SUPREMELY CRITICAL: UNDERSTANDING THE SENATE CONFIRMATION VOTES

FOR SUPREME COURT JUSTICES JOHN ROBERTS AND SAMUEL ALITO

by

AMANDA BROOKE WALKER MOORE

(Under the Direction of John Maltese)

ABSTRACT

Much has been said about what influences senatorial confirmation votes in Supreme Court appointments. Despite the preponderance of scholarly works, determining the most influential factors in the process can be difficult. This is especially the case with the recent confirmations of Chief Justice John Roberts and Justice Samuel Alito to the Court. Despite the fact that both nominees were nominated by the same president, were nominated mere months apart, and are ideologically similar, their confirmation votes differed considerably. This work begins by outlining the history and evolution of the Supreme Court confirmation process; this description will include an outline of debates about the Appointments Clause at the Constitutional Convention, as well as a discussion of how and why the roles of major actors involved in the process have changed. Previous literature on the appointments process, as well as literature addressing the factors influencing Senate confirmation votes, will also be presented. Subsequent chapters will provide narratives of the Roberts and Alito appointments. This discussion will outline the nominees' judicial backgrounds, the behavior of major actors in the process, the issues and controversies that were prominent in each appointment, and details of the confirmation hearings. Finally, several factors – critical nomination, party, ideology, same party status for the president in the Senate, year of the president's term, qualifications, and presidential popularity ratings – will be examined to see what factor best accounts for the differences in the Roberts and Alito votes.

INDEX WORDS: John Roberts, Samuel Alito, judicial nominee, Supreme Court, confirmation, nomination, judicial appointment, critical nomination, President George W. Bush

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DEDICATION

I would like to dedicate this work first of all to my husband, Andrew, who I met when I began attending the University of Georgia and who has enriched my life in countless wonderful ways. I could not have imagined a more loving, supportive husband, and I have no doubt that without his patience, reassurance, and love, I would not have made it this far. I also dedicate this to my mom Cindy and my dad Rick, who have always encouraged me and believed in me, even when I had a hard time believing in myself. Their support and uplifting words have meant the world to me. Further, I want to dedicate this work to my nana, whose faithful prayers and constant encouragement truly inspired me. Nana, I wish you could have been here to see this work brought to completion – I know how proud you would have been. Finally, I would like to thank my grandfather (Papa), my aunt Pam, my sister Leah, my brother Jordan, and my sister-in-law Ragan for their support and love. You are all the best!

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TABLE OF CONTENTS

LIST OF TABLES

Page

Chapter One: The History and Evolution of the Supreme Court Appointments Process

The Supreme Court appointments process, particularly the confirmation process, has undergone numerous changes over the past 200 years. The process is now more open to public view, less insulated, and more amenable to influence by previously excluded actors, such as the public, the press, and interest groups. Some believe that the changes that have occurred have made the process more democratic; others argue that they have resulted in undesired consequences.

Many distinctions can be drawn between the confirmation process of old and the today's realities, especially when one looks at the individual actors in the process and how their roles have evolved. Before outlining the changes that have occurred, it would be helpful to examine how the Founders created the Appointments Clause.

THE BATTLE OVER THE APPOINTMENTS CLAUSE

While delegates at the Constitutional Convention agreed that the Constitution needed to provide a method of appointing certain officials to the national government, there was disagreement nearly from the start regarding how these officials should be appointed. Almost all of the delegates (Connecticut excluded) agreed that the president should have a significant role in the appointments process, and early in the convention's deliberations, the delegates voted to give the president the authority to appoint all officers not appointed by another body.

Following this vote, the debate over appointments centered on two key issues – where the authority to appoint federal judges should be vested and which appointments should be covered in the Constitution. The first plan that was debated by the convention was the Virginia Plan,

introduced by Edmund Randolph and crafted primarily by James Madison. The plan vested the authority to make appointments in two separate places based on the type of appointments involved. This division was agreed upon in the debates that followed, and the focus of debate shifted to the Virginia Plan's proposal to vest the power to appoint federal judges in both chambers of the legislature. Those who opposed the plan argued that allowing appointments to be made by both bodies could result in prejudice and conspiracies. Those supporting the plan asserted that the power to appoint was too great to vest in one person and that doing so could suggest that the delegates were inclined towards a monarchy.

Madison agreed with the potential problems suggested by opponents to the plan. However, he was not inclined to place power solely in the hands of the executive. Instead, Madison suggested that the power to appoint be placed in the Senate. When the matter came to vote, the convention decided to defer consideration to a later time.

Shortly thereafter, Charles Pinckney and Roger Sherman attempted to revitalize the provision in the Virginia Plan to vest appointment of the Supreme Court in Congress. Madison, among others, objected, arguing that the many members of Congress would not be fit to judge nominees' qualifications and would instead be motivated by their own beliefs. Madison again proposed that the Senate be given the power to appoint; Pinckney and Sherman abandoned their motion, and delegates accepted Madison's suggestion without remark.

Two additional plans were proposed in the weeks that followed. William Patterson introduced the New Jersey Plan, which recommended that appointment power be given to the president. The other plan, forwarded by Alexander Hamilton, proposed that the executive would have the power to nominate federal judges subject to the approval of the Senate.

Debate on the issue of federal judicial appointments did not re-emerge until mid-July, when delegates debated a resolution founded on Madison's proposal of a national judiciary appointed by the Senate. Some delegates expressed concern that the Senate had too many members and too little personal responsibility, while others fully supported the plan, arguing that members of the Senate would bring to the table more expansive knowledge of the character of candidates and would be less likely to be deceived by nominees than the executive would be. In an attempt to compromise, Madison again proposed presidential appointment subject to the approval of at least one-third of the Senate. In response, Randolph suggested that the Senate should have the power to appoint, and Nathaniel Gorham asserted that the president should possess sole appointment power of federal judges.

Ultimately, the convention rejected Gorham's proposal, and he came up with an alternative that allowed the president to nominate and appoint judges with the Senate's advice and consent. This proposal split the delegates in a four-to-four vote. Madison then put forth a plan of presidential nomination with the Senate possessing the ability to reject the nomination with a two-thirds vote. The motion was tabled for debate at a later time; once it came up for vote, the proposal was rejected by a six-to-three vote. However, the convention accepted his alternative proposal for Senate appointment by the same vote. The Committee of Detail included the provision into its draft of the Constitution, but in late August, opponents once again began arguing their case against the provision.

The power of making judicial appointments was not debated by the convention again until early September. At this point, delegates for the first time openly deliberated a proposal that mirrored the Appointments Clause in its current state. In the end, the Convention submitted the Appointments Clause to the Committee on Postponed Matters. The committee then

composed a report that included a provision for nomination of Supreme Court justices by the executive with the advice and consent of the Senate. Discussion regarding the provision took place a few days later; several delegates, including Pinckney and James Wilson, expressed opposition to it, while Gouverneur Morris was its lone supporter. The convention voted unanimously to adopt the language of the Appointments Clause regarding how judicial appointments were to be made, and in a nine-to-two vote, chose to insert the phrase "And all other officers of the United States" into the clause.

In the campaign to ratify the clause, debates fell along the same lines as they did during the Constitutional Convention. Those who opposed the new Constitution opposed the clause, arguing against its division of power, while those who supported the Constitution defended the clause. Opponents of the Constitution offered a variety of reasons why they did not support the Appointments Clause. Some argued that the clause gave the Senate, the president, or both too much power. Others claimed that the proposed Constitution robbed the president of the ability to independently make appointments, a power which they believed he should have as executive. Still others asserted that the sharing of appointment power by the legislative and executive branches violated the separation of powers principle.

Proponents – most especially Hamilton – attempted to explain why power was divided. Hamilton stated that true appointment power would be vested in the executive, with the Senate taking a deferential role with regards to a president's nominees. The Senate was not to act as a rubber stamp; the clause was intended to empower the Senate with a check on the president to prevent him from exercising favoritism, as well as decrease the odds that an unfit nominee, chosen for reasons such as popularity, family connections, or hometown prejudice, would be appointed. However, Hamilton believed that it would be improper for the Senate to reject a

nominee of the president simply because they preferred another person. Arguments from other proponents of the Constitution in general, and the clause specifically, followed similar paths, and in the end, the somewhat delicate compromise, struck between those supporting executive power and those who feared it, was ratified.

Having outlined the debate surrounding the creation and ratification of the Appointments Clause, we can now move on to an examination of how the appointment process has evolved since its creation. It is clear that the roles of major actors in the process have changed greatly since the earliest days of judicial nominations. There have been not only appreciable changes in the roles of players intended by the Founders to participate in the process (namely, the president and the Senate), but also dramatic changes to the process due to the increased power of outside actors who, beginning in the early twentieth century, have come to exert a great deal of influence on the process. The delicate balance of appointment power between the executive and legislative branches crafted by the Founders has been altered to the point where the Founders themselves would likely find today's process unrecognizable.

EVOLUTIONS IN THE JUDICIARY

Though the judiciary is typically not considered to exert much influence over the appointments process (other than by retirements, which will be addressed later), shifts in judicial power that have occurred since the beginnings of the Supreme Court have had an appreciable influence on the appointments process. Not only has the evolution in the policy-making role of the Supreme Court affected the behavior of specific actors, but it has also altered the importance placed upon Court vacancies, thereby making the selection and confirmation process much more salient and contentious than in the Court's early days.

Changes in the power possessed by the Court began almost immediately after its inception. The Founders considered the judiciary to be the "least dangerous branch" due to the fact that it "lacked both the political validity conferred by popular sovereignty and the institutional resources to develop strong and lasting bonds to important constituent groups" (Silverstein 1994, 35). However, John Marshall's opinion in *Marbury v. Madison* establishing the power of judicial review quickly changed the role of the Court, shifting the Court from a marginal political institution to one that was considered by influential groups to be an appealing ally. Throughout Marshall's tenure as chief justice, the Court became the key guardian of private property against state legislatures. Marshall passed onto future members of the Court the ability for the judiciary to take action against the states, though his immediate successor, Roger Taney, faced greater difficulty in forging bonds with prevailing economic and social forces, and judicial power had to be exercised carefully. Popular support for regulatory actions by the state was on the upswing, and the *Dred Scott* decision proved to be a damaging blow to the Court both politically and legally (Silverstein 1994, 36-37).

It was not until after the Civil War that the Supreme Court regained some of its power by issuing opinions that broadly interpreted the Due Process Clause while limiting the powers of the national government. The Court was able to link itself through its decisions with new industrial and financial capitalists and, in doing so, limited the government's ability to impose regulations based on social and economic welfare. The activism of this era was epitomized by the 1905 case of *Lochner v. New York* in which the Court rebuffed the argument that a New York statute restricting the number of hours a baker could work daily and weekly was essential to protect the health of bakers, ruling that the statute interfered with the right to free contract that was implied in the Due Process Clause as well as the Fourteenth Amendment's right to liberty provided to

employer and employee (FindLaw, nd, np). The Court's alliance with industrial capitalists led many progressive reformists during the early twentieth century to call for reform to limit the scope of judicial review, as they believed that an active judiciary meddling in state affairs was preventing the government from responding to the needs of a modern industrial civilization. While the idea of constricting the power of judicial review found popular support, none of the measures suggested to Congress were enacted (Silverstein 1994, 37-40).

Just before the New Deal era, a new mode of thought – new judicial liberalism – was adapted as a response to the conservative judicial activism of the *Lochner* era. Many liberals supported the notion of judges acting more moderately than in years past, tempering the power of judicial review with deference to the decision-making of elected branches of government. Judicial liberalism was now thought of as the exercise of self-restraint and moderation, with justices overturning disputed legislation only when it was considered to be thoroughly unreasonable. This judicial philosophy allowed for governing power to be placed back in the hands of elected representatives. Judicial restraint, combined with the stringent application of rules of justiceability, defined the era preceding the New Deal (Silverstein 1994, 41-45).

Once Franklin Roosevelt was elected in 1932 and legislative activity increased exponentially during his first one hundred days in office, the issue of what role was proper for the judiciary to play became even more contested. The conservative majority on the Court perpetuated the old activist role of the judiciary; however, this role was brought into serious question as economic crises fell upon the nation and the public increasingly called for government action. However, Roosevelt appointees believed that deferring to the legislative and executive branches with regards to social and economic decisions would in the end best serve the public's needs. New Deal policy matters faced little to no interference by the Court, and the

judiciary found itself in a secondary position in influencing national policy. New judicial liberalism prevailed, and for several years, the Roosevelt Court operated with little animosity or conflict (Silverstein 1994, 45-47).

By 1943, however, ideological differences and personal differences between the justices divided the Court, though it faced little confrontation with the legislative or executive branches. However, in the early 1950s, attempts to combine judicial restraint with the desire to defend civil rights and civil liberties ultimately proved irreconcilable (Silverstein 1994, 48).

When Earl Warren was appointed as chief justice in 1953, the Court underwent a dramatic change due to Warren's desire for the Court to shed its New Deal tradition of deference and restraint and embrace a more aggressive role. Justices on the Warren Court were interested in using judicial review to further the interests of critical elements of the New Deal coalition – specifically religious and ethnic minorities. Justices felt certain that judicial activism in serving the underprivileged would be widely supported, especially when joined with Kennedy's New Frontier and Johnson's Great Society (Silverstein 1994, 49).

However, controversy arose regarding the Court's shift to activism. Critics asserted that the proper role of the judiciary was that held by the Court during the New Deal era. Though the Warren Court was aiding the disadvantaged, critics took issue with the fact that it was a court that was making such decisions. The Warren Court's disregard for the limitations on the exercise of judicial review, more so than the decisions themselves, was what caused the greatest amount of controversy and led the Court to be propelled into the center of American political life (Silverstein 1994, 50-51).

Though Warren came onto the Court in 1953, the full force of the Warren Court was not felt until the mid-1960s, though the Court got the ball rolling in 1962 with the case of *Baker v.*

Carr. The case dealt with the issue of whether or not the creation of malapportioned state legislatures was unconstitutional. Many state courts refused asserted that the issue was a political question and, therefore, not fit for courts to rule upon. The Supreme Court throughout the New Deal era had relied upon the political-question doctrine a number of times in order to avoid conflicts with the other branches, and previously, the Court had ruled that congressional districting and apportionment of state legislatures was indeed a political question. However, the Warren Court asserted in *Baker* that malapportioned state legislatures were a claim that the Court could rule upon under the equal-protection clause (Silverstein 1994, 51-53).

Two important events occurred after the Court's decision in *Baker* was released. First, the executive branch announced its support of the result in *Baker*; President Kennedy's support of the ruling allowed the Court to sustain the heated debates over reapportionment that took place. Second, shortly after the decision in *Baker* was announced, Justice Felix Frankfurter experienced a severe stroke and, a few months later, announced his retirement from the Court after twenty-three years on the bench. What is significant about Frankfurter's retirement is that he had been one of the most vociferous supporters of judicial deference. His exit from the Court broke the final link with the New Deal era of judicial restraint, allowing the Warren Court to proceed at full speed with its doctrine of judicial activism (Silverstein 1994, 54-55).

Following Frankfurter's retirement, the Supreme Court continued to take apart the rules crafted by judicial restraintists of the New Deal era. By the mid-1960s, the Court's decisions relaxing the rules on standing, abstention, and other rules of justiceability allowed a greater variety of litigants to come before the Court and present their constitutional contentions for judgment. By erasing the limitations on judicial power created by new judicial liberals during

the 1930s and 1940s, the influence of the judiciary increased and the Court possessed a greater ability to further new political and social agendas (Silverstein 1994, 56-58).

