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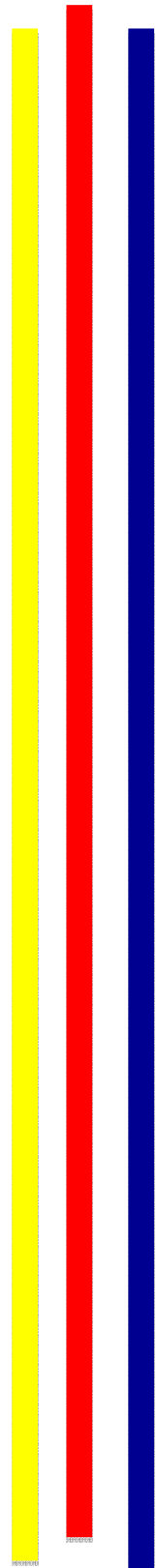
Choosing the Deciders: The Supreme Court Nomination and Confirmation Process in the United States

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I. Introduction

Any understanding of the nomination and confirmation process for justices of the Supreme Court of the United States (SCUS) must begin with the acknowledgement that it is suffused with political considerations from start to finish. Because the justices of the court have life tenure, and because it is the court of last resort for all federal legal questions in the United States, the SCUS is the most influential court in the country, and presidents view their appointments to it as an important part of their political legacy.¹ Accordingly, filling a vacancy on the court often precipitates great partisan conflict and always receives intense media scrutiny. However, this paper argues that the intense scrutiny and partisan conflict that surrounds each nomination to the court are evidence of the participatory nature of the nomination and confirmation process, such that the process has begun to resemble a national election.

II. The Nomination Process

Article II, Sec. 2 of the United States Constitution grants the president the power to appoint the justices of the SCUS with the advice and consent of the United States Senate. The Constitution is silent about all of the other details of the process. Most importantly, it establishes no criteria for service on the court, which leaves presidents a great deal of freedom to use their nominations to drive their partisan, personal and policy agendas.

The process of choosing a nominee begins with the president's advisers gathering a list of potential nominees.² Most recent presidents have asked to have a list of potential nominees prepared prior to a vacancy occurring, so that a nominee can be chosen and sent to the Senate in relatively short order when a vacancy happens.³ Different presidents have relied on different advisers to varying degrees, but most presidents have relied heavily on senior officials in the Department of Justice, especially the Attorney General, and the White House Counsel.⁴ These advisers, in turn, consult a variety of sources for suggestions, including state and federal politicians, bar associations, and interest groups.⁵ Some presidents are more deeply involved in the selection process than others, in that they play a larger role in formulating the candidate list at the initial stage, and in seeking opinions about who should be on the list.⁶

After the initial list is evaluated and screened, the remaining candidates are sent detailed questionnaires about their personal lives which they return to the Department of Justice. The department sometimes contacts the American Bar Association's (ABA) Standing Committee on the Judiciary, asking it to evaluate the candidates on this initial list.⁷ The Federal Bureau of Investigation (FBI) is then

¹ Epstein, L. and J. A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. Oxford, UK: Oxford University Press.

² Id...

³ Baum, L. 2007. *The Supreme Court*. 9th edn. Washington: Congressional Quarterly Press.

⁴ Yalof, D. A. 1999. *Pursuit of Justices*. Chicago, IL: University of Chicago Press.

⁵ Epstein & Segal.

⁶ Yalof.

⁷ Rutkus, D.S. 2005. "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate." *CRS Report for Congress*. Presidents sometimes referred potential candidates to the ABA for its advice from the 1950's until 2001. In that year, Republican President George W. Bush ended the ABA's role at this stage in the selection process, noting the unfairness of allowing one organization to play such a influential role in the selection process when others wanted to participate, but some observes speculated that this decision stemmed from the animosity that some in Bush's party felt towards the ABA since it gave an unfavorable evaluation to Judge Robert Bork when he was nominated to the Court in 1987 by fellow Republican Ronald Reagan. Goldstein, A. 2001. "Bush Curtails ABA Role in Selecting U.S. Judges." *Washington Post*. 23 March, p.A1. However, in 2009 President Barack Obama restored the ABA's role in prescreening candidates for Supreme Court nominations.

assigned to run security checks on all of the candidates. Once the FBI reports are done, the president decides which candidate to nominate, and transmits the nomination to the Senate.⁸

