The Supreme Court Appointment Process: Lessons from Filling the Rehnquist and O'Connor Vacancies

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The 11 years from 1994 to 2005 comprised the second-longest period without an appointment to the U.S. Supreme Court (Epstein et al. 2003, 353).[1] The nominations of John Roberts in 2005 and Samuel Alito in 2006 were met with enthusiasm by conservatives, foreboding by liberals, and great interest by political scientists concerned with the Court's future and with changes in the appointment process since Stephen Breyer's appointment in 1994.

This article offers a series of observations on continuities and changes in the appointment process, based on published accounts and several interviews with participants in Supreme Court appointments from the 1980s to 2006.[2] The list of continuities is shorter than it could have been simply because the appointment process underwent no revolutionary changes between 1994 and 2005. I therefore focus on four salient and important continuities and six comparable changes in the process.

Continuities in the Process

1. The President Predominates

Presidents nominate strategically to shift the Court's ideological balance in their own direction (Abraham 1999; Moraski and Shipan 1999; Johnson and Roberts 2005). For several reasons, they normally achieve at least partial success: they can choose among an array of candidates from across the political spectrum while others can only react to their choice; the Senate is seldom entirely opposed to them ideologically (Moraski and Shipan 1999); and even when politically constrained, presidents have an impressive array of resources to bring to the confirmation struggle (Maltese 1995; Johnson and Roberts 2004).

To be sure, the Senate may force the president to nominate a candidate who is more qualified (such as Blackmun after Carswell) or more moderate (Kennedy after Bork). But even when forced to compromise, a president can impact the Court ideologically: compromise with the Senate involves take as well as give by the president. A president who accurately gauges the ideology of potential nominees and persistently nominates ideologically will succeed at least partially. The only presidents unlikely to move the Court their way are those who elevate other goals above ideological ones (such as naming a member of a particular demographic group to the Court), lame ducks who cannot make successive nominations (Lyndon Johnson in 1968), or highly ideological presidents forced to replace highly ideological justices of their own persuasion (such as a very conservative president nominating Antonin Scalia's successor).

President Bush succeeded ideologically by replacing Chief Justice Rehnquist with another conservative (Roberts) and replacing the moderate conservative Sandra Day O'Connor with the more reliably conservative Alito (Savage 2007).

2. Elections Matter

The preceding point implies that presidential election outcomes impact the Court's ideology. So do Senate elections. Shortly before the Senate's 58–42 confirmation of Samuel Alito, Senator Charles Schumer (D-NY) explained the dismal political math facing his party. For Democrats to succeed, he said, "You either need a Democratic president, a Democratic Senate, or moderate Republicans who will break ranks when it's a conservative nominee. We don't have any of those three. The only tool we have is the filibuster, which is a very difficult tool to use ... with only 45 Democrats" (Nagourney 2006).

Although one liberal activist I interviewed called Schumer's discourse "an excuse," the other participants I spoke with agreed with him. So do scholars: the literature clearly identifies a presidential majority in the Senate as an aid to confirmation and divided government as a threat (Cameron, Cover, and Segal 1990; Watson and Stookey 1995). Because senators are increasingly willing to oppose nominees on ideological grounds (see below), Senate elections matter more than ever.

3. Quality Counts

Using newspaper descriptions of nominees, Jeffrey Segal and Albert Cover assigned Roberts a "Qualifications Score" of .97 out of a possible 1.0, placing him among the 12 best qualified of the 43 Supreme Court nominees since 1937.[3] Alito scored a .81, placing him twenty-fifth of the 43 nominees but still in the company of such nominees as William O. Douglas and Thurgood Marshall. Certainly, Alito's solid academic background, his varied experiences at all levels of the Justice Department, his 15 years on a federal appeals court, and the unanimous "Well Qualified" rating he received from the American Bar Association precluded questions about his qualifications.

Harriet Miers, by contrast, received a Qualifications Score of only .36 and placed thirty-seventh out of the 43 post-1937 nominees. Five of the six unsuccessful nominees since 1937 scored in the lowest third among the post-1937 nominees.[4] Miers's ranking of thirty-seventh placed her squarely in this danger zone. Liberal and conservative activists I interviewed described Miers as undistinguished. Her missteps while filling out the Senate Judiciary Committee's standard questionnaire and making courtesy calls on senators raised further legitimate doubts about her qualifications (*San Diego Union-Tribune* 2005).