The Court also attempted through its decisions to enlarge the scope and nature of judicial remedies. When issuing decisions, the Court did not merely rule on the case at hand; they also frequently dispensed expansive and at times contentious policy declarations. Justices on the Court realized that, given the dramatic increase of litigation and litigants during the 1960s, there was a need for inventive remedies to go along with the Court's enlarged role. As a result, the Warren Court "encouraged judges throughout the federal system to fashion innovative remedies that often required public officials to implement complex and varied policies designed by the court to square the defendant's practices with constitutional requirements" (Silverstein 1994, 61). Consequently, federal courts became actively involved in the everyday procedures of many governmental units; by the 1970s, the judiciary had firmly established its power to control how many areas of government operated, thereby offering victorious litigants solutions that had previously only been offered by the legislative or executive branches. It is clear that the Warren Court had turned the judicial branch into an imposing force in policy formation (Silverstein 1994, 59-61).

It was with the failure of Abe Fortas' nomination for chief justice in 1968 that the Warren Court revolution began to come to an end. The impact of the Warren Court on judicial power, however, was indelible. When Warren Burger was appointed as chief justice in 1969, he made no move to appreciably restrict access to the Court or abandon the tools used by the Warren Court to further judicial power (though Burger was not as vehement about protecting the interests of the disadvantaged as Warren was). Starting in the early 1970s, more and more interests – not just those representing the disenfranchised, but those representing the wealthy and

the middle-class as well – began to come before the Court to achieve their goals. Groups advocating environmental causes, women's rights, consumer rights, and business interests, among others, were turning to the Court, leading to an explosion not only in group presence before the Court but also in amicus curiae (friend of the court) briefs filed during the 1970s and 1980s. Once conservative groups saw how successful more liberal groups were in attaining their policy goals, they too became more involved in the process. What has resulted has been somewhat of a shift in operations on the Court from giving power to the disadvantaged to providing an arena to serve the interests of the politically empowered and the upper-middle-class (Silverstein 1994, 62-70).

Given the transformation in judicial power during the Warren era, it is no surprise that the selection of Supreme Court justices has become of paramount importance, especially to interest groups. It is important to note that interest group involvement in Supreme Court appointments is not a recent phenomenon; interest groups have attempted to influence judicial appointments since the Stanley Matthews nomination in 1881, though they did not participate in large numbers or with regularity until the late 1960s. The increased policy reach of the Court in recent years, coupled with the relaxation of rules of justiceability, have given interest groups a vested interest in seeing that justices on the Court are sympathetic to their needs and seem willing and open to address their grievances. In this way, not only did shifts in judicial power influence interest groups by providing a new outlet for achieving their goals, but interest group behavior has also come to affect the judiciary through the attempts they make at determining who staffs the Court.

The transformation of judicial power and influence has also affected Senate treatment of Supreme Court appointments. Given the Court's evolution into a strong force in policy formation and an important ally for interest groups of all types, senators nowadays have had to

noticeably alter their way of thinking and acting when faced with an open seat on the Court. Modern day senators must focus more of their attention on judicial nominations than they did in the past, speak out more frequently regarding nominations, and deal with increased pressure and demands from a variety actors seeking to affect their vote. To be sure, numerous other factors have shaped Senate behavior regarding judicial appointments, and those factors will be addressed momentarily. However, it is hard to imagine that the Court's shifts in power have not in some way affected how senators handle vacancies on the Court.

Finally, the increase in the judiciary's influence on policy-making has influenced both the media and the public. As will be discussed shortly, media coverage of Supreme Court appointments has increased greatly over the past 75 years. Undoubtedly, one of the reasons for this increased media interest is due to the influence that today's Court possesses in shaping public policy. The mere fact that the judiciary has become a formidable force in policy formation has increased the newsworthiness of Court proceedings and appointments. Additionally, the increased salience of Supreme Court nominations has led the media to want to participate in the appointments process, and over time, senators, the president, and interest groups have used the press in a way that has made it into a powerful actor in the process. It is unlikely that the media would have desired to cover (much less participate in) the appointments process as much as they currently do had the Court not become such an influential force on public policy.

It is also likely that increased public interest with regards to Supreme Court nominations is due in some part to changes in the nature and scope of the Court's power. To begin with, issues and values close to the hearts of many members of the public are increasingly being brought before the Court. The Court now hears cases on a variety of issues that would not have

been addressed prior to the Warren Court era; accordingly, the public has a vested interest in who staffs the Court and makes the decisions affecting these salient issues. Moreover, the evolution in the scope and nature of the Court's power has made it clear to the public that Court justices would play a vital role in helping form policy. Thus, it stands to reason that the public has increasingly come to possess a great deal of concern over who sits on the Court, especially since justices are not popularly elected and have lifetime tenure.

Outside of shifts in judicial power, the Court does not exert a great deal of influence on the appointment process, though it clearly has a lot a stake in the process. One additional way that justices throughout history have influenced the process is through timing – that is, they usually manage vacancies on the Court through retirement. Outside of retirement, justices have little to say regarding who staffs the Court.

Members of the Court are, however, strongly affected by the process. Numerous actors – from traditional players like the Senate and the president to new players such as the media, interest groups, and the public – have a hand in the appointment process, and through their influence on the process itself, they can affect several facets of the Court. To begin with, the justice chosen to fill an empty seat can affect the atmosphere of the Court. If a justice is repeatedly disrespectful towards other justices or consistently reluctant to be a "team player," he or she can profoundly affect the environment of the Court. Additionally, the Court's prestige and power can be altered by the way the selection and confirmation process is conducted. If the process does not proceed in a dignified manner that shields justices' independence, the Court can be negatively affected (Davis 2005, 23). Finally, the Court can face difficulties when a nomination to the Court is made due to purely political or personal reasons. For example, if a president makes a nomination merely to score political revenge, or when he allows himself to be

persuaded by organized interests to appoint a particular nominee, he can detrimentally affect the Court.

EVOLUTIONS IN THE SENATE

The evolution in how the Senate views and handles Supreme Court appointments is perhaps the starkest of any of the major actors involved in the process. From its early days as an insulated, hierarchal institution to its modern position as an outwardly focused, open, and visible chamber, the transformations that have taken place have resulted not only from Senate rules changes and alterations in old folkways, but also from the influence of other major actors attempting to affect Supreme Court appointments. It is important to first look at the general changes that occurred in the Senate before attempting to understand the more specific evolutions that occurred regarding the appointments process.

Throughout the nineteenth and early- to mid-twentieth century, the Senate was characterized by insularity, long-standing rules and norms, and a strong hierarchy. During those times, only a select few senior members held leadership positions, and new members were expected to perform a period of apprenticeship. Additionally, a lack of enumerated procedural rules led to the development of unwritten norms and rules. Such rules were intended to not only limit senators' independence, but also to maintain cohesion in the chamber. Senators were advised to seek the support of their colleagues and were discouraged from attempting to obtain national media exposure. Reciprocity was another Senate norm, as was specialization by individual senators in particular policy areas. These norms, along with institutional patriotism and senatorial courtesy, were meant to suppress renegade behavior by Senate members and further ensure structure and cohesion within the chamber (Silverstein 1994, 131-134).

While these norms for the most part successfully constrained senators' behavior during the early- to mid-twentieth century, nineteenth-century senators were less amenable. During the nineteenth century, the Senate was a markedly partisan institution, with senators devoted strongly to their local power base. Appointed by state legislatures, senators during this era had oftentimes previously served as state party leaders, and when they were elected to the Senate, they made sure to send aid back to the state party organization. Nineteenth-century senators were often reluctant to accept the limitations upon their independence, and their mindset focused less on pleasing their colleagues and more on satisfying their local party bases (Silverstein 1994, 140).

The enactment of the Seventeenth Amendment in 1913 is an important event that altered Senate behavior significantly, both in general and with respect to judicial appointments. Prior to 1913, senators were elected by state legislatures, and consequently, their behavior was influenced less by their constituency and more by their local party bases (Silverstein 1994, 140). The Seventeenth Amendment allowed for the direct election of senators by their constituents; senators were suddenly faced for the first time with being electorally accountable to their constituents. This in turn affected how they treated a host of issues, including judicial appointments. The amendment forced senators to consider the opinions of their constituents when deciding whether or not to support a judicial nominee, especially as media coverage of appointments increased and the public became more knowledgeable about nominees. Electoral retribution could result if senators ignored their constituents' opinions. While senators seemed to be increasingly adopting positions on important legislative issues corresponding with popular support following the amendment's passage, Senate norms continued to exert a strong influence

on Senate behavior. It was only during the 1960s that senators dramatically altered the way they behaved.

During the 1960s, a new Senate began to emerge due to a number of factors. To begin with, there was a considerable change in membership in the chamber. Southern conservative Democrats began losing their seats to northern liberal Democrats, who desired to reform old norms and folkways. Additionally, the increase in interest groups shifted the focus of the inward-looking Senate. Senators began to not only face increased lobbying efforts and demands on their time and resources, but were also provided the opportunity to gain national exposure and standing external to the Senate. Further, the explosion of electronic media – particularly television – significantly influenced senatorial behavior. Senators who were once specialists in one or two policy areas found themselves being pushed to become policy generalists, and the norm of shunning national media exposure and toiling behind the scenes fell to the desire to be as visible as possible. In addition, television coverage increased the salience of judicial appointments and has helped make them an important part of senators' political agendas (Silverstein 1994, 143-146)

Other important changes included alterations in the predominance of the committee system, an increase in the influence exerted by newcomers to the Senate, decreased courtesy on the Senate floor, and a tendency for senators to act independently and behave more aggressively than in the past. As a result of these changes, senators now have a plethora of new opportunities they can use to further political success, both in general and specifically with judicial appointments (Silverstein 1994, 147-151).

The extensive changes that occurred in the Senate in general altered how senators treated judicial appointments. Given the fact that nineteenth-century senators were resistant to

restrictions upon their independence implied by old Senate norms, it is easy to understand why they were less likely than senators during the early- to mid-twentieth century to approve a president's Supreme Court nominees. During this era, one out of three nominees to the Court was rejected (Silverstein 1994, 140). Rejections stemmed largely from partisan battles between Federalists and Democratic-Republicans. However, some nominations were rejected due to senatorial courtesy, a lack of qualifications, or sectional rivalries (Maltese 1995, 36).

Conversely, almost all nominees from 1900 to 1968 were confirmed (with the exception of Parker in 1930). Until the mid-1960s, a Supreme Court confirmation "was often a battle that did not matter and thus presented senators with a relatively simple decision. With few exceptions, appointments to the Supreme Court were of little electoral import to senators" (Silverstein 1994, 141). Given the lack of concern given to Supreme Court appointments by their constituents, senators had little reason to break rank in their consideration of a nominee.

Since the 1960s, however, senators have placed much more importance on judicial nominations, and they have altered the calculations they make in deciding whether or not to support a nominee. The momentous shift in judicial power that occurred during the Warren Court era, coupled with increased interest group involvement, intensified media coverage and participation, stronger public interest in appointments, and the public appeals that presidents began to make for nominees have all contributed to the shift in the way senators think about nominees to the Court. No longer can they afford to simply tow the party line and follow old Senate norms of conformity and acquiescence; now, the eyes of their constituents, the press, interest groups, and the president are watching to see not only what senators say publicly about nominees but how they vote (Silverstein 1994, 153-154).

The way that the Senate conducts confirmation hearings has also undergone a striking evolution. During the first years of its operation, the Senate debated Supreme Court nominations in almost complete secrecy. Hearings were closed to the public, nominees did not appear before the Senate, and no witnesses testified. Floor debates on nominations were also closed unless two-thirds of the Senate voted to open them, an occurrence that was quite unusual. Additionally, the Senate processed nominations quickly, oftentimes with little debate and no roll-call votes (Maltese 1995, 37).

During the twentieth century, important changes took place in how confirmation hearings were held. Perhaps the most important change of all was the 1929 Senate rules change opening floor debate on nominations and the Senate Judiciary Committee's decision to open confirmation hearings to the public that came shortly thereafter. The impact of these rules changes has been profound, as will be evidenced in the forthcoming discussion of the evolution of other actors in the process. Senators' behavior was impacted both by the rules changes themselves and the effects of the changes on these other actors, and they altered their treatment of Supreme Court appointments almost immediately due to the fact that proceedings were no longer behind closed doors. Increased media, interest group, and public interest and influence over time furthered evolutions in senatorial behavior.

Other Senate rules changes regarding confirmation hearings have crafted how the modern confirmation process operates. Beginning with the Louis Brandeis nomination in 1916, the Senate Judiciary Committee conducted its first full public confirmation hearing, though it was not until 1949 that the committee began holding public hearings on all nominees (Maltese 1995, 88-89). Additionally, nominees themselves began testifying before Senate committees and subcommittees; this first occurred with Harlan Stone in 1925 and became a regular occurrence

beginning in 1955 with the John Marshall Harlan nomination. Further, interest group testimony during confirmation hearings has increased. Though interest groups had been participating in the process for a number of years (especially after the enactment of the Seventeenth Amendment and the Senate rules changes in 1929), they did not begin testifying at confirmation hearings until 1930 with the John Parker nomination, though it was not until 1971 that groups started testifying at hearings for every subsequent nominee to the Court.

Finally, media coverage of confirmation hearings increased steadily during the twentieth century. During the nineteenth and early twentieth century, closed hearings and floor debates prevented the majority of reporters from being able to cover nominations at all, and those who did towed a party line. Coverage was, as a result, sparse and blatantly partisan. Following the 1929 rules changes, the media became an important player in the process – both as an educator and a participant. The media's influence became particularly strong with the advent of television and, more recently, the Internet.

The transformation of the Senate into the institution it is today is a result of several factors. As has been discussed, the Senate itself is responsible for some of these alterations. Other aspects, however, it has little influence over.

One factor that has come to influence how senators behave towards judicial appointments is the influence of interest groups. Given the importance of who staffs the Court, it is of little surprise that groups heavily target the Senate in their quest to affect the outcomes of Supreme Court appointments. Interest groups have affected and continue to affect the Senate in several ways. As has been mentioned, members of the Senate Judiciary Committee have for nearly forty years been subjected to increased testimony of interest groups during confirmation hearings. Not only has testimony itself increased, but the variety of groups appearing at hearings and the

number of overall groups who appear has risen. With the increased attention that stems from testifying comes the heightened ability of groups to signal and potentially rally their members to pressure senators to support their positions.

Interest groups have also affected the evolution of Senate treatment of judicial appointments through lobbying efforts, media campaigns, campaign donations, and advertising. Groups also provide information regarding nominees to senators that they believe are sympathetic to their cause and send signals to senators regarding the costs of not complying with their goals (Gerhardt 2000, 70). All of these efforts are intended to sway a senator's vote for a nominee.

Another way the Senate has evolved in its treatment of Supreme Court appointments stems from the influence of the president. The president has always affected Senate behavior towards judicial appointments, as the president and the Senate have always been key actors in the process, oftentimes engaging in tense battles over nominations. Recently, however, presidents have taken more of an active role in "selling" their nominees to interest groups, the public, and the Senate by making public appeals to increase support for their nominees, by using the Congressional Liaison Office, created during the Eisenhower administration. One of the duties of the office is to be a line of communication between the president and the Senate regarding judicial nominations, with the Office seeking to influence senators' attitudes towards nominees. The Office uses organized interests, speeches, and a variety of written material to persuade senators and, at times, uses political tactics or patronage in its efforts to garner votes for nominees. The White House has gone so far as to use threats to get its point across; past presidents have threatened to take direct action against a senator or to make "spite" nominations

if their nominee is defeated (Maltese 1995, 132-133). The office also uses other White House units to organize grassroots movements in order to pressure undecided senators.

