generally defer selection of district court judges to senators of their own party who represent the state in which a vacancy occurs on the federal bench, a practice called **senatorial courtesy.** By tradition, the Senate Judiciary Committee will not confirm a presidential nominee who has not been agreed to by the senator(s) of the nominee's home state. This tradition is an important source of political patronage for senators.

enatorial courtesy: A practice y which senators can have near eto power over appointments to e federal judiciary if the opening s in a district in their state

Senatorial courtesy does not operate to the same degree in the selection of the more prestigious courts of appeals judgeships, largely because the jurisdiction of each circuit includes at least three states. When vacancies on the courts of appeals occur, presidents frequently consult senators of the various states in the circuit. Ultimately, however, the Justice Department plays the key role in the selection process.

Since the 1970s, most presidents have pledged (with varying degrees of success) to do their best to appoint more African Americans, women, and other groups traditionally underrepresented on the federal bench (see Table 10.3). Each president, moreover, has created a special group to help him identify and nominate candidates for the bench. Jimmy Carter, for example, created judicial nominating commissions,[15] but these commissions were abandoned by President Reagan, whose Justice Department (and in-

creasingly, the White House counsel) played a key role in selecting court of appeals judges. George Bush's administration followed in this tradition as it searched for ideological conservatives who could further his administrations' political agendas through rulings from the bench.

While getting off to a slow start in filling the 100 vacancies left by President Bush on the federal courts (from January to June 1993, no vacancies were filled), President Clinton assigned the initial task of judicial selection to the Office of Policy Development in the Justice Department. Until the head of that office, Eleanor D. Acheson, was confirmed by the Senate, judicial selection was centered in the Office of the White House Counsel, called Judicial Appointments Central by some staffers. Today judicial appointments are a shared process between the Justice Department and the White House. At the Justice Department as many as fifteen people work full time on judicial selection, gathering and analyzing candidate records including judicial decisions. Interviews with prospective candidates are also conducted at the Justice Department. Although, "on occasion, discussion with candidates touch(es) upon issues such as abortion and the death penalty . . . care (is) taken not to discuss with candidates how they w(ill) rule in specific cases."[16] By June 1996, using this process, the Clinton administration was able to fill 24 percent of the total 846 federal judgeships.[17] All but three of his nominees were supported by then Senate Majority Leader Bob Dole. Studies by political scientists reveal that Clinton appointees have been more moderate than earlier Republican or Democratic appointees.[18]

Appointments to the U.S. Supreme Court

The Constitution is silent on the qualifications for appointment to the Supreme Court (as well as to other constitutional courts), although Justice Oliver Wendell Holmes once remarked that a justice should be a "combination of Justinian, Jesus Christ and John Marshall."[19]

Like other federal court judges, the justices of the Supreme Court are nominated by the president and must be confirmed by the Senate. Few appointments, however, have been subject to the kind of lobbying that occurred when Ruth Bader Ginsburg was nominated to the U.S. Supreme Court in 1993 (see Politics Now: Lobbying for a Top Spot).

Historically, because of the special place the Supreme Court enjoys in our constitutional system, its nominees have encountered more opposition than district or court of appeals judges. As the role of the Court has increased over time, so too has the amount of attention given to nominees. And with this increased attention has come greater opposition, especially to nominees with controversial views.

Nomination Criteria

Justice Sandra Day O'Connor once remarked that "You have to be lucky" to be appointed to the Court.[20] Although luck is certainly important, over the years nominations to the bench have been made for a variety of reasons. Depending on the timing of a vacancy, a president may or may not have a list of possible candidates or even a specific individual in mind. Until recently, presidents often have looked within their circle of friends or their administration to fill a vacancy. Nevertheless, whether the nominee is a friend or someone known to the president only by reputation, at least six criteria are especially important: competence, ideology or policy preferences, rewards, pursuit of political support, religion, and race and gender.

Competence. Most prospective nominees are expected to have had at least some judicial or governmental experience. John Jay, the first chief justice, was one of the authors of *The Federalist Papers* and was active in New York politics. Most have had some prior judicial experience. In 1996 eight sitting Supreme Court justices had prior judicial experience (see Table 10.4).