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4. Nominee Testimony Provides Little That Is Truly New, but Is Still Valuable

Commentators have long complained that nominees' testimony provides little useful information on their interpretive philosophy or views on current issues (Comiskey 2004). Indeed, we typically learn little that is truly new at the hearings (Comiskey 1993). Yet the hearings often provide varying testimony and useful insights into nominees' interpretive views (Comiskey 2004). And evidence adduced at the hearings may be valuable for confirming what we think we already know about nominees.

The testimony of Roberts and Alito was typical in these respects. Democrats and outside commentators complained that neither nominee had testified candidly (Liptak and Toner 2005). Neither nominee had clearly embraced an all-encompassing or controversial interpretive theory prior to his High Court nomination, and neither one did so at his Senate hearings.

The nominees' testimony did, however, contain noteworthy clues. They seemed to confirm what was already known—or feared—by doing little to assuage liberal concerns that they would defer excessively to the president's interpretation of executive powers. On other matters, Roberts and Alito differed significantly if not radically. Alito, for instance, agreed that the one-man-one-vote decisions of the 1960s and other holdings were "settled law." But he refused, unlike Judge Roberts, to apply that language to *Roe v. Wade*. In general, Alito also signaled a greater attachment to originalism than did Roberts (Liptak 2006).

What's New?

Some of the following "changes" in the appointment process are really continuations of existing trends and therefore not entirely "new." But they are sufficiently different, by degrees at least, to merit discussion under the heading of "new" or "different" features of the process.

1. Interest Groups on Both Sides, but Especially on the Right, Have Grown in Number, Sophistication, Resources, and Ability to Mobilize the Grassroots

New forces on the liberal side include liberal bloggers, the Internet-based group Moveon.org, and the umbrella group IndependentCourt.org, as well as an enhanced role for environmental groups. But the conservative side in particular has seen substantial growth in the number, sophistication, and financial resources of groups, and their ability to mobilize their grassroots. Activists on both left and right agreed on this point. When asked what had changed most between the appointment of Stephen Breyer in 1994 and those of Roberts and Alito, one conservative replied:

> The new aspect of the current debates is the infrastructure of grassroots groups and information clearing-houses [on the right] ... I don't think there ever was an equivalent infrastructure of groups on the right equivalent to what we regard as the very well-organized, well-funded, and well-directed coalition headed really by People for the American Way [on the left] ...

One sign of the increased sophistication and organization of conservative groups was the localization of the campaign to confirm Alito. These local efforts were coordinated by the Judicial Confirmation Network (founded in 2005) and by Progress for America, a public relations and advocacy firm led by former George W. Bush campaign executives (founded in 2001) that had operatives in 20 states. Their tactics were not entirely new. They were present, for instance, in the fight over Robert Bork in 1987 (Maltese 1995). But they are now more sophisticated and widespread than ever (Justice and Pilhofer 2005; Kirkpatrick 2005).

Also noteworthy is the greater amount of money that interest groups wield. After President Bush's reelection, liberal and conservative groups began major fundraising campaigns. Progress for America pledged $18 million to support Bush nominees to the High Court, although it is unclear whether the group raised that much.

Predictions of an "ad storm" over Roberts's and Alito's nominations proved overblown for several reasons: the nominees' strong professional credentials, their non-threatening personas, a lack of public attention to the Supreme Court appointment process over the summer (Roberts) and the holiday season (Alito), and the perception that their confirmations faced no real jeopardy. But the groups still spent record sums on advertising. Liberal and conservative groups spent roughly $4.3 million on television commercials in the pre-nomination period and during the struggles over Roberts, Miers, and Alito. A majority of that amount, a record $2.4 million, was spent on the Alito battle, with liberals outspending conservatives by $1.4 million to $1 million (Brennan Center 2006).

Conservative activists told me that they did not spend all the money they had, choosing to conserve their resources for some future battle where, unlike with Roberts and Alito, the outcome may be in serious doubt. Liberal activists claimed to have raised and spent all they could. There is little doubt, however, that in the event of a true battle royale—such as a replay of the 1987 Bork imbroglio—both sides could have raised additional funds with little effort, as their web sites provide instant fundraising capability. After all, groups on both sides spent a total of $3.3 million on advertising during the 2005 Senate fight over the "nuclear option," and a hefty $7.4 million on state supreme court elections in 2004.