The media has also played a role in the evolution of how the Senate handles judicial appointments. Throughout much of history, the closed nature of the process prevented most reporters from gaining access to hearings. However, once hearings and floor debates were opened, media coverage increased exponentially, especially with the advent of television. More recently, the Internet has allowed for the dissemination of information in a way that had never before been seen. Modern senators' behavior during hearings is now much easier to track, and missteps are harder to conceal.

Further, senators nowadays are pushed to speak out regarding nominees more than in the past. It was not unusual for senators in the past to be able to avoid speaking out regarding their thoughts on Supreme Court appointments – appointments themselves were not seen as being critically important issues, and senators followed the norm of shunning national media exposure in favor of more behind-the-scenes work. Today's senators are expected by the media, their constituents, and interest groups to be quotable and knowledgeable regarding a variety of issues, especially highly salient ones such as Supreme Court nominations. Increased press coverage has played a part in furthering this expectation.

As previously mentioned, the judiciary has considerably influenced the way the Senate deals with Supreme Court nominations and confirmations. Because the Court became a powerful institution with strong effects on policy-making (as well as a strong ally for a variety of interest groups), senators must make their consideration of judicial appointments a higher priority than they did during the nineteenth and early twentieth century, speak out via the media

more often regarding their support or opposition to nominations, and tackle increased pressure from interest groups, the president, and the public.

Finally, the public has had a hand in altering how senators treat openings on the Court, especially since 1917 with the Seventeenth Amendment's enactment. Prior to this, the public was rarely if ever involved in the judicial appointment process and, if they attempted be involved, they exerted little influence. Further, senators could afford to ignore constituent opinions (if any firm opinions existed regarding appointments). Following the enactment of the Seventeenth Amendment, constituents began making their opinions well known through phone calls, letters, telegraphs, and petitions to their senators. More recently, constituents have taken to faxing and e-mailing their thoughts to senators. The public can also influence senators' opinions and behavior towards nominees through the use of intermediaries, such as interest groups and the media. Polling provides senators with further details regarding constituent attitudes towards nominees.

For senators, the modern confirmation process "demands a calculation of political variables so complex that even the most experienced and electorally secure senators are often unable to predict the course and outcome of proceedings" (Silverstein 1994, 158). Handling nominations is certainly not as cut-and-dry as it once was, and it seems that evolutions in how the Senate treats judicial appointments been one of the most dramatic and consequential of all the actors involved in the process.

EVOLUTIONS IN THE PRESIDENCY

The president has also gone through some appreciable evolutions in how he handles Supreme Court nominations. Presidents in the past contended with the Senate alone when making Supreme Court nominations, rarely if ever made public statements regarding their

nominees, and possessed few resources they could use to secure their nominations. Presidents now face a variety of actors who attempt to influence their decision-making, frequently wage public campaigns in support of their nominees, and have at their disposal a variety of tools they can use to communicate with and garner support from the Senate, interest groups, and the public. The development of the institutional presidency is the reason for some of these evolutions; others are simply the result of changes outside of the president's control.

To begin with, in the past, the appointment process of the past was largely influenced by two actors – the Senate and the president. Though the battles waged between the two were rife with politics and resulted in their share of Senate rejection of presidents' nominees, the president faced a simpler environment in making nominations in that he could focus most of his attention on attempting to sway or thwart the Senate, as there were far fewer additional actors attempting to influence his decision-making.

Additionally, prior to 1981, presidents did not wage public campaigns for their nominees; in fact, for much of history presidents themselves did not even announce their nominations, delegating that responsibility to a spokesperson for the Justice Department or the White House press secretary. If they did announce nominations, it was done in small press conferences. Explicit public appeals were frowned upon by presidents throughout the nineteenth and early twentieth centuries. This hesitation to engage in public appeals decreased as the twentieth century progressed. Presidents, realizing the power inherent in making public appeals, began "going public" to increase support of their policies (Maltese 1995, 112-113). However, they still showed reluctance to publicly promote Supreme Court nominees, even in highly publicized and controversial nominations.

It was not until Ronald Reagan waged a public campaign for Sandra Day O'Connor in 1981 that presidents regularly started going public in order to garner support for their nominees. Since then, public statements have increased considerably, especially when the atmosphere surrounding the nominee is controversial. For example, Reagan issued five public statements of support for Antonin Scalia, while issuing 32 for Robert Bork. President George H.W. Bush made 10 statements for David Souter, contrasting considerably with the 24 he made for Clarence Thomas (Maltese 1995, 115).

Regardless of the nature of the nomination, going public has become an important part of a president's treatment of judicial nominations in recent years. This is due, some argue, to the elevated level of conflict over nominations that has occurred since the 1960s, increased scrutiny from more and more actors over longer periods of time that prompts questions about nominees which must be answered or contained in some other fashion, and the benefits presidents receive from having public support on his side, and as such, he must appeal to the public either through an intermediary or directly to gain this backing (Comiskey 2004, 15).

One critically important aspect of the campaigns that presidents wage on behalf of their nominees is crafting a nominee's image in order to "sell" the nominee to the press, the public, and interest groups. Presidents must first get an initial framework established from the start to prevent others from setting an image first, and they do this primarily by basing the image on a nominee's symbolic story, which "defines the nominee in a way that enhances public appeal and makes confirmation more likely" and turns nominees into symbols for groups and values (Davis 2005, 132-133). Presidents also attempt to diminish the appearance of partisan factors as influencing his selection, emphasize a nominee's merit, and create a theme (such as that of a nominee being a "strict constructionalist") that can target supporters. Such image-building has

become necessary for presidents due to the fact that external players such as interest groups and the public need to feel confident in the fact that the nominee exemplifies democratic values (Davis 2005, 133).

Presidents have also over time (especially since the Eisenhower administration) accrued important resources they can use to persuade or communicate with various actors in the process. First, presidents became key policy leaders; second, the White House staff expanded greatly, with specific units assigned to carry out specialized functions in order to assist the president in forming and implementing policy. These developments led to a system of government centered on the White House that is referred to as the institutional presidency (Maltese 1995, 117).

The rise of the institutional presidency can be traced to the passage by Congress of two acts – the Budget and Accounting Act of 1921, which required presidents to form the government's fiscal policy, and the Reorganization Act of 1939, which gave the president substantial staff resources via the creation of the Executive Office of the President and the White House Office (Maltese 1995, 117). Following the passage of the Budget and Accounting Act, presidents took a much more active role in forming domestic policy, beginning in earnest with Franklin Roosevelt. Further, the Reorganization Act created both the Executive Office of the President (where institutional staff serves) and the White House Office (where personal staff resides). After the act's passage, an institutionalized presidential staff evolved, with the number of staff members growing by leaps and bounds ever since. The development of the institutional presidency carried important consequences for the presidency, both in general and with regards to judicial nominations.

Judicial nominations are handled by the White House Office. The creation of the office allowed for specialized units that lobby the Senate, evaluate potential nominees, shape public

opinion, and rally interest group participation. The Office of White House Counsel (in conjunction with the Justice Department, the FBI, the White House chief of staff, and a variety of advisors and confidants) assists in the screening of Supreme Court nominees. The Office of Communications advances appeals to the public and issues public statements to garner support for judicial nominees. The Congressional Liaison Office, as previously discussed, applies pressure to senators to influence their votes on nominations. Finally, the Office of the Public Liaison works to activate interest group support for judicial nominees. The rise of the institutional presidency has thus given presidents a number of important resources that they can employ to persuade various actors to support their nominees.

Along with the aforementioned development of the institutional presidency, several actors have exerted significant influence on presidential treatment of judicial appointments.

One actor the president has had to consider since the beginning is the Senate. Much about the relationship between the Senate and the president regarding judicial appointments is similar to the earliest days of judicial appointments. Nowadays, just as in the past, partisan politics are a strong force in Senate rejections of nominees. Additionally, presidents still employ bargaining tactics and even subtle threats in order to sway senators' votes (though modern increases in presidential staff have sharpened this tool). However, there have been changes during the twentieth century – namely, Senate rules changes – that have altered presidential behavior regarding Supreme Court appointments.

The opening of Senate floor debates and confirmation hearings to the public served to increase interest group participation, media participation, and public interest in and awareness of judicial nominations. As these changes have occurred, there has been a domino effect on the president. He now faces increased lobbying by a wide variety of interest groups, heightened

coverage by the media of his actions and decisions during the nomination and confirmation processes, and increased scrutiny by the public of his nominees. It is hard to imagine that these actors would be able to influence the president in this way without the Senate having first changed its rules for Supreme Court confirmation proceedings.

Presidents have also been increasingly influenced by the Senate when making their nominations. As the president's presumption of confirmation has weakened, as nominations and confirmations have become more contentious in general, and as divided government and party-line voting has become commonplace, presidents have more and more frequently had to make calculations about Senate reaction to his nominees. They seek to pacify those in their party who want a nominee that will support their policy position while not alienating members of the opposite party to the point where the nomination is doomed from the start. Additionally, he is aware that he must select a nominee that does not have a controversial record that Senate opponents could use to torpedo the nomination, and he can be faced with the difficult decision of choosing between a less qualified but "stealth" nominee and one who may be more qualified but has a more contentious record. In short, presidents nowadays face more difficult nominating conditions with respect to Senate reaction to their nominees and have had to alter how they select their nominees as a result.

Additionally, presidential treatment of judicial nominations has increasingly been influenced by the media. As the media's role in the process has expanded over the years, presidents have been affected increasingly by its influence. To begin with, the media, in an attempt to influence the nominating stage, has been known to leak the names on the president's list of potential nominees. This leads media pundits as well as opponents of the president to use the names as fodder (Gerhardt 2000, 242). Additionally, increased coverage has affected when

presidents announce nominations. In some cases, pressure from the media has caused presidents to announce nominees too hastily in order to preclude leaks or catch opponents off-guard. In other instances, the rise in media coverage has led presidents to take too long in making a nomination, due to their desire to choose a nominee that will have the best chance of being confirmed. Such behavior can lead to the president appearing to be of indecisive.

Further, expanded media coverage has led some presidents to choose nominees who seem to be the least vulnerable over those who possess stronger qualifications, much as they do as a result of Senate pressure. Presidents choose such nominees because they are more difficult to attack in confirmation hearings than those with controversial records. Finally, any blunders the president makes in his Supreme Court nominations are more likely to be widely broadcast than in earlier days. If a president has been too quick in making his nomination or has performed an insufficient background check, the media can latch onto his oversights; this is especially true when the media itself uncovers damaging information about a nominee that the president may not have been aware of. In an effort to avoid this, presidents (as previously mentioned) have been compelled at times to select "safe" nominees when there may have been a more qualified candidate for the position.

Modern presidents also face a great deal of pressure from interest groups. Once interest groups began participating in the appointments process regularly, presidents began to alter their behavior regarding Supreme Court nominations. To begin with, President Nixon created the Office of the Public Liaison to build interest group support for presidential policies, including judicial nominations. In their efforts to secure confirmation for their nominees, presidents and the office first target interest groups in order to gain their backing, then attempt to use supportive interest groups to launch campaigns on behalf of nominees (Maltese 1995, 138). The creation of

this office and its use to mobilize support for judicial nominees was an acknowledgement that interest groups had become an integral part of the appointments process.

Additionally, increased interest group involvement has forced presidents to alter their calculations when making nominations. Interest groups attempt to influence the president in a variety of ways, some similar to those they use on the Senate. Groups seek to inform presidents (or their staff members or advisers) about their main areas of concern, supply information about nominees, and signal to presidents the probable costs that will be incurred if they do not support candidates that groups prefer. They buttress these signals with various methods of persuasion, including advertising, media campaigns, campaign donations, and lobbying.

Presidents must also contend with interest group attacks on their nominees. Groups have over time developed increasingly complex methods for signaling opposing messages to that of the president's when they do not agree with a nomination, such as image-building. Although presidents have advantages in image-building in that they have guaranteed media coverage and are the first to get their image out to the public, interest groups can still create an image of a nominee that convincingly challenges or weakens that constructed by the president. Further, interest groups work in conjunction with other political groups who share their feelings about a nominee to instill activities typically seen in political campaigns, such as information leaks and grassroots lobbying into judicial nominations (Gerhardt 2000, 220). In response, presidents have to expend additional time and resources defending their nominees.

Finally, the president's behavior has been altered to a noteworthy extent as public interest in Supreme Court nominations has risen. Presidents are aware of increased public interest in nominations, and they know quite well that going against public opinion can have high electoral costs, while cultivating public opinion in their favor can provide a great deal of power and

influence. The creation of the Office of Communications by President Nixon is evidence of this awareness. The office is employed as a public relations device to manage news flow from the executive branch, to direct public appeals, and to forward the administration's positions on daily policy issues (Maltese 1995, 129). The office was used almost immediately by presidents to gain support for judicial nominees and continues to play a strong role in influencing public perceptions of Supreme Court nominees. In addition to using the Office of Communications, presidents themselves have been speaking out to the public more frequently regarding nominees, as has been discussed. Though presidents are hoping to influence several actors when speaking out, the public is certainly near the top of their list.

It is clear that the president's role in the appointments process has evolved considerably. Given the many things that judicial appointments can influence – including the president's ability to affect policy outcomes in relation to their immediate concerns, pacify their primary constituency, enhance their position vis-à-vis Congress, and appeal to swing voters to enhance their odds of reelection – it is not surprising that the president has in recent history employed a host of new tools at his disposal to appeal to the public, the press, and interest groups and guide his nominee successfully onto the Court's bench (Davis 2005, 17-19).

EVOLUTION OF NOMINEES

The role of nominees to the Supreme Court has undergone some noteworthy evolutions over the past 200 years. Nominees can now play one of two roles – active or passive – while early nominees were largely silent players in the appointments process. Additionally, the actors who influence nominees have changed over the years as interest group involvement and media coverage have increased. No longer can nominees limit their concerns to the Senate and the

president; modern day nominees have a new crowd to "win over" in their attempts to secure a seat on the Court.

For much of the past, nominees did not testify in front of the Senate Judiciary Committee. Further, they stayed away from Washington while their nomination was under consideration. They also did not speak to the press, oftentimes rebutting attempts by the media to ask them questions about their nomination. Nominees now, however, have the option of adopting a passive role, where nominees are objects around which groups or institutions rally for or against, or an active role in the appointments process, where nominees coordinate support for their appointments as well as petition and testify on their own behalf (Gerhardt 2000, 181). In recent times, it seems that nominees have increasingly adopted at least some degree of an active role. It is not unusual for nominees to meet privately with senators and interest group leaders to influence their opinions, and it is common for nominees to work with executive branch officials to receive direction and assistance in securing their confirmation. Some nominees even have off-the-record discussions with the media (Gerhardt 2000, 199). This kind of participation in the process by nominees during the eighteenth and most of the nineteenth century would have been unusual.

Almost every actor in the process has influenced the evolution of the role and behavior of nominees in the appointments process. To begin with, the evolution of presidents' behavior regarding judicial nominations has to a degree influenced the nominees themselves. Specifically, as presidents began making public appeals about their policies in general, they also started speaking out about their judicial nominees, at times waging all-out campaigns for them. As a result, nominees have been thrust into the spotlight and face more media exposure and critical analysis than they previously have. Moreover, given this outspoken, more public role presidents

have taken regarding Supreme Court nominations, nominees must concern themselves more with presidential behavior than in the past. It can be beneficial to a nominee to have the president speak out in his favor, especially if the nominee himself intends to keep a low profile and will not be doing much self-promotion. However, any missteps the president makes can be costly for a nominee, leaving him with the onus of fixing a mess that the president made.