Ideological or Policy Preferences. Most presidents seek to appoint to the Court individuals who share their policy preferences, and almost all have political goals in mind when they appoint a justice. Presidents Franklin D. Roosevelt, Richard M. Nixon, and Ronald Reagan were very successful in molding the Court to their own political beliefs. Roosevelt was quickly able to appoint eight justices from 1937 to his death in 1945, solidifying support for his liberal New Deal programs. In contrast, Nixon and Reagan publicly proclaimed that they would nominate only conservatives who favored a **strict constructionist** approach to constitutional decision making—that is, an approach emphasizing the initial intentions of the Framers.

strict constructionist: An approach to constitutional interpretation that emphasizes the Framers' initial intentions.

Rewards. Historically, although not so often more recently, many of those appointed to the Supreme Court have been personal friends of presidents. Abraham Lin-

coln, for example, appointed one of his key political advisers to the Court. More recently, Lyndon B. Johnson appointed his longtime friend Abe Fortas to the bench. In addition, most presidents select justices of their own party affiliation. Chief Justice Rehnquist was long active in Arizona Republican Party politics, as was Justice O'Connor before her appointment to the bench; both were appointed by Republican presidents. Party activism can also be used by presidents as an indication of a nominee's commitment to certain ideological principles.

Pursuit of Political Support. During Ronald Reagan's successful campaign for the presidency in 1980, some of his advisers feared that the "gender gap" would hurt him. Polls repeatedly showed that he was far less popular with female voters than with men. To gain support from women, Reagan announced during his campaign that should he win, he would appoint a woman to fill the first vacancy on the Court. When Justice Potter Stewart, a moderate, announced his early retirement from the bench, President Reagan nominated Sandra Day O'Connor of the Arizona State Court of Appeals to fill the vacancy. It probably did not hurt President Clinton that his first appointment (Ruth Bader Ginsburg) was a woman and Jewish (at a time when no Jews served on the Court).

Religion. Ironically, religion, which historically has been an important issue, was hardly mentioned during the most recent Supreme Court vacancies. Some, however, hailed Clinton's appointment of Ginsburg, noting that the traditionally "Jewish" seat on the Court had been vacant for over two decades.

Through 1996, of the 108 justices who have served on the Court, almost all have been members of traditional Protestant faiths.[21] Only nine have been Catholic and only seven have been Jewish.[22] Twice during the Rehnquist Court, more Catholics—Brennan, Scalia, and Kennedy, and then Scalia, Kennedy, and Thomas—served on the Court at one time than at any other period in history. Today, however, it is clear that religion cannot be taken as a sign of a justice's conservative or liberal ideology: When William Brennan was on the Court, he and fellow Catholic Antonin Scalia were at ideological extremes.

Race and Gender. Only two African Americans and two women have served on the Court. Race was undoubtedly a critical issue in the appointment of Clarence Thomas to replace Thurgood Marshall, the first African-American justice. But President Bush refused to acknowledge his wish to retain a "black seat" on the Court. Instead, he announced that he was "picking the best man for the job on the merits," a claim that was met with considerable skepticism by many observers.

In contrast, O'Connor was pointedly picked because of her gender. Ginsburg's appointment was more matter-of-fact, and her selection surprised many because the Clinton administration appeared to be considering seriously several men for the appointment first (see Politics Now: Lobbying for a Top Spot).

The Supreme Court Confirmation Process

The Constitution gives the Senate the authority to approve all nominees to the federal bench. Before 1900 about one-fourth of all presidential nominees to the Supreme Court were rejected by the Senate. In 1844, for example, President John Tyler sent six nominations to the Senate, and all but one were defeated. In 1866 Andrew Johnson nominated his brilliant attorney general, Henry Stanberry, but the Senate's hostility to Johnson led it to *abolish* the seat to prevent Johnson's filling it. Ordinarily, nominations are referred to the Senate Committee on the Judiciary. As detailed later, this commit-

Politics Now

Lobbying for a Top Spot

Lobbying on Ginsburg's behalf paid off when she became the second woman on the nation's highest court, joining Sandra Day O'Connor. (Photo courtesy: Ken Heinen)

The Supreme Court is not now, nor has it ever been, above politics. Politics permeates the selection process of federal court judges, including those on the Supreme Court. And, on occasion, some individuals or their friends have actively lobbied for the spot on the bench.