2. The Internet Has Enhanced the Open and Participatory Nature of the Confirmation Process

Several political scientists have described the highly open, participatory, vibrant nature of the contemporary confirmation process (e.g., Silverstein 1994; Maltese 1995). The development of the Internet has furthered these trends by making the discovery and dissemination of information cheaper, easier, and faster. A liberal activist described the Internet's impact this way:

> Certainly in disseminating information, it's a huge change—information to the Hill, to grassroots, to law profs with whom we're in pretty constant communication. It's amazing as an organizing tool to put a message on an e-mail and you can send it to thousands of people. It makes advocacy on nominations cheaper ... And for us I guess the biggest change is [that] gathering information is a little bit easier.

A conservative activist agreed that, "The Internet has been indispensable. We'd have to be a much larger group to function as effectively without it. It dramatically enhances our productivity." Or as Ralph Neas, president of People for the American Way, has put it more briefly, the advent of the Internet (and 24-hour news channels) means that "everything's at warp speed" compared to 1987, when his organization helped defeat the nomination of Robert Bork (Crowley 2005).

At the same time, however, the Internet has yet to have a decisive impact on a nominee's fate. Partisan and ideological factors easily explain Senate voting on both Roberts and Alito (as does the fact that Roberts was slated to replace

Rehnquist, which led to expectations that his appointment would merely replace one conservative with another, while Alito was nominated to replace Sandra Day O'Connor, the Court's most famous swing vote).

3. Senators Are More Willing to Judge Nominees Ideologically

After the Roberts and Alito confirmations, a liberal activist complained to me that senators are unwilling to vote against a nominee who may be ideologically objectionable but also professionally qualified and sufficiently ethical. This complaint would have been accurate as recently as the 1990s. In 1989, Jeffrey Segal, Albert Cover, and Charles Cameron reported that senators who might wish to cast an ideological "no" vote would seldom do so unless the nominee lacked objectively strong qualifications or the nomination faced real jeopardy (Segal, Cover, and Cameron 1989). In 1993, only three Republican senators voted "no" on the nomination of Ruth Bader Ginsburg to replace the moderate-to-conservative Byron White, a move that promised a significant if not sharp leftward shift in the Court's balance. In 1994, Republicans voted 33–9 to bless the replacement of Harry Blackmun by Stephen Breyer.

In 2005 and 2006, Senate Democrats felt less constrained. Half of them (22 of 44) voted on ideological grounds against confirmation of the concededly well-qualified John Roberts, even though he was slated to replace William Rehnquist, whose ideology he was widely thought to share. On the Alito nomination, 41 of 44 Democrats cast ideologically inspired votes against confirmation, and over half of them supported a filibuster.

4. Filibusters Are More Likely, Although Most Will Fail

Several factors indicate that senators are increasingly willing to filibuster ideologically uncongenial nominees: the heightened readiness to oppose ideologically distant nominees, the increased party polarization in the Senate, the recent judicial filibusters and other obstructions of lower court nominees (Goldman 2003), and the attempt by 25 Senate Democrats to filibuster the Alito nomination. Empirical studies confirm that presidents consider the possibility of a filibuster in making nominations (Johnson and Roberts 2004, 2005). In 2005 and 2006, some commentary speculated that the May 2005 "Gang of 14 Agreement" permitting judicial filibusters only under "extraordinary circumstances" had made filibusters against Supreme Court nominations less likely (e.g., Babington and Schmidt 2005). The filibuster against Alito occurred nonetheless, becoming just the second filibuster against a High Court nominee. (The first one derailed the 1968 nomination of Associate Justice Abe Fortas to be chief justice.)

Successful filibusters will nonetheless remain infrequent because of Supreme Court nominations' high visibility and the difficulty of persuading the public that a seemingly well-qualified nominee for such an important post should be denied a vote. A successful filibuster is especially difficult if opponents of the nomination fail to paint a well-credentialed nominee as objectionably extreme and if the public supports confirmation, as happened with Roberts and Alito (Pew Research Center 2005; CNN.com 2006). As a former congressional liaison staffer for a Republican administration explained to me:

> Unless the candidate can be painted to be something closely akin to Darth Vader, that's about the only thing that would justify ... a filibuster for a Supreme Court nominee ... You've almost got to have just some really starkly devastating "We can paint you like the devil incarnate" kind of an environment before you can get away with doing that.

These difficulties are illustrated by the fact that only 25 of Alito's 42 senatorial opponents supported the filibuster of this clearly conservative nominee for Sandra Day O'Connor's famous "swing seat."