Additionally, presidential management of nominations (that is, how successfully a president can manage the implementation of his overall confirmation strategy) can affect the nominee's behavior in the process. When managing a nomination, the president must be vigilant and not allow for the use of plans that are counterproductive to or incompatible with his strategy for confirmation; otherwise, additional (and avoidable) opposition to a nomination can be generated. Further, presidents have to be careful not to alienate any senators whose support is vital to the success of the confirmation (Massaro 1990, 142). If a president fails in these tasks, the nominee may be forced to build a self-defense or counter criticism when he testifies at his confirmation hearing, and his odds of confirmation may be negatively affected.

Finally, the president's efforts at image-building can influence not only how a nominee behaves during the process, but his or her confirmation odds as well. As previously discussed, image creation has become an important part of a president's campaign for a nominee. In order to "sell" a nominee to the public, the media, and interest groups, the president must establish a strong framework from which an evocative symbolic story emerges. In image-building, the president must also create a theme that will catch the attention of supporters and that can be used again and again in describing a nominee, tout a nominee's merit, and downplay the appearance of any partisan factors surrounding his choice of a nominee. Again, if the president does not succeed in these activities, or if interest groups are successfully able to craft an image that runs

counter to that which the president advances, a nominee can be faced with the difficulty of salvaging his image as well as his nomination.

The Senate is another traditional player in the appointments process that has and continues to influence how nominees behave. As is the case with other actors in the process, the 1929 Senate rules changes opening confirmation hearings and floor debates affected nominees considerably. The changes led to increased interest group involvement, the rise of media coverage, and the alterations in the behavior of senators that resulted from the rules changes had a trickle-down effect on nominees and their confirmation odds. Interest groups can testify before the committee in an attempt to torpedo the nomination, and the doors are now wide open to the media to cover and critically analyze every aspect of the hearings, including nominee testimony. Additionally, senators on the Judiciary Committee, whose constituents can now watch and criticize their actions and words, subject nominees to hard-hitting, intense questioning in order to avoid the appearance of being "too easy" on the nominee. The enactment of the Seventeenth Amendment has also altered the atmosphere nominees face, as they are now confronted by senators whose votes can be strongly influenced by constituent opinions in ways that were not seen prior to 1913. There is little doubt that the aforementioned Senate rules changes set into action a domino effect that has ultimately influenced the environment that nominees face when heading into confirmation hearings, as well as how nominees themselves act.

The push by the Senate Judiciary Committee for nominees to begin testifying during confirmation hearings was another major Senate influence on the evolution of nominee involvement and behavior in the appointments process. As has been mentioned, nominees of the eighteenth and most of the nineteenth century never testified. A few communicated with the Judiciary Committee by written statement; this first occurred in 1873 with George Williams, who

responded to charges that he was corrupt and unqualified in a written statement to the committee (Maltese 1995, 93). Now, nominee testimony is a routine part of confirmation hearings. The first nominee to testify was Harlan Stone in 1925. After Stone, nominee testimony was intermittent and did not become a regular occurrence until the John Marshall Harlan nomination in 1955. Not only has testimony become a common occurrence, but it has also lengthened in recent history. When nominees first began to testify, hearings themselves were shorter and testimony was typically brief; Stone was questioned before the committee for just four hours. Nowadays, confirmation hearings can stretch out over several days, and nominees can be subjected to hours of intense questioning each day.

One of the newer players in the appointments process – the media – has affected nominee behavior in a noticeable way. To begin with, nominees feel the pressure of media coverage of confirmation hearings more now than ever before. Coverage began to rise following the 1929 Senate rules changes, a few decades before nominees started testifying on a regular basis, and nominees did not at first feel direct effects of this coverage; they stood largely in the background as confirmation hearings took place and did not face the direct scrutiny of the media (though they still of course had to be concerned about negative media coverage outside of the hearings). Once nominees began to testify regularly, they faced a different set of circumstances than they had before – it was now their words and behavior (and not just that of senators and the president) being closely watched and critiqued by members of the press. As has been the case with other actors, nominees began to feel the direct pressure of media coverage and knew that covering up any missteps would prove difficult if not impossible. Press coverage has intensified even more since hearings began being televised in 1981, inevitably heightening the pressure on nominees to craft their statements carefully. The advent of the Internet has furthered the dissemination of

nominee testimony; the nearly instantaneous distribution of negative information about nominees can render nominee rebuttals all but useless (Gerhardt 2000, 239).

Further, media investigations of nominees have intensified in recent history, with members of the press seemingly on a vigilant hunt for negative or potentially damaging information about a nominee's professional or private life. From the moment their names are announced, nominees are placed under a media microscope; not only must they watch what they say and do from then on, but they also face concerns over a prior indiscretion being revealed or having a past statement seized upon and used against them. Something as simple as a decades old memorandum can come back to haunt a nominee if the media focuses its attention on it and makes it a key issue of the nomination. As a result, many potential nominees have shied away from accepting a nomination, as they simply do not desire to go through the process of being so critically examined by the media.

Additionally, interest groups have wielded a great deal of influence on nominees. While nominees as far back as Stanley Matthews in 1881 were forced to deal with the potential influence of interest group opposition, only recently have nominees had to contend with such a large number and variety of interest groups that are speaking out about their nominations. Further, the scope of interest group involvement has changed, with groups now attempting to exert influence both before and during confirmation hearings. Prior to the start of confirmation hearings, interest groups focus on building intense grassroots campaigns as they seek to mobilize their supporters to become involved, lobby senators and the president, and launch media campaigns for or against nominees.

Interest groups influence upon nominees continues and can intensify once confirmation hearings begin. This is the area where there have been particularly noteworthy changes since

1881; even though interest group involvement in Supreme Court appointments is not a new occurrence, their testimony during confirmation hearings began in 1971. As previously mentioned, more and more interest groups have entered the fray in recent years, putting even more pressure on nominees to defend their positions. Faced with what can be loud, strong opposition to their nominations, nominees have at times been put on the defensive and forced to lobby on their own behalf or seek out others to speak out or testify for them in order to rebut negative interest group messages.

Over time, the evolution in how nominees approach the appointment process can easily be seen. No longer can they afford to be silent players in the background; even if they adopt a passive role, modern nominees face an environment far different than that of even half a century ago, and consequently, their role and behavior bears little resemblance to that of past nominees.

EVOLUTION OF INTEREST GROUPS

Although interest groups have only played a regular role in the appointments process for the past 35 years, they have exerted a considerable amount of influence on almost every actor in the process. From lobbying senators and presidents to testifying for or against nominees to launching extensive media campaigns regarding nominations, interest groups engage in a variety of activities in their attempts to influence who is appointed to the Supreme Court. Though their presence has been most strongly felt since the early 1970s, interest group involvement in Supreme Court nominations began in the late 1800s, and both their ability to impact and their methods of influencing appointments to the Court have morphed considerably in the past 125 years.

Interest groups took an interest in Supreme Court nominations following the Civil War. Extensive political movements grounded in class interests were developing, with laborers,

farmers, and proponents for big business mobilizing and bringing before the Court cases regarding the constitutionality of laws governing business (Maltese 1995, 36-37). As the Court took on more and more of these cases, organized interests turned their eye towards affecting who staffed the Court.

Groups first became involved in Supreme Court nominations in 1881 with the Stanley Matthews nomination, as economic interests had become a key issue following his nomination. His nomination was blocked, and group involvement was considered to have played a role in its defeat (groups were unable, however, to prevent Matthews from being confirmed later that year). Over the next twenty years, interest group participation was infrequent and weak, as economic interests were not at the forefront of these nominations. During the early twentieth century, however, nominations started to center on economic issues again, increasing organized group interest in nominations. Additionally, new groups began to enter the fray and attempting to exert influence upon judicial selection as the Court adopted an economically conservative stance protecting businesses from government regulations from which they rarely diverged. Overall, though, involvement remained scant.

Not only was group involvement during the late nineteenth and early twentieth centuries irregular, but it was also limited in its scope. Interest groups were typically limited to exerting influence on the pre-nomination stage, as Senate rules shut groups and other external players out of the process. In addition to direct lobbying, groups would send petitions and letters to the president trying to influence his choice of nominees. Once the nomination reached the Senate, interest groups had little ability to exert any additional influence.

Interest group participation began to change following the ratification of the Seventeenth Amendment. The direct election of senators by constituents allowed interest groups to start

using electoral retribution as a viable threat against senators. However, it was not until the enactment of the aforementioned 1929 Senate rules changes opening confirmation hearings and floor debates on Supreme Court nominations that more dramatic changes in interest group involvement began to take place. Increased involvement by groups was observed almost immediately following the rules changes as several groups came out in opposition to the Charles Evans Hughes and John J. Parker nominations of 1930. Group participation in the Parker nomination was particularly significant due to the fact that groups testified about a Supreme Court nominee for the first time. Interest groups helped defeat Parker with the threat of electoral retribution but were unable to prevent Hughes from being successfully confirmed. Though interest groups participation was active in the nominations after Parker, they did not testify on a frequent basis for a number of years. Between the 1930 Parker nomination and the Clement Haynsworth nomination in 1969, interest groups testified in 11 of the 28 Supreme Court confirmation hearings that took place during that time (Maltese 1995, 90). When group testimony did take place, most hearings garnered only a handful of groups.

However, dramatic changes began to take place with the Haynsworth nomination. To begin with, interest group involvement from this point on was consistent. Additionally, the number of groups that testified in Haynesworth's confirmation hearings had increased dramatically from years past, from two groups during the Parker nomination to 12 during the Haynesworth nomination, with numerous others submitting written statements. Not only did the total number of groups testifying rise, but the variety of interest groups who participated increased as well. As a result, it has been said that the Haynsworth proceeding is the first modern one, and proceedings since then have only gotten more contentious, lengthy, and filled with interest group involvement (Maltese 1995, 87).

Nowadays, interest group involvement is routine, and their influence is widespread. Senators face intense lobbying and signal-sending by groups, as well as threats of electoral retribution. Presidents deal with similar lobbying efforts and signaling, as well as attempts by groups to create images of nominees that are contradictory to the ones they crafted. Nominees are subjected to more intense group activity both for and against their nominations (as well as increased numbers of groups speaking out) than ever before, and their confirmation hearings have become increasingly clogged with group testimony. The media is deluged by countless interest group media and ad campaigns, and the public has been subject to increasingly intense efforts by groups to affect their opinions and educate them about areas of group concern.

The types of activities groups engage in have undergone changes as well. No longer do groups limit themselves to written appeals to or direct lobbying of the Senate and the president as they did in earlier days. During the nomination process, groups attempt to affect the standards by which presidents select nominees, suggest potential nominees to the president, screening candidates that the president is considering, perform extensive research on the nominee, and try to determine what kinds of questions will be presented to the nominee by the Senate (Davis 2005, 111). Throughout both the nomination and confirmation process, interest groups use focus groups to craft their messages; conduct public opinion polls to direct where to make their appeals; create television, radio, and print ads to voice their views on nominees; hold press conferences; write op-ed columns; create images of nominees that they forward to the press; send out questions and information about nominees to members of the media; mobilize their members to contact senators; and present or sponsor public appearances or events (Gerhardt 2000, 218; Davis 2005, 146; Maltese 1995, 89, 91).

In addition to increases in the scope of their influence and the types of activities they engage in, interest groups are participating in greater numbers than before. For example, over 300 groups came out in opposition to Robert Bork's nomination, and 43 groups testified in the Clarence Thomas confirmation hearings (Maltese 1995, 91, 137). Even in less controversial nominations, such as the Stephen Breyer nomination in 1994, numerous groups appear to testify. Confirmation hearings now stretch out for several days and transcripts have lengthened considerably as a result. The variety of interest groups participating in the appointments process has also risen; whereas interest groups of the late nineteenth and early twentieth century were formed mainly around economic interests, current judicial appointments face activism from feminist groups, environmental groups, business interests, pro-choice and pro-life groups, and civil rights groups, to name a few.

It is clear that interest group participation in Supreme Court appointments process has undergone a substantial evolution in the past 125 years. Part of this evolution is due to interest groups themselves seizing opportunities to exert power when they have been given the chance, and there is little doubt that their own hard work and determination has helped groups find the tools that work best for them in influencing the process. However, a great deal of the evolution has resulted from the influence of other actors.

Perhaps the most notable effects on group participation are from the Senate. The key influence that the Senate has had on group involvement has been the ratification of the Seventeenth Amendment and the enactment of the 1929 rules changes opening floor debates and confirmation hearings. Once the Seventeenth Amendment was enacted, groups were given a powerful tool to use on senators to persuade them to vote their way – electoral revenge. By employing the threat against senators of punishment by their constituents, groups were able to in

a sense use the amendment against them. The implications of the 1929 rules changes have already been discussed, and the resulting increase in interest group activity following the changes has been evidenced. Suffice it to say that had the Senate kept proceedings closed, interest group involvement may well have remained limited and irregular.

Evolutions in judicial power have also played a significant role in affecting interest group involvement and influence. Beginning with the Warren Court, the judiciary started tackling a wide variety of policy issues. As a result, more and more types of interest groups began participating in the appointment process, as their interests were being touched upon in Court decisions in ways they never had been in the past. Additionally, during the Warren era, the Court turned itself into a powerful force in determining how policy was formed. This shift in power caused interest groups to take an even more active concern in who staffed the Court. Post-Warren Court nominations "command the attention of a wide range of interests, provoke sophisticated campaigns to mobilize grass roots support, and trigger the expenditure of substantial sums of private money in the effort to sway public opinion" (Silverstein 1994, 71). Had the Court's power and scope of influence not shifted so appreciably, interest group involvement in the process may not have evolved and grown as much as it has.

The president has also exerted an appreciable amount of influence on interest groups, namely through the creation of the Office of the Public Liaison. As has been mentioned, the office was created by President Nixon in 1970 in order for presidents to activate interest group support for the president's policies (and judicial nominees). The office works to not only mobilize support through direct mailings and phone calls, but to also take note of interest groups' concerns and to be their representative of sorts in different areas of government (Maltese 1995, 136-138). Interest groups are aware that supporting the president in such a way can earn them

influence later on, so they can be amenable to president's requests for help in garnering support for judicial nominees, especially those groups who are known to support the same causes and values that the president does.

The media has affected interest group involvement as well, mainly by offering valuable resources that groups can use. As media coverage of appointments rose, interest groups realized that using the media to disseminate their agenda to senators, the President, and the public would be quite advantageous. Modern groups frequently employ ad campaigns and media blitzes as part of their overall plan to affect who sits on the Court. They also release public statements, send reporters questions and information packets about nominees, and hold press conferences to voice their opinions and educate other actors regarding their areas of concern. Televised confirmation hearings provide an additional avenue of influence for interest groups, as groups use confirmation hearing testimony to not only go on record regarding their opinions on a nominee, but to also have a venue to broadcast their agendas. The rise in the number of interest groups testifying in the past twenty years is undeniable, and media coverage of the hearings may well be one of the reasons why more groups are testifying. Had the media not taken on such an important role themselves in both covering and participating in the Supreme Court appointment process, interest groups would lack one of the most powerful tools in their arsenal.

Finally, the public has come to play a role in influence interest group involvement in judicial appointments. Interest groups have come to realize that public opinion matters greatly, and they have altered their behavior and activities in order to influence public opinion in their favor. For example, groups now use public opinion polls and focus groups to ascertain how and where to target their public appeals. They also use public statements, public appearances, and radio, print, and television ads to sway public opinion.

Additionally, the public influences groups by using them as an intermediary to let senators and the President know their thoughts on nominations. As their interest in who staffs the Court has increased, the public has frequently turned to interest groups as a method of exerting influence on the process, as they realize the power that interest groups possess and are aware of the many means they use to exert that power to achieve their goals.