It is important to note that each vacancy on the court requires a separate nomination and confirmation. Therefore, when the position of Chief Justice of the United States becomes vacant, a person must be nominated and confirmed to that post, even if that person is already a sitting justice of the Supreme Court.⁹ The selection process to find a nominee for the position of Chief Justice proceeds in much the same way as the process does to find nominees for a position as an Associate Justice on the court, except that when the position to be filled is that of Chief Justice, presidents sometime look for qualities in nominees that are of greater importance due to that office's responsibilities for the court's administration and its control over the justices' opinion writing duties.¹⁰ For example, some presidents have put special emphasis on leadership abilities, inter-personal skills, and administrative prowess when filling Chief Justice vacancies.¹¹ Given that the Chief Justice speaks first at the conference where the justices discuss cases and vote for their favored outcomes, and that the Chief always assigns opinion writing duties if he/she is in the majority coalition in a given case, leadership and inter-personal skills are especially important qualities for a Chief Justice.¹² Presidents also have to consider whether to choose a nominee from outside of the court, or to nominate a sitting associate justice, which, if successful, results in the need to fill the resulting vacancy for the associate justice seat. Of the 17 Chief Justices of the United States, three have been associate justices at the time of their nominations.¹³

III. Confirmation: The Senate's Role

The path of the nomination in the Senate begins in that chamber's Committee on the Judiciary (hereinafter, Judiciary Committee), and as soon as the nominee is announced, its staff begins the committee's own exhaustive investigation of the nominee. Before the committee begins its hearings on the nomination, the nominee is asked to fill out another detailed questionnaire for the committee staff to study.¹⁴ The questionnaire typically asks the nominee to disclose information about finances, group affiliations, judicial decisions, past public statements, and other matters.¹⁵ Some information from the questionnaire is made public, while other information that might be of a sensitive nature is kept confidential.¹⁶ The ABA also does a detailed evaluation of the nominee to determine the individual's qualifications to serve on the court, culminating in a rating of "highly qualified," "qualified," or "not qualified," which it reports to the Judiciary Committee.¹⁷ Also during this period the nominee meets with key senators (often party leaders and members of the Judiciary Committee), to give them an opportunity

Liptak, A. 2009. "As the Bar Gets Its Voice Back on Judges, Advice Rings Familiar." *New York Times*. 31 March. p.A14.

⁸ Rutkus.

⁹ Rutkus, D.S. and L. H. Tong. 2005. "The Chief Justice of the United States: Responsibilities of the Office and Process of Appointment." CRS Report for Congress.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ U. S. Senate Committee on the Judiciary, *Judicial Nominations and Confirmations*, <http://judiciary.senate.gov/nominations/judicial.cfm> (accessed 7 January 2010).

¹⁵ See e.g., Doyle, M. 2009. *Sotomayor's Finances Look A Lot Like The Average Person's*. McClatchy Newspapers. 4 June. LoBianco, T. 2009. *White House Gives Sotomayor Papers to Panel*. *Washington Times*. 5 June, p.A11.

¹⁶ Rutkus.

¹⁷ *Id.*

to acquaint themselves with the nominee prior to the hearings.¹⁸ Next, the Judiciary Committee holds hearings in which members question the nominee and other witnesses,¹⁹ to determine whether the nominee is suitable for confirmation. After the hearings, the committee members might ask for additional materials in writing from the nominee to answer any questions remaining after the hearing. Most of the hearings are public, but the committee usually holds a confidential hearing with the nominee in order to address any sensitive issues that might have been revealed by the investigations conducted by the FBI or the committee's staff.²⁰

When the committee is ready, it votes on the nomination, usually within a week after the hearings have ended. The committee has several choices: it can vote to issue a report about the nomination to the full Senate that is favorable, unfavorable or with no recommendation, although members who disagree with the report are entitled to have their views included in the report as well. Senate rules allow the committee to refuse to transmit the nomination to the full Senate if a majority of the members opposes the nomination, which would kill the nomination. However, by tradition, the committee always transmits a nomination to the full Senate, even if a majority of its members opposes it.²¹ Furthermore, failure to receive a favorable report is often a sign that the nomination will receive considerable opposition when the full Senate considers it.²²

Once the nomination has been submitted to the full Senate, typically, it is scheduled for debate and a final vote.²³ A simple majority is required for confirmation, but actually proceeding to a final vote on a nomination is not always a simple proposition. This is because Senate rules allow unlimited debate on most bills,²⁴ as long as any senator wishes to continue to speak about that bill.²⁵ The debate can only end and the final vote taken on a nomination if three-fifths of the Senators who are present vote to invoke "cloture."²⁶ Perhaps the most notable casualty of the filibuster was Justice Abe Fortas, whose nomination to be Chief Justice of the United States was withdrawn after his supporters failed to muster enough votes to invoke cloture in 1968.²⁷ There have only been two other cloture votes since Fortas' vote, the first involving William Rehnquist's initial confirmation to the court in 1971, and the second involving his elevation to the office of Chief Justice in 1986. Rehnquist was confirmed the first time despite the failure to muster the required super majority, and was confirmed the second time after the cloture vote succeeded.²⁸ The rarity of cloture motions is indicative of the fact that senators tend to be reluctant to use filibusters as way to kill these nominations.²⁹ Under Senate rules, immediately after the Senate has voted

¹⁸ See e.g., Herszenhorn, D.M. and C. Hulse. 2009. Parties Plot Strategy as Sotomayor Visits Capitol. *New York Times*. 3 June, p. A20.