5. Political Campaigns for and against Nominees May Undermine the Supreme Court's Legitimacy

Public confidence in the Supreme Court remained relatively high despite the Court's controversial ruling in *Bush v. Gore* and the periodically sharp conflict over Supreme Court nominations in the last third of the twentieth century (Comiskey 2004; Gibson 2006). But one study of the Alito confirmation found that ads for and against the nominee weakened public confidence in the Court as a neutral, nonpolitical, legal decision maker by portraying the nominee—and by extension the Court—as a politically driven policy maker (Gibson and Caldeira 2007). If these reported declines are real and durable, and they recur during future confirmation struggles, the Court's public prestige, and citizens' willingness to abide by Court rulings they dislike, face a serious threat.

6. The "Stealth Nominee" Strategy Is Less Viable

Some uncertainty about a nominee can aid confirmation, as Roberts and Alito demonstrated by avoiding any promise to uphold or reverse *Roe v. Wade*. But Harriet Miers's disastrous nomination demonstrated that a nominee who is a near-cipher may face rough going because neither side trusts her. Concededly, Miers was hurt by doubts about her qualifications. Her nomination also came at a bad time for a stealth nominee: conservatives had waited impatiently for years to replace one of the Court's liberals or swing votes with one of their own. Thus they were "completely crestfallen," as one conservative told me, by Miers, a nominee with no track record on constitutional issues, to replace O'Connor. And Democrats were wary of Miers because her only certain political quality was her obvious loyalty to George W. Bush.

Still, it is difficult to imagine that an almost complete unknown such as David Souter could win confirmation today by a 90–9 vote, as he did in 1990. A Republican president nominated Souter to replace Justice William Brennan, the Court's leading liberal intellectual and master coalition builder. The potential for Republicans to change the Court was enormous. Democrats and Republicans both voted their hopes and supported Souter. His subsequent liberalism left Republicans feeling "burned"; "No More Souters" became their rallying cry. Democrats are similarly wary of "stealth nominees."

The stealth nominee strategy is not utterly dead, however. A Democratic president, for example, might nominate a relatively little known Hispanic to replace John Paul Stevens in 2009. Republicans might see the nominee as the best they will likely get from that president and, at worst, a "wash" ideologically—one liberal for another. And neither party would relish opposing a Hispanic nominee. So the stealth strategy might work under some circumstances. But as the Miers debacle and the saga of Souter demonstrate, that strategy is not as viable as it once was.

Conclusion

There are both changes and continuities in the way America appoints judges to its highest court. The principal continuity is that the executive branch retains the advantage because presidents act strategically in choosing one person from an array of qualified candidates while the Senate, the public, and the interest

groups can only react to the president's choice. A president attentive to the prospective nominees' ideologies can normally move the Court's ideology at least marginally in the president's direction.

While the president will always lead the appointment dance, several developments have made the Senate, the public, and interest groups more influential partners in the process. There are now more groups spending more money to "go public," sway public opinion, and pressure senators to respond ideologically to nominations. The heightened ideological polarization and willingness of senators to vote ideologically have several important consequences. First, the appointment process is more conflictual. Second, filibusters will be more frequent, although usually unsuccessful. Third, the stealth strategy is less viable than previously. Fourth, the partisan balance in the Senate, and the elections that produce it, will have a greater impact on the Court's overall ideology. Last and perhaps most importantly, ad wars over nominees may threaten the Court's legitimacy.

These developments bring benefits as well as risks. Senators and the public's enhanced influence lessen the still preponderant influence of one person—the president—and make this important process more collaborative and democratic. Given the current deep divide over fundamental constitutional questions such as abortion, the rights of gays, and federalism, and the Court's prominent voice on these issues, it is inevitable and healthy for the nation to have a frank and inclusive debate about who serves on the Supreme Court.

Yet the possibility that ad wars over nominees damage the Court's legitimacy is cause for serious concern. The public may conclude that the justices are hypocritical political policy makers in black robes, and public loyalty to both the Supreme Court as an institution and its more controversial rulings may erode. But even if these outcomes prevail, they do not justify despair. One might argue that this altered public perception of the Court is simply more realistic and, if not without cost, ultimately healthy. Or a resilient Supreme Court may rise to the occasion and prove that the rule of law is no myth.

Notes

1. The longest period without a vacancy was 12 years and one month—from November 1811 to December 1823 (Epstein et al. 2003, 353).

2. I interviewed nine people for this article: three liberal and two conservative activists, one former Democratic and one current Republican staffer, and two former congressional liaison staffers for past presidents (one Republican and one Democratic). All interviews took place in the summer and fall of 2006. I conducted them with the promise that I would not reveal identifying information about those interviewed.

3. These "Segal-Cover" scores are available at http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf.

4. Robert Bork was the lone exception. With a Qualifications Score of .790, he ranked twenty-eighth out of 43—just above the lowest third.

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