Groups have come a long way from the days when participation was irregular, involvement was limited largely to the nominating process, and methods of influence rudimentary at best. As has been evidenced, groups are now involved in nearly every stage of the nomination and confirmation processes, have developed finely honed, tried-and-true techniques of persuasion they can use on nearly every major actor, and are now considered by most to be a legitimate player in the process. Given how markedly interest group involvement in current nomination and confirmation proceedings differs from appointments of just 30 years ago, it is likely that group participation and influence will continue to grow with successive nominations to the Court.

EVOLUTION OF THE MEDIA

Another player in the appointments process that has undergone a dramatic evolution in the past century has been the media. Once a figure that stood largely on the sidelines forwarding limited information, the press has become a formidable force that is not only frequently employed by a variety of actors, but also one that has come to exert a considerable amount of influence on its own.

Prior to the twentieth century, media influence on the Supreme Court appointments process was limited. Newspapers and, to a lesser degree, pamphlets, letters, magazines, and discussions among prominent citizens and civic organizations helped expose certain parts of the

appointments process (Gerhardt 2000, 236). Nominee evaluations were supplied mostly "by a politically polarized press and intimate correspondence among influential figures in legal and political circles" (Gerhardt 2000, 72). The lack of coverage was for the most part due to Senate rules preventing access to confirmation debates. With the rules changes of 1929, media coverage began to increase almost immediately. In addition, news coverage expanded due to the development and growth of media outlets, such as radio, magazines and newspapers, network television, cable news, and the Internet (Gerhardt 2000, 72). Each stage of the process is covered extensively through each of these outlets; as a result, the appointments process faces more public scrutiny than ever before.

The media nowadays plays three distinct roles in the appointments process. The first is that of participant, and through the years the media has found a number of ways to attempt to affect the events they cover. To begin with, the media attempts to influence the nomination phase by leaking the president's list of potential nominees, allowing the names to become objects of debate by media pundits or political opponents of the president. Additionally, the media has attempted to manipulate the names on a president's short list by reporting objections to or possible problems with particular nominees. The media has also tried to participate in the appointments process by publicly scrutinizing nominees. Finally, the media helps generate, then cover, media-oriented events (Davis 2005, 112-117).

The second role the modern press possesses is that of educator. "Throughout U.S. history, the media have prided themselves on their efforts to inform or enlighten the American public about public affairs," says Gerhardt. "Indeed, no single organization has done more than the media to inform the general public about various episodes, events, and developments in the federal appointments process" (Gerhardt 2000, 235). As mentioned, the development of new

media outlets such as radio and television and the growth of the newspaper and magazine industries, along with the opening of confirmation hearings by the Senate, have allowed the media to figure prominently in educating the public about every stage of the appointments process. The Internet in particular has allowed the media to expand its educative function, distributing more data and reaching more citizens than ever before. Nowadays, large amounts of information is disseminated about most (if not all) stages of the appointments process, the public has the ability to network with lawmakers in ways never before seen, and the information available to the public is not filtered, allowing citizens themselves to form opinions without being influenced by any opinions offered by the media (Gerhardt 2000, 236-237).

Finally, the media plays the role of ombudsman. This role of uncovering abuses of power is one that the media has adopted on its own, and there have been several instances over the years when the media, acting as ombudsman, has uncovered important (and potentially damaging) information about nominees or appointment proceedings in general, such as when a member of the press reported the day before Hugo Black's nomination was to be considered by the Senate that Black had been a member of the Ku Klux Klan. It is believed that this task will be strengthened or even superseded by the Internet, which has over the years become its own medium for dispersing unfavorable information about the government (Gerhardt 2000, 248).

Several actors have had a hand in the media's evolution in the appointments process. To begin with, the Senate has affected media coverage to a great extent through rules changes. The overriding reason for limited coverage throughout the nineteenth and early twentieth century was Senate rules preventing access to confirmation deliberations. It was not simply that information technologies were lacking; reporters simply were not allowed to access the process, and any coverage that did emerge was politicized and editorialized. Once rules changes in 1929 opened

floor debates and confirmation hearings, members of the media were able to gain access and increase coverage far beyond the sparse, largely partisan evaluations of old. The previously discussed advent of new information technologies (and the growth of older methods of media coverage such as magazines and newspapers) accentuated these rules changes. The Senate added to the media's influence when they decided in 1981 to allow confirmation hearings to be televised. With the introduction of television cameras into the hearings, the media could analyze proceedings in even greater depth and provide unprecedented access to and dissemination of information about confirmation hearings to the public, thereby enhancing their role as both educator and participant.

Additionally, senators began more and more frequently to use the press to take public stands on nominees, especially following the passage of the Seventeenth Amendment. Senators, who had previously not given great thought to judicial nominations, started to speak out about their views on nominees, knowing that their constituents were at home watching to see what their positions would be. After evaluating how their constituents feel about a nominee, senators make sure to issue numerous public statements about the nominee that reflects their constituents' viewpoints in the hopes of preventing any sort of electoral retribution. Senators' concerns are not limited to their constituents, however, especially in recent years. As has been explained previously, modern senators seek to achieve national prominence in order to further their influence and power in the Senate. To gain such prominence, a senator needs to be seen as a "highly visible, and quotable, generalist" who possesses knowledge on a wide range of policy issues (Silverstein 1994, 146). As a result, senators frequently use the media to establish a public voice on a variety of policy questions, especially judicial nominations. Their hope is that putting forth their opinions will garner some amount of national exposure and in turn will aid them not

only in accruing power and influence, but also attracting out-of-state contributions to fund increasingly costly re-election campaigns (Silverstein 1994, 146-147). As a result of these evolutions in senators' tendencies to speak out regarding judicial nominees, the media's coverage has been altered and its influence has been augmented.

The president has exerted a considerable amount of influence on the media's role in the appointments process as well. To begin with, presidents have employed the media to float trial balloons with the names of potential nominees by interest groups and senators to elicit their reactions. This allows the president to gauge senatorial, interest group, and public opinion before the administration binds itself to a particular nominee. By using the media in this way, the president has given them the new function of aiding in the creation of his short list (Davis 2005, 116).

One of the most significant influences on media behavior was the decision by presidents to begin speaking out for their nominees. Over the years, presidents have increased the number of public statements they have made about nominees, evidencing their desire to speak out as much as they need to in order to ensure their nominee's success. The president also utilizes the media heavily in image building. Once presidents have crafted a symbolic story for their nominees complete with easily identifiable themes that the public and interest groups can relate to, they quickly forward the story to the press so that senators, groups, and the public can become familiar with the nominee (or at least with the positive aspects of the nominee that the president wants to emphasize). Though interest groups also try to release images about nominees, the president carries definite advantages in that he is guaranteed press coverage and his views are typically presented to the public and the press first (Davis 2005, 142). By serving as a conduit in

the president's efforts to speak out regarding their nominations, the press has no doubt added to their power in influencing judicial appointments.

The judiciary has also influenced the media's role in judicial appointments. The previously discussed shifts in judicial power made Supreme Court appointments more critical to several actors in the process; as the importance of Court appointments to these actors has increased, so has the contentiousness of the appointments process. This has made appointments to the Court interesting, newsworthy events that the press has been more than eager to cover and to influence. Had the judiciary not increased its power as an institution and influence over policy formation so greatly during the past 40 years, vacancies on the Court may not be nearly as consequential as they currently are, nor would they garner as much interest from the actors involved the process or elicit as much of a battle over who is appointed to the open seat. Consequently, appointments would not be nearly as interesting of a topic for reporters to cover, and the media would play a more reduced role in the appointments process.

Interest groups have affected the media's evolution in their treatment of Supreme Court appointments as well. Much of their influence on the media is due to their use of it as a conduit to reach the public, the Senate, and the president. Interest group desires to shift public opinion in their favor, mobilize supporters, influence senators' votes, and shape the president's short list have led groups use the media extensively as part of their overall campaign to influence who sits on the Court.

Not only do groups influence the media's role by using them as an intermediary to reach their intended audience, but they also affect it through attempts to influence news coverage itself. By releasing informational packets and questions to members of the press, groups hope that the information will aid the media in its investigative reporting and influence the content of news

reports. Groups also try to pressure newspapers into printing op-ed columns that voice their views on nominees. Once printed, groups package these op-ed columns and distribute them to other media outlets in an effort to prove that the media supports their position (Davis 2005, 146). Interest groups find the media particularly useful when they want to disseminate an image of a nominee (one that can run contrary to the one created by the president). Though they do not possess the advantages the president has in image building, they nonetheless put a great deal of time and effort into feeding the media their portrayal of the nominee. While it is true that interest groups have to rely on the press to accept and disperse their messages, the press is also dependent upon interest groups to both provide them with important information and to further enhance their roles in the process.

The public has also shaped the media's treatment of judicial appointments. As public interest in Supreme Court appointments has increased, so has media coverage of them. The public has come to realize through the years how critical judicial appointments can be, and as a result, public desire for knowledge about nominees, as well as about the appointments process in general, has risen. The media has become aware of increased public interest and has responded by increasing coverage exponentially. Even those nominations that are less controversial garner considerable amounts of coverage.

The public's desire for more information has not only caused the media to increase its coverage but has also led them to alter and expand the means by which the public can access information about judicial appointments. For example, the press has turned more and more frequently to the Internet to educate the public in its attempt to disseminate as much information as possible to as many people as possible. Technological advances have, of course, had a lot to do with increased media coverage and the expansion of access to information, as has the desire

by members of the media to strengthen its roles as educator and participant in the process. Still, it is hard to imagine that coverage would be as extensive or as prominent as it is now if public interest were not so high.

Increases in and evolutions of media coverage have been said to have several consequences, some beneficial and some negative. Some applaud the growth in media coverage and influence on the process, stating that the public is better informed, the Senate and the president are more accountable, interest groups are better able to spread their messages and gain influence, and the process in general benefits from being more visible. Others decry the media's roles in the process, arguing that extensive media coverage has resulted in a rise in leaks and misinformation distributed to the public, an increased likelihood that the president will either act too quickly or deliberate too much due to media pressure and will select a weak nominee, and a far too intense focus on revealing controversies or scandals in nominations in order to make appointments into newsworthy events. In the end, what can be said with some certainty is that the growth of information technologies, coupled with other social, political, and historical occurrences, has helped generate "a complex set of internal and external pressures that presidents, senators, and others routinely involved in the federal appointments process must cultivate or master to achieve their desired outcomes" (Gerhardt 2000, 74).

EVOLUTION OF THE PUBLIC

Prior to the twentieth century, the public exerted little if any influence on the appointments process. Most members of the general public (with the exception of elites) possessed little information about the appointments process or nominees to the Court. The scarcity of media coverage, along with Senate rules keeping confirmation proceedings behind closed doors, left the public out of the loop. Further, even if members of the public were

informed enough to want to wield influence, there were few venues for them to become involved. Interest group involvement and power was not substantial, public opinion polls regarding nominations were not prevalent, and senators, beholden to state legislators prior to the adoption of the Seventeenth Amendment, rarely sought to ascertain their constituents' opinions regarding nominations (if in fact opinions on appointments were crystallized at all). Citizens could write letters to their senators or pay them visits, but such attempts made little real difference in the process.

Following the ratification of the Seventeenth Amendment, the public began participating in the appointments process in several ways. To begin with, citizens increasingly contacted their senators to express their views on judicial nominees. During the first half of the twentieth century, they usually wrote letters, sent telegraphs, submitted petitions, and made phone calls; more recently, they have taken to e-mailing and faxing senators. These attempts have been far more numerous and successful than they were prior to the Seventeenth Amendment's enactment, with modern senators instructing their staff to keep track of constituent communications for and against certain nominees (Gerhardt 2000, 213).

The public also influences the appointments process through polling data. Both presidents and senators throughout the past thirty years have routinely employed professional polling organizations to ascertain public opinion on a wide variety of issues, including judicial appointments (Gerhardt 2000, 214). Though there has been some controversy over the years regarding the use of polls by presidents and senators to make such important decisions as judicial nominations and confirmations, these actors have not hesitated in continuing to use this tool to tap into public attitudes about particular nominees. Further, during the 1930s, scientific public opinion polling arrived, and public opinion on a wide variety of policy issues was tapped

(although polls about Supreme Court nominees were infrequently conducted until the 1980s). The Bork nomination was the first to employ widespread poll use, and now, polls about Supreme Court nominees are commonplace (Davis 2005, 122).

Public opinion is said to perform several roles in the appointments process. To begin with, public opinion can be used to tilt the balance of power in high-profile, contentious nominations. Additionally, public opinion can help politicize the nomination process and push actors in the process to act differently than they would have if public opinion was not a necessity in securing victory. Further, public opinion personalizes the process, as certain features of the appointments process encourage a role by the public. For example, the appointments process requires only that the public assess a single individual and come up with a yes-or-no decision, as opposed to policy proposals that necessitate a study of bills or policy papers. Finally, public opinion symbolizes the process. Interest groups and the White House, among others, create themes and symbols to characterize appointments in order to appeal to the public in a way that they can understand and respond to (Davis 2005, 123-127).

Further, the public can use intermediaries such as interest groups to participate in the appointments process. It is no secret that interest groups have carefully developed the techniques necessary to affect the process, such as garnering attention from the media and sending signals insinuating the costs of noncompliance to senators and presidents when selecting and confirming nominees. The public is also likely aware of how important their opinions are to interest groups, given the amount of resources that groups expend attempting to shift public opinion in their favor. Thus, citizens know that they can go to interest groups to gain access and influence, since interest groups desire their help and have successful track records in shaping the outcomes of

judicial appointments. This reciprocal relationship seems to serve both parties well, especially the public (given the lack of resources and influence it possesses in comparison to groups).

Numerous actors have influenced the public's role in the appointments process. First, the Senate, through its rules changes, has shaped public participation and interest in judicial appointments. The Seventeenth Amendment, as has been discussed at length, altered how senators behaved towards their constituents in a dramatic fashion. Suddenly, public opinion mattered a great deal, and letters and phone calls from constituents about nominations – once marginalized in favor of the views of the state legislatures that elected them – became of considerable interest to senators. The Seventeenth Amendment empowered the public in a way that they had not previously experienced. The public now had the threat of electoral payback on their side and thus possessed one of the most important tools they would ever be given in participating in the judicial appointments process.

The other changes of great import were the rules changes that occurred in 1929 opening floor debates on nominations to the Court to the public and the decision by the Senate Judiciary Committee shortly thereafter to open confirmation hearings to the public. The opening of hearings and floor debates allowed the public further access to and understanding of the confirmation process, particularly once media coverage of hearings and interest group participation in the process increased.

Other Senate changes in confirmation hearings also affected the evolution of the public's role in the judicial appointments process. The Senate's decision to require nominees to testify during confirmation hearings was of some consequence to the public. Once nominee testimony became commonplace, it became easier for the public to get to know (and judge) nominees for themselves instead of relying on the testimony of nominee's intermediaries or the images

forwarded by the president or interest groups. Additionally, the Senate's decision in 1981 to allow hearings to be televised was momentous in terms of enhancing the public's access to, interest in, and knowledge about the process and nominees. Members of the public could watch the hearings for themselves, or they could become informed via the plethora of media coverage and analysis that stemmed from the televising of hearings. Overall, these changes by the Senate to judicial confirmation hearings have given the public a good deal more understanding of and interest in the judicial appointments and has pushed some to become more involved in the process.