¹⁹ Judicial Confirmation and the Constitution,

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/senateconfirm.html> (accessed 7 January 2010).

²⁰ Rutkus.

²¹ Epstein and Segal.

²² *Id.*

²³ The full Senate has the power to send a nomination back to the Judiciary Committee. There have been eight attempts to do this, but only two have been successful. *Id.*

²⁴ Senate rules limit debate on some budget bills. Keith, R. 2008. "The Budget Reconciliation Process: 'The Senate's Byrd Rule.'" *CRS Report for Congress*.

²⁵ Beth, R.S. and B. Palmer. 2003. "Filibusters and Cloture in the Senate." *CRS Report for Congress*.

²⁶ *Id.*

²⁷ Silverstein, M. 2007. *Judicious Choices: The Politics of Supreme Court Confirmations*, 2nd edn. New York: W.W. Norton & Co. The percentage of votes required to invoke cloture was three-fourths prior to 1975, when the Senate voted to lower the required percentage to its current level. Beth, R.S. and B. Palmer. 2005. "Filibusters and Nominations." *CRS Report for Congress*.

²⁸ Rutkus.

²⁹ *Id.*

to confirm a nomination, any senator who has voted for confirmation has the option to call for a second vote on the nomination, although this has never happened.³⁰

It is important to note that although the Constitution requires the Senate to confirm SCUS nominations, the Senate does not have to act on a nomination if it does not choose to, and some nominations have been withdrawn when the Senate has refused to take a final vote on them, although most of these withdrawals occurred in the context of significant Senate opposition to the nominee.³¹

At this point, it is appropriate to mention senatorial courtesy. This custom gives senators from a nominee's home state the power to kill the nomination if either senator opposes it. Although the tradition has worked differently in different eras,³² the custom has usually functioned so as give each nominee's home state senator the ability to kill a nomination either in committee or on the Senate floor if they are of the same party as the president. Although, the opposition of home state senators has played a role in the defeat of at least seven Supreme Court nominations,³³ senatorial courtesy has not figured in the defeat of any recent nomination.³⁴ The relative passivity of home state senators with respect to invoking senatorial courtesy regarding Supreme Court nominations stands in marked contrast to the more central role that they play in nominations to the lower federal courts from their home states.³⁵

IV. Recess Appointments

Article 2, Sec. 2 of the United States Constitution also gives the president the right to fill "...vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." This is an alternative path that allows a president to fill a seat on the court without Senate approval, when the Senate is in recess. However, these appointments expire at the end of the next Senate session unless the Senate confirms the justice before the end of that session.³⁶ Presidents have made 12 recess appointments to the court, the last being in 1958, when President Dwight Eisenhower named Potter Stewart to the Court.³⁷ Although it has never happened, the Constitution allows the president to reappoint the same recess-appointed justice to the court when that justice's term expires, but federal legislation would prevent the justice from receiving a salary.³⁸

V. Presidential Goals

Scholars have found that presidents often seek to pursue a number of goals when deciding whom to appoint to the Supreme Court. Presidential goals can be broadly broken down into three categories: partisan, policy, and personal.³⁹ Because of the power and high profile of the court, presidents often consider their parties' reactions to the nominee and the nomination's potential electoral consequences. For example, President Richard Nixon went out of his way to appoint a southerner (Louis F. Powell) to

³⁰ Id.

³¹ See Rutkus, D.S. and M. Bearden. 2009. "Supreme Court Nominations 1789-2009: Actions by the Senate, the Judiciary Committee and the President." *CRS Report for Congress*.

³² Epstein and Segal; Palmer, B. 2005. "Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History." *CRS Report for Congress*.

³³ Hogue, H.B. 2008. "Supreme Court Nominations Not Confirmed." *CRS Report for Congress*.

³⁴ Epstein and Segal.

³⁵ Epstein and Segal; Goldman S. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, CT: Yale University Press.

³⁶ See Hogue, H.B. 2008. "Recess Appointments: Frequently Asked Questions." *CRS Report for Congress*.

³⁷ Halsted, T.J. 2005. "Recess Appointments: A Legal Overview." *CRS Report for Congress*.

³⁸ Hogue.