In their classic insider's view on the Supreme Court, *The Brethren,* Bob Woodward and Scott Armstrong wrote critically of court of appeals Judge Warren Burger's somewhat clumsy efforts to lobby Richard M. Nixon for the position of chief justice.* Burger's lobbying for the position was portrayed as unseemly.

Once Justice Byron White announced that he would retire from the high court in March 1993, the Clinton administration went to work on possible nominees. A long list of more than fifty names was first put together. Later that list was culled down to fewer than twenty serious nominees. As the time since White's announcement dragged on, however, the names of Secretary of Interior Bruce Babbit and court of appeals judge Stephen Breyer seemed to emerge as front runners.

On a trip to New York with Senator Daniel Patrick Moynihan (D–N.Y.), the President asked Moynihan who was his top nominee. "There's only one name: Ruth Bader Ginsburg,"** responded the senator. Yet Ginsburg's name never seemed to reach the top.

To draw more attention to his wife's qualifications, sixteen years after Burger lobbied for a seat on the Court, Martin Ginsburg, husband of court of appeals judge Ruth Bader Ginsburg, unabashedly orchestrated a letter-writing campaign on behalf of his wife's nomination to the Supreme Court. Martin Ginsburg, a prominent tax attorney and Georgetown University law professor, contacted his wife's former students, the presidents of Stanford and Columbia universities, academics, legal scholars, and even Texas Governor Ann W. Richards, urging them to call or write the White House on behalf of his wife's nomination. Said Ginsburg of his campaign on his wife's behalf after her nomination, "If there was something I could have done to be helpful, I would have done it, because I think my wife is super, and the president couldn't have made a better appointment than the one he just made."***

Unconventional? Yes. Effective? Maybe. Appropriate? You decide.

*Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979).

**Richard L. Berke, "The Supreme Court: An Overview," *The New York Times* (June 15, 1993): A1.

***Eleanor Randolph, "Ginsburg's Spouse Says He Arranged Letter Campaign," *The Washington Post* (June 17, 1993): A17.

tee investigates the nominees, holds hearings, and votes on its recommendation for Senate action. The full Senate then deliberates on the nominee before voting. A simple majority vote is required for confirmation.

Investigation. As a president begins to narrow his list of possible nominees to the Supreme Court, those names are sent to the Federal Bureau of Investigation before a

nomination is formally made. At the same time, the president also forwards names of prospective nominees to the American Bar Association (ABA), the politically powerful organization that represents the interests of the legal profession. After its own investigation, the ABA rates each nominee, based on his or her qualifications, as Highly Qualified (now called "Well-Qualified"), Qualified, or Not Qualified. (The same system is used for lower federal court nominees; over the years, however, the exact labels have varied.)

David Souter, Bush's first nominee to the Court, received a unanimous rating of Highly Qualified from the ABA, as did both of Clinton's nominees, Ruth Bader Ginsburg and Stephen Breyer. In contrast, another Bush nominee, Clarence Thomas, was given only a Qualified rating (well before the charges of sexual harassment became public), with two members voting Not Qualified. Of the twenty-two previous successful nominees rated by the ABA, he was the first to receive less than at least a unanimous Qualified rating.

The key role of the ABA, a voice for the traditional, established bar with 370,000 members, is not without its critics. Some argue that a professional organization should not carry so much clout in the process. Republican presidential candidate Bob Dole went so far as to pledge, if elected, he would remove the ABA from the selection process, viewing it as "another blatantly partisan liberal advocacy group."[23] The ABA counters that it is "completely nonpartisan" and that its fifteen-person selection committee members are chosen for their "credibility and contacts in their communities, so lawyers and judges will speak frankly to them" about a prospective nominee's fitness for the federal bench.[24] Other supporters of the current system argue that it is an independent check on the quality of judicial appointees who, once confirmed, serve for life.[25]