Increases in power and influence in the judiciary have affected public participation and interest in the appointments process in much the same way that they have with interest groups and the media. As has been mentioned, most members of the public have increasingly seen issues in which they have a vested interest or values they hold being addressed by the Court following the shift in power. "Decisions of the Court have an impact on individuals' social relationships, business decisions, religious activity, and political roles," asserts Davis (2005, 125). As such, the public is now more concerned about the men and women who decide these cases than they were previously. Further, the Court's behavior beginning with the Warren Court made the public aware that whoever staffed the Court would play an important role in policy formation, rivaling the executive and the legislature. It makes sense, then, for public interest in the process and in nominees to have been affected substantially by changes in the scope and power of the judiciary.

The president has also exerted considerable influence on how the public treats judicial nominations, namely due to his intense focus on garnering public approval of his nominees. As has been noted, presidents know that public interest in nominations has increased markedly

following the aforementioned Senate rules changes and increased media coverage of the appointments process; further, they are aware that acting against public opinion can impose heavy electoral costs, while shifting public opinion in their favor can give them a great deal of influence and power. Throughout the process, the public is thus bombarded by attempts by the president to gain their support. By using image building, presidents hope to sell nominees to the public as symbols for particular values and groups.

Further, presidents use public statements to target citizens throughout the process. These statements have become more and more numerous throughout the past twenty-five years, especially in controversial nominations. Whereas presidents prior to the 1980s, seemingly content to let intermediaries speak out for them, largely refrained from making such statements and appeals, modern day presidents routinely tout their nominees' professional and personal merits and offer strong rebuttals to interest group attacks in hopes of increasing their nominees' levels of public support.

Finally, the president also targets the public by issuing appeals and messages through the Office of Communications. Members of the office appear on television, send out fact sheets on nominees to newspapers, write op-ed columns, and send letters to newspaper and magazine editors about nominees to be published in their letters-to-the-editor sections in order to influence public opinion of the nominee (Maltese 1995, 129). Given the time and resources the president expends on selling nominees to the public and attempting to gain their approval, the president has legitimized the public's role in influencing judicial appointments to a considerable degree.

Interest groups have also expended a great deal of time and money in their attempts to mold public opinion and have in turn had a significant bearing on the evolution of the public's role in judicial appointments. Interest groups, aware of the weight that public opinion carries,

and consequently, they strongly desire to control how the public perceives the key issues of particular confirmation battles. As mentioned previously, groups target the public with their appeals by presenting or sponsoring public appearances and events, creating television, radio, and print ads to educate the public about nominees, writing op-ed columns, holding press conferences, and engaging in their own form of image-building that they send to the press to counteract the image put forth by the president. By involving the public in their efforts to further their agenda regarding judicial appointments, groups are not only shaping the issues in a framework that encourages a public role but are also acknowledging its increasingly important role in the process.

In addition, groups influence how the public participates in the appointments process by providing them with a powerful source of influence. By using groups as intermediaries, the public can not only reach presidents and senators more easily, but with greater impact. "It stands to reason that interest groups with their greater resources are in a much better position than private citizens to mobilize support for or against nominees and to be heard, particularly at critical moments, in the federal appointments process," states Gerhardt. "Consequently, an effective option for individual citizens who intensely want to be heard on some issue(s) is to align themselves with an organize group whose position on the issue(s) in question most closely approximates their own" (Gerhardt 2000, 219).

Finally, the media has affected how the public acts towards judicial appointments appreciably. To begin with, the media uses its role to bring unprecedented amounts of information to the public, educating them more thoroughly than ever before. Senate rules changes not only opened the door to confirmation proceedings to the public, but also to the media, who quickly began expanding the amount of coverage as well as the means by which they

were covering judicial appointments. With growth in the newspaper and magazine industries and the arrival of radio, television, and the Internet, the media became increasingly capable of providing copious amounts of information to the public, available through a wide range of sources. The boom of cable news networks and the Internet have been particularly influential on the public in terms of receiving information about Supreme Court appointments. Interested citizens can tune in to a variety of cable news networks at any hour of the day to catch up with the goings-on in the nomination or confirmation process, and through the Internet, they can retrieve abundant amounts of unfiltered information from a wide assortment of web sites. The public is now undoubtedly more informed about the process in general and nominees in particular than they ever have been as a result (or, at the very least, they have far more information at their disposal should they want to access it).

Increases in media coverage have also caused the public nature of the process to increase, creating an atmosphere that encourages public involvement. When an event such as Supreme Court appointments attains a higher profile in public discourse, the mass public becomes increasingly involved (Davis 2005, 102). For example, during the Bork and Thomas nominations, the public – inundated with media coverage – formed strong opinions and joined in the fierce debates surrounding the nominations. It is evident, then, that the media's increase in coverage of judicial appointments has not only educated the public far more than in the past but has also spurred public participation in Supreme Court appointments in a whole new way.

Though the public does not possess an official decision-making role in the appointments process, public opinion "is the largely silent factor that hangs over the heads of elites in the judicial selection process," and "the salience of the public's opinion about the confirmation of a Supreme Court nominee is no longer seriously questioned" (Davis 2005, 121, 123).

EVOLUTION OF NATIONAL PARTIES

Though parties are not formal actors in the appointments process, the changes that have occurred over the years dealing with the rise and partial decline of national parties, along with the fragmentation of governing coalitions during the twentieth century and the phenomenon of polarized politics that has become commonplace, have influenced the appointments process and should be discussed.

One of the most influential factors on the federal appointments process in general (and Supreme Court appointments specifically) has been the rise, then partial decline of national parties. "The rise of national political parties coincided with – and, indeed, helped to shape fundamentally – presidents' and senators' conceptions and exercises of their prerogatives regarding appointments," notes Gerhardt (2000, 50). Throughout the nineteenth century, parties controlled the decisional framework of both presidents and senators in many ways, including in the selection and confirmation of Supreme Court nominees. As such, presidents throughout the nineteenth century for the most part selected nominees of their own party. Just three of the 58 Supreme Court justices appointed during the nineteenth century belonged to a different political party than did the appointing president (Gerhardt 2000, 55-56). Additionally, senators routinely rejected nominations based on a nominee's party, with John Rutledge providing a particularly strong example of when a nominee's devotion to his party caused the Senate to defeat his nomination (Gerhardt 2000, 51).

Though parties played a critical function in motivating Senate behavior during the majority of the nineteenth century, the influence of national parties began to decline during the twentieth century. For the most part, the Senate during the twentieth century has been incapable of maintaining opposition to presidents' nominees to the Court in a similar fashion to the way

they did during the nineteenth century. The only instances where the Senate came close were the rejection of two of President Nixon's nominees in a row before finally accepting the third and the back-to-back Bork rejection and Ginsburg withdrawal before Kennedy's nomination was confirmed. A simultaneous decline in party influence occurred in presidential nominations. During the twentieth century, eight presidents have made a total of 11 Supreme Court nominations that were not members of their party (Gerhardt 2000, 58-59).

As the control of national parties over Supreme Court appointments has decreased, other factors, such as factional interests, special interests, and personal allegiances, have increasingly become more important. Though parties are not as influential as they once were, partisanship still plays a fundamental role in the appointments process, with presidents and senators examining other factors such as include insight about a nominee from close advisers, articles a nominee has written or speeches he or she has given, a nominee's professional record, and the interest groups a nominee has supported to ascertain whether or not a nominee agrees with their political viewpoints (Gerhardt 2000, 59). Despite the weakening of national party influence, the majority of twentieth century presidents' federal appointments (at least 82 percent) are of the same party as the president, proving that national parties, while in decline, are still a powerful factor in competing for control of federal appointments. "Next to close personal association with the president or others to whom he feels indebted, significant stature in the president's political party has been a consistent feature of nominees for most federal appointments," Gerhardt states (Gerhardt 2000, 60).

Not only has there been a partial decline in the influence of national parties, but governing coalitions during the twentieth century have undergone noteworthy evolutions. The fracturing of these governing coalitions is said to have had an appreciable impact on judicial

appointments because "without a stable governing coalition, policy-making by the judiciary becomes a more pronounced feature of American politics, producing substantial conflict over the staffing of the federal courts" (Silverstein 1994, 8). Evolutions in both the Democratic and Republican parties throughout the mid- to late-twentieth century have not only brought the parties to where they are today but have also significantly influenced how judicial nominations are treated.

From the New Deal era to the presidential election of 1968, the Democratic party was the prevailing political force, strongly shaping national political life. The party's focus was upon building a powerful centralized government, and judicial nominations during this period "excited only minimal investigation and public interest" (Silverstein 1994, 76). Nominees were routinely confirmed; for the most part, little opposition was raised, as the Court during this time avoided interfering in the policy areas that were most important to the coalition (Silverstein 1994, 80).

Problems began to occur due to increasing issues with race. Beginning in the 1960s, the Democratic party became increasingly reliant on the black vote to win presidential elections and Democrats became champions of civil rights legislation to court these voters. Democrats succeeded in attracting blacks to the party, but also generated a backlash among white voters, especially in the South. White flight from the Democratic party was exacerbated as the civil rights movement spread from the South to the North during the 1960s, driving away the vote of the white working class (Silverstein 1994, 81). Though economic changes, social changes, and a shift in the political landscape also caused declining votes for the Democratic party, the loss of white southerners and white working class members – two key voting blocs for the New Deal coalition – contributed significantly to the beginning of the coalition's downfall.

By the late 1960s, a divide had developed in the Democratic party between New Deal Democrats and a new faction of the party, who had participated heavily in the civil rights and anti-war movements and were intent on shifting the attention of the party towards serving a growing suburban middle class. Further, the issues which had brought the New Deal coalition together – namely the development and expansion of the welfare state – began to diminish in importance and were replaced by the war in Vietnam, race relations, and crime – issues over which the New Deal coalition found themselves at odds (Silverstein 1994, 85). The loss of Democratic nominee Hubert Humphrey in the presidential election of 1968, along with the debacle that was the Chicago national convention, furthered the governing coalition's downfall considerably by strengthening calls for reform in how the party selected its candidates. Prior to the 1972 convention, new guidelines were adopted which altered the demographic representation at the convention and evidenced the strength of the new generation of Democrats – the New Progressives (Silverstein 1994, 83).

New Progressives differed from their old-line predecessors to a noteworthy extent. To begin with, they were more liberal than members of the New Deal coalition, especially when it came to cultural and social issues. Additionally, New Progressives gave considerably less importance to unity within the party, instead basing their political activities on their ideological agendas and policy preferences. With the McGovern presidential nomination in 1972, it became evident that the New Progressives were a force to be reckoned with within the party, though Nixon's landslide victory over McGovern signaled that the new coalition had not done a successfully attracted a wide-ranging national vote (Silverstein 1994, 85-86).

Throughout the following twenty years, the party continued to be plagued by an identity crisis. The New Progressives still directed the party line, but electoral success was dependent

upon the vote of working-class, socially conservative voters, a group tied to the New Deal coalition that New Progressives had largely ignored. Consequently, electoral success was elusive. "In effect, from 1968 through the election of Bill Clinton in 1992, the Democratic party was a political party at war with itself," notes Silverstein (Silverstein 1994, 87).

Though the Democratic party suffered continuous losses in presidential elections after 1968, they had a stronghold on Congress, thus creating an environment ripe for conflict between the executive and legislative branches that made control of the judiciary quite important. Given the lack of power party leadership possessed, New Progressives found the judiciary to be a worthwhile avenue for pushing their progressive goals and securing their agendas, and they found success throughout the 1970s in furthering their goals largely due to Court decisions in their favor; thus, what they lacked in electoral success they made up for in victories before the Court (Silverstein 1994, 88). Even when Democrats won the White House in 1976, President Carter was unable to unite the factions within the party and prevent them from pursuing whatever avenues they wanted to achieve their disparate goals (Silverstein 1994, 90).

When Democrats lost both the White House and control of Congress in 1980, it proved to be the death knell to the New Deal coalition. Reagan's economic policies prevented Democratic party dominance and increased conflict among the factions within party. Reagan's ascent and the Democrats' loss of the Senate also led New Progressives to focus on judicial appointments even more, pushing them to use sympathetic liberal interest groups to investigate Reagan's judicial appointments and to mobilize grassroots campaigns against them (Silverstein 1994, 92-93). By the time Reagan's first term was up, the factions within the Democratic party had successfully modified their techniques and policy goals to deal with Republican control of the presidency, and New Progressives "made an activist judiciary an indispensable ally in

formulating and securing their policy agenda" while successfully using the resources and influence of a variety of middle- and upper-middle-class interests (in concert with the long-established influence of civil rights groups) to affect judicial nominations (Silverstein 1994, 95-96).

The influence of New Progressives on the judiciary underwent few changes during the George H.W. Bush administration. The loss of the 1988 presidential election by Dukakis, combined with the conflict inherent in divided government, continued to make control of the judiciary salient to Democrats. Their influence is evident in the nomination of David Souter, which is said to perfectly evidence the nature of judicial nominations and confirmations during that time. The Bush administration, unwilling to go through a confirmation battle akin to that faced by Bork and acutely aware of how influential New Progressives had become in influencing judicial appointments, chose Souter due to his ability to be a "stealth nominee" that would hopefully please conservatives while presenting few, if any, points of attack for New Progressives and the civil rights community (Silverstein 1994, 98). Bush continued this strategy when he was presented with his second Supreme Court vacancy.

Bush's behavior towards Supreme Court nominee selection evidences a turning point in how modern presidents handle Supreme Court appointments. No longer could presidents presume success in making Supreme Court nominations; instead, "the constellation of political and legal forces at work in the nation virtually guarantees a potentially powerful opposition in response to any nomination, and thus the modern president is compelled to seek out nominees who present characteristics certain to forestall, or at least minimize, this opposition" (Silverstein 1994, 100). President Clinton faced these difficulties with the Ruth Bader Ginsburg and Stephen Breyer nominations (mostly during the selection process, as both New Progressives and the New

Right were able to come together to produce low-key confirmation hearings for both nominees), and President George W. Bush (as will be evidenced) dealt with his share of difficulties with the Roberts, Miers, and Alito nominations.

There is little doubt that the rise of New Progressives after 1968 contributed at least in part to this volatile environment that modern presidents face (though the rise of the New Right, to be discussed momentarily, has fueled this volatile environment as well). In the end, the disbanding of the Democratic party's governing coalition "altered not only American politics on the grand scale but the process of judicial selection and confirmation as well" (Silverstein 1994, 76).

Developments within the Republican party must also be examined when one is attempting to determine the influence of evolutions in governing coalitions on judicial appointments. Nominations to the Court began taking on greater importance for Republicans after they took control of national elections in 1968 with the election of President Nixon. Republicans sought to forge relationships with sects of voters – such as southern and northern working-class whites and northern and mid-western ethnics – who had abandoned the Democratic party. Further, Nixon and the party desired to transform the party's image from "the party of privilege" to "the party of middle America," and Nixon used sensible economic policies and a conservative social agenda to ensure the transformation (Silverstein 1994, 105-106). These issues successfully united lower-middle-class populists (the "silent majority") with the party, thus creating a new Republican majority (Silverstein 1994, 103, 106).