³⁹ Epstein and Segal.

the court as a part of plan to bolster his party's popularity in that region of the country.⁴⁰ Also, Ronald Reagan named Sandra Day O'Connor to the court to fulfill a promise that he made during his election campaign to appoint a woman to it, presumably to win favor with female voters.⁴¹ Scholars have found evidence that the policy preferences of justices, as shown by their votes, tend to match the policy preferences of the presidents who appointed them, at least initially.⁴² Some presidents have been quite open about the ideological characteristics that they will look for when choosing nominees, and have used this as a way to appeal to various groups in the electorate.⁴³ On the other hand, given that the court has the power to overturn legislation and issues authoritative interpretations of federal law, it is logical for presidents to appoint people to the court who will not frustrate their policy objectives.⁴⁴ Finally, personal factors such as friendship or a recommendation from a trusted aide or friend can play a large role in deciding whom a president nominates.⁴⁵ Presidents also place great importance on a nominee's professional qualifications for a seat on the high court, and there is evidence indicating that, on average, the more qualified a nominee is perceived to be by the public, the more votes that nominee will receive for confirmation.⁴⁶

VI. The Character of Senate Debate

When the Senate debates a SCUS nomination, typically many senators make statements for the record detailing their reasons for voting as they intend to vote on the nomination.⁴⁷ Many senators focus their remarks on a nominee's qualifications, background and character, although the major focus of Senate debate is usually the nominee's judicial philosophy, political ideology, or about how the nominee is likely to vote on some controversial issue of the day.⁴⁸ Evidence indicates that along with a nominee's professional qualifications, there is an inverse relationship between the ideological distance between a nominee and a senator, and the probability that the senator will support the nominee's confirmation.⁴⁹ As a result, it is less likely that a senator who is not from a president's party will vote for that president's nominees, all other things equal.

VII. The Democratic Character of the Supreme Court Selection Process

Although the federal judiciary in the United States is not directly chosen by the people at the ballot box, more than one observer has noted that the Supreme Court nomination and confirmation process is one in which public participation plays a vital role.⁵⁰ Richard Davis has likened the process to a national election in which nominees are scrutinized by the national media, much like presidential candidates, polls are taken about the public's attitude towards the nominees' confirmation, and nominees campaign to win favor among both the public and political elites. Certainly senators take public opinion into account when deciding whether to approve the nomination.⁵¹ This is in marked contrast to the situation as it was in the 1940's and earlier when presidents consulted with relatively few individuals and groups before making a nomination, and the Senate Judiciary Committee rarely held public hearings on nominations.⁵² For

⁴⁰ Parry-Giles, T. 2006. *The Character of Justice: Rhetoric, Law and Politics in the Supreme Court Confirmation Process*. East Lansing, MI: Michigan State University Press.

⁴¹ Davis, R. 2005. *Electing Justice*. Oxford, UK: Oxford University Press

⁴² Epstein and Segal.

⁴³ Id.

⁴⁴ Epstein and Segal.

⁴⁵ Yalof.

⁴⁶ Epstein and Segal.

⁴⁷ Rutkus.

⁴⁸ Id.

⁴⁹ Epstein and Segal.

⁵⁰ Silverstein.

⁵¹ Davis.

⁵² Silverstein

example, before 1930, the Judiciary Committee only held public hearings on two Supreme Court nominations, and before 1916 the Committee had held hearings on only one previous occasion,⁵³ which shows the extent to which the nomination and confirmation process was a closed-door affair.⁵⁴ Since the late 1940's, however, the nomination and confirmation process has been opened to greater public participation. For example, presidents have consulted with more individuals and groups before choosing a nominee; the Senate Judiciary Committee has consistently held well-publicized hearings about each nomination; and special interest groups have become heavily involved in trying to sway elite and public opinion in favor of and against nominees.⁵⁵

Naturally, there are observers who criticize the current process, particularly the Senate's handling of confirmations. For example, some critics claim that senators' tendency to focus on the political ideology of the nominees and the votes that they are likely to take on specific issues (e.g. abortion) that could come before the court is a threat to the independence of the judicial branch and its ability to act as a counter-majoritarian defender of the rule of law.⁵⁶ Other critics decry the Judiciary Committee hearings as a waste of time, since nominees typically refuse to provide answers that might in any way excite controversy that could imperil their confirmation prospects.⁵⁷ Whatever these faults, there is no strong movement to revise the selection and confirmation process, and no apparent likelihood that it will cease to be a highly contentious affair.

⁵³ Rutkus and Bearden.

⁵⁴ In fact, nominees did not even testify at the hearings until 1939, which Felix Frankfurter became the first to do so. Shapiro, N. 2009. "Hearings a Mere Formality." *Monterey County Herald*. 29 July, p.A8.

⁵⁵ Davis; Silverstein.

⁵⁶ Carter, S. L. 1993. "The Confirmation Mess." 1993 *U. of Illinois Law Review* 1-19.

⁵⁷ Kiehl, S. and A. Tucker. 2006. "Practicing the Art of Saying Little." *Baltimore Sun*. 13 January, p.1A.