Anita Hill testifies before the then all-male Senate Judiciary Committee as it considered the appointment of Clarence Thomas to the Supreme Court. (Photo courtesy: Rick Wilking/Reuters-The Bettmann Archive)

After a formal nomination is made and sent to the Senate, the Senate Judiciary Committee also begins its own investigation. (The same process is used for nominees to the lower federal courts, although such investigations generally are not nearly as extensive as for Supreme Court nominees.) To begin its task, the Senate Judiciary Committee asks each nominee to complete a lengthy questionnaire detailing previous work (dating as far back as high school summer jobs), judicial opinions written, judicial philosophy, speeches, and even all interviews ever given to members of the press. Committee staffers also contact potential witnesses who might offer testimony concerning the nominee's fitness for office.

Lobbying by Interest Groups. While the ABA is the only organization that is asked formally to rate nominees, other groups are also keenly interested in the nomination process. Until recently, interest groups played a minor and backstage role in most appointments to the Supreme Court. Although interest groups generally have not lobbied *on behalf* of any one individual, in 1981 women's rights groups successfully urged President Reagan to honor his campaign commitment to appoint a woman to the high court.

It is more common for interest groups to lobby *against* a prospective nominee. Even this, however, is a relatively recent phenomenon. In 1987 the nomination of Robert H. Bork to the Supreme Court produced an unprecedented amount of interest group lobbying on both sides of the nomination. The Democratic-controlled Judiciary Committee delayed the hearings, thus allowing liberal interest groups time to mobilize the most extensive radio, television, and print media campaign ever launched against a nominee to the U.S. Supreme Court. This opposition was in spite of the fact that Bork sat with distinction on the D.C. Court of Appeals, and was a former U.S. solicitor general, a top-ranked law school graduate, and a Yale Law School professor. (His actions as solicitor general, especially his firing of the Watergate special prosecutor, made him a special target for traditional liberals.)

he scrutiny by the public and press f President Reagan's Supreme Court ominee Robert H. Bork set a new :andard of inquiry into the values—oth political and personal—of future ominees. Bork's nomination was re-cted by the Senate in 1987. (Photo ourtesy: Frank Fournier/Contact ress Images)

The Senate Committee Hearings and Senate Vote. As the uneventful 1994 hearings of Stephen Breyer attest (he was confirmed by a Senate vote of ninety-seven to three), not all nominees inspire the kind of intense reaction that kept Bork from the Court and, more recently, almost blocked the confirmation of Clarence Thomas. Until 1929 all but one Senate Judiciary Committee hearing on a Supreme Court nominee was conducted in executive session—that is, closed to the public. The 1916 hearings on Louis Brandeis, the first Jewish justice, were conducted in public and lasted nineteen days, although Brandeis himself was never called to testify. In 1939 Felix Frankfurter became the first nominee to testify in any detail before the committee. Subsequent revelations about Brandeis's secret financial payments to Frankfurter to allow him to handle cases of social interest to Brandeis (while Brandeis was on the Court and couldn't handle them himself) raise questions about the fitness of both Frankfurter and Brandeis for the bench. Still, no information about Frankfurter's legal arrangements with Brandeis was unearthed during the committee's investigations or Frankfurter's testimony.[26]

Until recently, modern nomination hearings were no more thorough in terms of the attention given to nominees' backgrounds. In 1969, for example, Chief Justice Warren E. Burger was confirmed by the Senate on a vote of ninety-four to three, just nineteen days after he was nominated!

Since the 1980s it has become standard for senators to ask the nominees probing questions; but most nominees (with the notable exception of Robert H. Bork) have declined to answer most of them on the grounds that these issues might ultimately come before the Court. After hearings are concluded, the Senate Judiciary Committee usually makes a recommendation to the full Senate. Any rejections of presidential nominees to the Supreme Court generally occur only after the Senate Judiciary Committee has recommended against a nominee's appointment. Few recent confirmations have been close; prior to Clarence Thomas's fifty-two to forty-eight vote in 1991, Rehnquist's nomination in 1971 as associate justice (sixty-eight to twenty-six) and in 1986 as chief justice (sixty-nine to thirty-three) were the closest in recent history.