During his campaign for president in 1968, Nixon looked at the Supreme Court with considerable disdain, repeatedly alleging that the Court was too activist and needed to be populated with judicial restraintists and strict constructionists. Part of Nixon's attempts to tie

together the Republican party and middle class voters (especially white southerners) once in office involved keeping true to his promises to reform the activist Warren Court. Though his first nominee (Burger) was successfully confirmed, his next two nominations (Haynsworth and Carswell) were rejected. The defeats "signaled a dramatic change in the politics of judicial confirmation and were pivotal events in the evolution of the modern Republican party," as they furthered attacks on the Warren Court (Silverstein 1994, 109). Specifically, they gave Nixon the opportunity to criticize liberal elites and their staunch defense of the Court's willingness to inflict what he deemed as unwanted social policies on the country. During his term, Nixon used the Court as a scapegoat when he was confronted with divisive policy decisions in an attempt to redirect the dissatisfaction of white southern voters. Further, he painted a picture of the Court as being "the bastion of liberal elitism and the symbol of the retreat from fundamental American values," an image which "became Republican orthodoxy during the Nixon years and a powerful theme in the resurgence of the party" (Silverstein 1994, 109). Though Nixon had faced back-to-back defeats, the administration was nonetheless evidencing its dedication to bringing white southern voters into the Republican party, and the failure of the nominations did not hurt the party's long-term electoral strategy.

By the time Nixon's second term in office began, it was evident that his strategy to attract southern voters to the Republican party was successful. Though the Watergate scandal ruined Nixon's presidency and allowed Jimmy Carter to capture the presidency in 1976, it did not disrupt Republicans' national majority. The party had, however, assumed a different appearance once Reagan began his run for president in 1980. The party shifted from its focus on advancing the social and economic interests of the middle class to altering economic policy to favor the capitalist elite. "In short order, Reagan's ascendancy undercut any hope of a broad-based

Republican economic populism" as the party's focus became "'country club' economic elitism" at the expense of middle- and lower-class laborers (Silverstein 1994, 112).

As Reagan began his ascent to the presidency, the New Right, "a populist revolt against the blue-blood Republican establishment" emphasizing the need to change the party's attention to "'issues that people care about'" (such as abortion, pornography, and prayer in schools) was on the rise after gaining momentum in 1970s (Silverstein 1994, 113). The issues that the New Right wanted to focus on enabled them to connect themselves with ethnics, blue-collar workers, and evangelicals. Beginning with his 1980 campaign for president, Reagan attempted to garner the support of the New Right and bond evangelicals to the Republican party, and he found success by calling for a return to traditional family values. Reagan was able to attract middle-class and lower-class voters back to the party despite his economic policies by using this strategy (Silverstein 1994, 113-115). The coalition that emerged "was anchored, on one end, by lower- and middle-income northern ethnics and white southerners attracted by conservative social policies advocated by Republican candidates and, on the other, by an economic elite generously rewarded by Republican tax and economic policy" (Silverstein 1994, 115).

Thus, Reagan (and later Bush) faced a predicament – he needed to be able to successfully advance the social policies of the New Right without alienating economic elites. As part of his strategy to keep this Republican coalition together, Reagan promised to alter the Court's membership in order to further the administration's conservative, family values goals. The party believed that changing the makeup of the Court with a return to family values would both avoid discord with members of the New Right and would focus the attention of the New Right on federal court appointments instead of on the president's legislative agenda (Silverstein, 102).

Such promises by the administration were, however, largely symbolic for quite some time. Aware of the potentially serious electoral consequences that could occur from pushing the New Right's social policies, and attempting to find some way to tactfully avoid implementing these policies, Reagan used the Court's activist policy decisions in his favor. Reagan argued that he as president did not have the power to affect Supreme Court precedent (which controlled most of the social agenda that the New Right was fighting for), and as long as the decisions of the Court were good law, neither he nor the legislature could exert any control over such issues. Major changes to the Court, he asserted, could be made only when vacancies occurred; until then, the Court's constitutional bar would prevent implementation of New Right social policy changes (Silverstein 1994, 116-117). Further, Reagan urged the solicitor general and government attorneys when appearing before the Court to implore the Court to reverse constitutional precedent; this furthered Reagan's appearance as a staunch advocate of the causes of the New Right (Silverstein 1994, 120). Through his largely symbolic rhetoric and actions, Reagan was able to retain the support of the New Right without upsetting economic elites.

Reagan further secured the support of the New Right by taking seriously the task of staffing lower federal courts with conservative justices. He created a special committee to screen judicial appointments and employ a constant ideological gauge. The committee interviewed nominees using the New Right's agenda as the basis for many of its questions, putting into place what was potentially the most stringent, thorough screening process of judicial nominees in American history (Silverstein 1994, 121). When given the opportunity to make appointments to the Supreme Court, Reagan followed through with his promises to change the ideological makeup of the Court in order to further conservative interests. Though the New Right was not always wholly on board with Reagan's nominations (most especially O'Connor's), Reagan

managed to maintain the support of most of the party while at the same time preventing a groundswell of Democratic opposition (with the exception of Bork, who the New Right strongly supported but the New Progressives found unpalatable).

During the 1988 presidential campaign, George H.W. Bush asserted that Reagan policies would continue to prevail, though he would proceed in a more temperate, cautious manner. Bush intended to carry on Reagan's economic policies while satisfying the New Right by backing their traditional family values agenda, and he wanted to continue Reagan's reshaping of the federal courts via the appointment of conservative judges to maintain the link between the New Right and the Republican party. However, Bush was unable to employ Reagan's strategy of postponing implementation of New Right policies until the Court was restructured because by the time Bush took office, Reagan had already restructured the Court. As a result, the New Right expected that their social policies would finally be advanced by the Court, and more moderate members of the party were fearful of the radical policy changes that could take place as a result of Reagan's appointments. Bush had to deal with a reality that Reagan did not: "a belief on the part of both critical wings of the Republican party that the constitutional constraints on the promotion of a new social agenda would soon be gone" (Silverstein 1994, 123-125).

Throughout his term and especially during the 1992 presidential election, Bush faced difficulties in holding together the Reagan coalition. As a result of pro-choice activism (which gained important support from Republican moderates) following the Court's 1989 decision in *Webster v. Reproductive Health Services*, Republicans suffered numerous losses in the 1989 elections. Additionally, the Court's decision in *Webster*, along with Bush's appointments of Souter and Thomas, increased the expectations of the New Right, who threatened not to participate in the 1992 election should Bush fail to come through on his promises to implement

New Right social policies and make conservative judicial nominations. Conversely, the social moderates and economic elite of the party cautioned that if Bush did not moderate the party's conservative social policies, he would lose crucial votes in key states (Silverstein 1994, 126-127). Ultimately, Bush, who appeared to both sects of the party as being irresolute and lacking in direction, suffered defeat and allowed New Progressives to take hold of the presidency once again in the form of Bill Clinton.

As has been evidenced, the evolutions that both parties have undergone in their governing coalitions during the past half century caused noteworthy changes in the treatment of judicial appointments. A concurrent evolution involving parties that has strongly affected how judicial appointments are treated has been increased party polarization and partisanship. As a result of party realignment during the mid- to late-twentieth century, the modern Senate has become increasingly divided along liberal/Democratic and conservative/Republican lines.

The increase in polarization in the Senate began to occur during the 1960s. Regional realignment was taking place in the South, as conservative southern Democrats switched to the Republican party after New Progressives began taking the Democratic party in a new direction. Around the same time, liberal and moderate Republicans (mostly from the northeast and northwest) were decreasing in number. As a result, the number of moderates and liberals in the Republican party, as well as the number of moderates and conservatives in the Democratic party, had decreased considerably by the 1990s. Accordingly, partisanship and ideology were strongly associated with one another; being conservative meant associating with the Republican party, and being liberal went along being a Democrat (Comiskey 2004, 17).

As the two parties became further and further apart in ideology, voting along strict party lines increased, as did party unity scores in the Senate. In fact, party-line voting increased from

40 percent to around 60 percent from the early 1970s to the late 1990s, reaching a high of 75 percent in 1995 following the Republican takeover of the Senate and the House. Additionally, since 1993, party unity scores have hovered around 90 percent, higher than ever before. "Members of the same party, out of ideological inclination and choice, marched increasingly in lockstep even as they gained the freedom to go their own ways," Comiskey notes (2004, 17).

As has always been the case, contentious votes in the Senate often rest upon the votes of moderates in both parties. Now that the number of moderates in both parties has declined, the votes on contentious matters such as Supreme Court nominations is more likely than ever to fall along strict party lines. The outcome in cases where a close vote is likely hinges on the votes of an increasingly small number of Republican and Democratic moderates (Comiskey, 17). This has of course complicated Supreme Court nominations quite a bit. Nominations to the Court are typically contentious to begin with, due to the numerous actors involved in the process who all desire to shape the outcome. The battlefield environment of judicial appointments has been furthered by party polarization as conflict between the two parties in the Senate over nominees has become more intense over the past forty years. The president also faces difficulty in that he has fewer moderates to work with in order to alter the outcome of close votes; to gain the support of senators on the other side of the aisle, he can only hope to convince them to put partisanship aside and vote based on a nominee's merit. Based on the above-mentioned statistics, however, the odds of a president finding a great deal of success in bringing members of the opposite party into his corner are against him.

CONCLUSION

Davis asserts that the current Supreme Court appointments process "might look unrecognizable" to those who took part in the process some 100 or perhaps even 50 years ago.

He goes on to describe the sedate, more private proceedings during past appointments. "In the past, presidents typically received recommendations from their staff, the legal community, and even sitting justices and then issued a statement to the Senate nominating someone to the Court," he states. "The Senate usually held low-key hearings or even bypassed them to offer swift confirmation. Even when opposition occurred, it was usually elements of the legal community acting privately to oppose the nomination" (Davis 2005, 30).

In contrast, Davis paints a more colorful but complicated picture of current appointments. "Live television coverage of Senate hearings, 'murder boards' in preparation for those hearings, a flood of press releases, television and radio advertisements, and public opinion polls all characterize nominations," he says. "In addition, the president makes the announcement the subject of a major appearance before the press, with the nominee typically standing at the podium, and the president actively lobbies the Senate, the press, and the public to support the nominee" (Davis 2005, 30-31).

It is unquestionable that though the appointment process may seem to have evolved in a way the Founders never intended for it to, there is little chance that the roles adopted by traditional players, as well as those taken by new players, will be reversed. It seems that the current state of affairs of very public and often overtly politicized judicial selection and confirmation is here to stay.

The next chapter will detail past and current literature regarding the appointments process in general and the factors that influence senators' confirmation votes specifically. Following the examination and critique of the literature, three hypotheses will be outlined which will be tested to see if they can account for the difference in confirmation votes between Roberts and Alito. It

is suspected that one hypothesis in particular – the critical nominations hypothesis – holds the key to explaining why Roberts and Alito received such dissimilar confirmation votes.

Chapter Two: The Appointments Process in Modern Scholarly Literature

The Supreme Court appointments process has generated an extensive amount of literature. Some works are historical in nature, with studies of particular nominations to the Court. Danelski (1964) concentrates on the 1922 nomination of Pierce Butler by President Harding and details how politics infused the president's selection of this nominee, attempting to explain the appointment in terms of what he calls "transaction analysis." Abraham (1974) provides a historical overview of the appointments process and constitutional prescriptions for appointments, then examines the first 100 justices confirmed to the Court, focusing on the politics of each appointment as well as how each justice affected the Court. He also discusses why some nominees were selected over others, assesses characteristics of both the nominees and their appointing presidents, and describes why some confirmations to the Court failed (namely, he says, due to opposition to the president). Yalof (1994) describes nominations from Truman to Clinton, paying attention to the nominating process. He first discusses ways in which the selection process has evolved, then outlines the factors that presidents take into consideration when making their selections for the Court and the three decisional frameworks that presidents employ. He goes on to explain the roles those frameworks and factors played in the nominations he examines.

Other works detail the factors that have influenced the confirmation process. Davis (2005) describes how the addition of new actors has furthered the democratization of the appointments process (making judicial appointments quite similar to elections) while at the same time making nominations and confirmations more political and contentious. He discusses the

traditional players in the process and the roles they have customarily played, as well as what has allowed external players to enter the fray. Additionally, he details the roles of external players, the evolution of the behavior of traditional players, and characteristics of the modern appointments process. He concludes that the appointments process has permanently become a public affair and, as such, calls for the implementation of a process (such as directly involving the electorate in the selection of justices) that legitimizes the position of external players.

Silverstein (1994) argues that the evolutions that have taken place over the years in the appointments process must be understood in terms of changing legal and political contexts. He posits that confirmations were drastically transformed beginning in 1968 due to the increased activism of the federal judiciary and the disintegration of governing coalitions. As these changes took place, the Senate shifted from "an insulated and conservative institution in which a handful of senior members dominated the distribution of resources and widely accepted norms constrained behavior" to "a far less stable, more outward-regarding institution" with an increasingly complicated process of obtaining Senate confirmation of a judicial nomination. He concludes that a return to less conflictual and visible hearings is doubtful and imprudent, since public participation in the process of the selection of Supreme Court justices "may be the principle mechanism for ensuring a measure of political accountability" (Silverstein 1994, 164).

Maltese (1995) asserts that the growth of interest group participation, Senate rules changes opening up the confirmation process to the public, increased media and public involvement, increased participation by nominees, and the rise of the institutional presidency have all significantly influenced the confirmation process. He also asserts that partisanship in the appointments process has been commonplace since the very beginning. Maltese's examination reveals that while the process has indeed been politicized since the beginning, it has

become increasingly so during the second half of the twentieth century as more and more actors have become involved and as the stakes in influencing who sits on the bench have become greater.

Gerhardt (2000) examines the historical practices and patterns of the federal appointments process from an institutional context. He discusses the original understanding of the appointments process, describes the structure of the process, and explains the social, historical, and political changes and patterns that have shaped the development of the nomination and confirmation processes. He also studies each actor in the process, outlining the history of their influence, the behavioral patterns and procedures that have developed over time, and the current roles they play.

Still other works further arguments regarding how political and ideological factors infuse the selection and confirmation processes. O'Brien (1988) makes several observations about the characteristics of the appointments process, most of which revolve around the belief that politics permeate almost every element of the process. He argues that partisan politics rapidly became a controlling factor in the appointment of federal judges and asserts that the notion of selecting judges and justices based strictly on merit is nothing but an illusion. He also maintains that the Senate acts as a "rubber stamp" when handling judicial appointments, with standards that are narrow and based largely on partisanship and senators' personal beliefs and argues that "the swing of electoral politics" largely controls who staffs the Court and that party considerations are the prevailing force (O'Brien 1988, 95). He concludes that extensive reforms of the politics of judicial selection or attempts to create nonpartisan standards are unrealistic and instead asserts that quality of nominees can be improved with procedural changes.

Epstein and Segal (2005) claim that the phenomenon of conflictual judicial appointments where partisanship and ideology play an extensive role is not new, and they assert that a key reason the process is political is because judges are political creatures who carry with them their ideological and partisan ties even after they take the bench. Throughout their work, the authors highlight how partisanship and ideology infuse the appointments process, from the selection of justices to the confirmation process to the way that justices are shaped by the motivations of the president who appointed them once they are on the bench. They conclude that the process will not become less political until justices and judges stop arriving at political decisions, something which has little if any possibility of occurring.

More recent works have focused their attention on problems that plague the current confirmation processes. Carter (1995) believes that the modern confirmation process is a "mess" due to the fact that a nominee's disqualifications rather than his or her qualifications has become of paramount importance. Of additional concern is the presupposition that nominees are pressured to tell all – including how they may vote on particular cases – in order to secure confirmation, as well as the fact that almost all the players in the confirmation game are focused on attaining specific results at any cost. After presenting numerous cases that support his claims, he asserts that to fix the confirmation "mess," we must address the inclination to search for disqualifying factors by recovering our ability to weigh the past wrongs that a nominee may have committed against the strengths that he or she could bring to the bench. If we are unwilling to change our attitudes towards public service, he argues that a fundamental shift in how we choose justices – such as imposing term limits or holding judicial elections – may be necessary.

Comiskey (2004) analyzes the main assertions of two schools of thought regarding judicial appointments – the legalist school and the political school – to see if either provides a

provocative case regarding the current state of affairs in Supreme Court confirmations. Such arguments by the two schools stem from several elements of the modern confirmation process, including the fact that ideology has become the supreme factor in confirmations and that the level of conflict over confirmations has risen considerably since 1968. The legalist school of thought posits, among other things, that senators do not have the constitutional authority to assess Supreme Court nominees based on their ideological perspective and that intense scrutiny of nominees by Senators furthers the overpoliticization of the process by the media, interest groups, and senators skeptical of nominees' viewpoints. The political school of thought asserts that the Senate does not gather enough information about nominees' legal philosophies to give educated consent to Court nominations and is concerned that because of the Senate's inability to ascertain the beliefs of nominees, presidents can fill the Court with ideological allies and gain too much influence over constitutional law. In the end, Comiskey dismisses the legalist school and finds that while the political school correctly promotes a stronger role for the Senate, some of their fears are overstated. After considering various reform proposals, he asserts that increases in power sharing by the Senate and the president in the appointments process "is the most salutary – perhaps the only salutary – reform of the normally well-functioning High Court confirmation process that Americans could hope for" (Comiskey 2004, 193-194).

Wittes (2006) argues that the confirmation process is problematic because the modern Senate "has created a confirmation process in which it learns little that is useful while pressuring would-be judges to conform to the wills of legislators who do not themselves agree on what results they should demand of nominees" and that along the way, it "probably imprints upon them a stronger partisan identity than they had prior to nomination and charges a sometimes exorbitant personal toll" (Wittes 2006, 9). He chooses to look at the problem from an

institutional perspective, asserting that Senate aggressiveness towards confirmations was an institutional reaction to the expansion of judicial power in the years following the Court's 1954 ruling in *Brown v. Board of Education*. This rise in aggressiveness has not only forced nominees to give senators assurances that they have in the past refused to give or risk the possibility that the Senate will reject their nomination but, in broader terms, could be the beginning of a series of efforts by the Senate to curtail judicial power through their power over the budget, impeachments, or court-stripping measures. He concludes that reforms should focus on ways to "maintain the political conflict surrounding nominations so as to protect the independence of the courts and the prerogative of the president to choose judges – as well as to maximize the utility to democratic government of an aggressive, ideologically oriented approach to its role on the part of the Senate" (Wittes 2006, 13).

These works share quite a few commonalities. To begin with, most agree that the current process is not ideal, though their reasons for believing this (and their prescriptions on how to correct the problems) vary. They also concur that there cannot be a return to the past in terms of how appointments were handled, either due to the fact that no "golden era" in judicial appointments ever existed (thus leaving us with nothing to return to) or because reversing evolutions in the process is not practical or desirable. Additionally, most authors agree that partisanship and ideology infuse almost every part of the process and that the nomination and confirmation processes are now more contentious and complex than in the past. Finally, the majority of these scholars recognize how the process has become increasingly democratized and how most actors have become publicly oriented (though again, they cite different reasons for such evolutions).

However, these authors also deviate from one another in several notable respects. First, the overall focus of the works varies; some view the changes in and characteristics of the appointments process from a strictly partisan or political perspective, while others examine it from an institutional point-of-view. This of course produces variations in explanations as to what caused the modern appointments process to evolve in the way that it did. Additionally, the authors offer widely divergent diagnoses of what is "wrong" with the process, as well as prescriptions on how to fix it. Furthermore, some decry the increased public nature of the appointments process, citing it as the impetus for the degeneration in the civility, consensual nature, and quality of the process, while others accept, if not embrace, the transformation. Finally, the authors vary in how they view the role of ideology and partisanship in the appointments process. Authors also differ in their opinions on the roles of ideology and partisanship in the process; some assert that there have been few if any changes in the importance of these factors when nominating or confirming justices, arguing that the process has been that way since the start and has not changed significantly. Others contend that the focus on ideological and partisan factors is a new phenomenon that strongly contrasts with the more congenial, genteel processes of old.

In the end, there are several areas in which the various works are lacking. Some works miss out entirely on the focus of institutional factors in shaping the appointments process. Those who fail to recognize the importance of shifts in judicial power and influence, the evolution of the Senate from an inner-focused to an outer-directed chamber, the adaptation of numerous and quite consequential Senate rules and norms involving confirmation proceedings, and the institutionalization of the presidency cannot hope to provide a complete picture of the evolution of the appointments process. Some works adopt an overly fatalistic viewpoint of the modern

process, asserting that it is "broken" or a "mess" and condemning various actors for their part in the degeneration of the process. Such scholars make sweeping, damning assessments regarding the overpoliticization of the process, the lack of focus on nominee qualifications, interest group and media smear campaigns, needless and overly aggressive questioning of nominees during committee hearings, and overtly political nominee selection by the president; they also call for sweeping and occasionally unrealistic reforms of the process. Adopting that type of viewpoint distorts the way the process truly operates and provides a biased and, at times, unfair assessment of what truly goes on; it would be far more advantageous to be less pessimistic and more realistic when discussing evolutions in the appointments process. Further, as mentioned, some works seem to overlook the almost inarguable, empirically proven fact that ideology and partisanship in the process have increased in significance over the years. Others who maintain that the process has evolved from one that was not political to one that is are also mistaken. Partisan and ideological factors have been evident in both judicial nominations and confirmations from the very start, and these factors have only increased in salience over the years. To maintain that they either have stayed static or did not exist in an earlier era is incorrect.

Overall, it seems that works which focus on the influence of institutional factors, adopt a realistic and not fatalistic view of the process, and provide accurate information regarding the role of ideology and partisanship offer the clearest picture of the evolution of the appointments process.

INFLUENTIAL FACTORS ON SENATE CONFIRMATION VOTES

Having reviewed some of the broad literature regarding the appointments process, we can now turn to the more pertinent task at hand – considering the factors that modern scholars have found to be influential upon the confirmation votes of senators.

Interest Groups

Caldeira and Wright (1998) focus on the role of organized interests in influencing confirmation votes for Supreme Court nominees. The authors argue that organized interests exert a direct effect on the votes of senators by circulating policy information to senators' constituents with the intent of garnering opinion in their favor, facilitating and directing the verbalization of constituent interests and opinions, and providing senators with what they consider to be important information. They test their assertion by analyzing interest group activity surrounding the Bork, Souter, and Thomas nominations to the Supreme Court through the distribution of surveys to a variety of organized interests. The authors control not only for party, constituency, and ideology, but also for an interest group's organizational strength in individual states, prior campaign contributions from interest groups to individual senators, and the membership of a senator on "a relevant gatekeeping committee" (Caldeira and Wright 1998, 508).

The authors find that interest group lobbying "provided important information to senators above and beyond what they might have gleaned from public opinion polls and constituency demographics" (Caldeira and Wright 1998, 521). With regards to judicial nominations, they state that interest group lobbying "constitutes an important part of the legislative calculus," and that future accounts of interest groups' lobbying activities should be included in models that attempt to explain how Congress votes to avoid the risk of exaggerating the significance of conventional predictors (Caldeira and Wright 1998, 520).

Caldeira and Wright's work is quite valuable in that it addresses a gap in the literature that had only been touched upon by Segal, Cameron, and Cover (1992). They were able to obtain statistical evidence of what many scholars had asserted – that "more than ever before,

judicial selection is prone to manipulation by forces outside the Senate, especially mobilization and counter-mobilization by organized interests" (Caldeira and Wright 1998, 500). Further, they sufficiently proved that lobbying was not linked to party, constituency, and ideology, instead finding that membership on the Judiciary Committee, as well as the strength of the party's base in various states, largely controlled instances when groups would lobby senators. Their work seemed to disprove the argument that interest groups "add nothing new to the equation of legislative voting" due to the fact that they are a function of forces such as constituent preferences, personal preferences, and party, and that, once these factors are taken into effect, "the variance in lobbying will disappear; and as a result lobbying will have little or no independent effect on voting decisions" (Caldeira and Wright 1998, 502). They were also able to buttress their claim that groups do not view senators' legislative situations as a given and restrict themselves to lobbying "only when situations are favorably predisposed to groups' own preferences" but instead "attempt to alter these forces when they are not favorable; and when they are favorable, to maintain them in the force of opposition" (Caldeira and Wright 1998, 505). Finally, they used a much more intensive measure than Segal et al did when attempting to ascertain interest group involvement. From the comprehensive list of groups they compiled to the way they structured their questionnaires to the rate of success they had in obtaining responses, the authors' measure is without question much stronger and more in-depth than those in previous works and should be commended.

Still, the work is not without its shortcomings. To begin with, I would have liked an explanation of why the authors used such different measures for each nominee when measuring ideological preferences. They explain what they use but not why they construct their scores in three different fashions for the three nominees. I am uncertain as to whether or not the different

methods of constructing ideological preferences would pose a problem in terms of the accuracy or strength of their findings; however, an explanation of why different methods were used with each nominee would have been helpful.

However, the most glaring issue at hand is the fact that the authors chose to examine two of the three most contentious nominations in recent history – Bork and Thomas. It is widely known that interest group participation in both of these cases (especially Bork's) was extremely high – so much so, in fact, that Johnson and Roberts (2005) omitted Bork from their study entirely due to the fact that "by any diagnostic measure he is an influential outlier" (Johnson and Roberts 2005, 679). The Thomas case was thoroughly contentious as well, not only due to the Anita Hill controversy but also due to the issue of race that permeated the nomination. When one compares the Bork and Thomas cases to others that have taken place since the early 1980s, the unescapable fact is that those two nominations were, in more ways than one, anomalies.

The authors attempt to explain why the Bork, Thomas, and Souter cases work best for their study. They argue that this selection of cases "allows us to test the effects of lobbying under various conditions of public awareness and involvement" (Caldeira and Wright 1998, 500). They go on to list three justifications forwarded by Krehbiel (1996) for the use of case studies and assert that the three cases they have selected "clearly meet these criteria" (Caldeira and Wright 1998, 501). While they are not incorrect in this assertion, it is hard to believe that there are not other cases in recent history that would meet these criteria that do not present the outlier problem that the Bork and potentially the Thomas nominations do.

As a result of their choices, their results may have been skewed so as to put too much weight on interest group involvement and not enough on other factors. Further, their results seem to present problems in terms of generalizability. Case studies are inherently difficult to

generalize from, but when the authors have selected such extreme cases to test their hypotheses, it would seem that generalizability would become even more difficult. The authors admit this difficulty when they state, "These cases are of course not typical…Accordingly, we must take care in making inferences from our research on this set of nominations" (Caldeira and Wright 1998, 500). Krutz et al further this sentiment by stating that Bork is "unusual and unrepresentative of failed nominations" (Krutz et al 1998, 872). In my view, the authors would have been better off to omit Bork at the very least and add other nominations from the past quarter century, such as Scalia, Rehnquist, Breyer, Kennedy, or Ginsburg to test how influential interest group involvement was in more "run-of-the-mill" confirmations. Assuming that their theory is in fact correct, using these cases would have, in my opinion, made their findings even stronger by evidencing that interest groups can exert influence under a variety of circumstances.

Further, such a study would have allowed the authors to compare how influence varies across nominations based on how contentious they were. The authors argue that the high salience of the nominations they chose make them "good and tough cases" to investigate the effects of interest group lobbying, since interest group success under the difficult circumstances inherent in controversial nominations would almost certainly suggest success in more consensual circumstances (Caldeira and Wright 1998, 501). Since they did not include a few less contentious nominations for comparison, however, they are left merely with the assumption that interest group influence would be stronger with less salient cases. Had they included additional cases, they could have empirically tested circumstances under which interest groups were more influential versus less and may have been able to outline conditions under which interest groups find the most success. This would have provided a much clearer picture of the degree to which

and instances when interest groups successfully influence confirmation votes and would have provided a notable addition to the literature.

Senatorial Ideology

Songer (1979) argues that attempts to explain senators' voting behavior with regards to Supreme Court nominees must go beyond the public statements they make and into their ideology. He asserts that senators engage in a two-step process in their decision-making. First, they decide whether or not the nomination is controversial. If it is not, then he or she is likely to feel as if they must vote for confirmation, regardless of whether or not they have ideological conflicts with the nominee. However, if the nomination is seen as controversial, Songer claims that senators "may then proceed to evaluate the merits of the nomination, his own preferences, and relevant political factors before deciding whether to vote for or against confirmation" (Songer 1979, 929). He posits that when a nomination is deemed controversial, senators will confirm nominees who they perceive as having similar policy positions to their own and will oppose nominees whose issue positions are incongruent with theirs.

Songer looks at what he considers to be the fourteen most controversial Supreme Court nominations of the twentieth century, and using the voting records of senators on economic and civil liberties policy, he finds that the positions of senators who supported a nominee were significantly different than the positions of those who opposed a nominee. Additionally, those who opposed nominees were, in every case, concentrated towards one end of the ideological scale. Finally, the relationship between senators' issue positions and their confirmation vote was found to be strongly independent of party and opinions on ethical standards. Songer claims that, in light of his findings, neither concern over ethics nor party considerations can be considered reasonable explanations for senators' opposition to nominees. He states, "It seems reasonable to

conclude that, until such time as contradictory evidence is reported, predicted policy dissatisfaction should be regarded as the major cause of most votes against confirmation" (Songer 1979, 946).

Songer makes some interesting assertions and discoveries in his work that should be noted. To begin with, the two-step decisional framework he outlines regarding how senators consider confirmation votes is noteworthy, given the presumption of confirmation the president has enjoyed throughout the twentieth century. Further, his testing of policy preferences with a variety of controls, such as ethics and party, is an advantageous addition to his work. He was able to successfully prove that the effects of policy positions was independent of party and that in fact no spurious relationship existed between either party loyalty or ethical standards and policy opposition. Further, the second hypothesis he proposed regarding the cohesion of opponents of a nomination was thought-provoking. The confirmation of this hypothesis sheds further light on senatorial decision-making regarding confirmation votes, as it indicates that policy views that are considerably different from a nominee are more likely to produce a nay vote than similar views will lead to a yea vote. Finally, Songer was able to test and provide convincing evidence against Rohde and Spaeth's (1976) assumption that ideology is a less important factor for moderates in terms of confirmation voting. He finds that, contrary to Rohde and Spaeth's arguments, policy positions were not more salient to liberals or conservatives than they were to moderates. Further, moderates were not found to weigh ethics more heavily in their confirmation votes – in fact, extremists seemed to place more value on ethics than other senators did. Songer's willingness to test this previously untested hypothesis not only disproved the caveats Rohde and Spaeth placed on the influence of policy positions on senators' confirmation votes, but added strength to his assertions.

There were a few problematic issues with Songer's work. To begin with, it is uncertain as to whether testing policy position provides as strong of an explanation of confirmation voting as personal ideology would. Songer does not provide an explanation of why he chose policy positions over ideology, other than arguing that Senate norms typically dissuade senators from being completely forthcoming in their reasons for opposing a nominee and pushing them to cloak any partisan or ideological opposition in terms of ethical improprieties or lack of qualifications. Thus, he asserts that it is difficult to truly ascertain whether or not factors such as ideology or party were reasons for opposition to a nominee. His analysis of voting records of senators on economic and civil rights policy "was designed to explore the 'real' reasons for senatorial opposition to Supreme Court nominees" (Songer 1979, 929). Despite what Songer states regarding voting records providing the "real reasons" for opposition, there are inherent difficulties in using roll call votes as a measure of senators' true preferences – namely, factors such as constituent interests and interest group lobbying could mask or cause false measurement of senators' personal preferences.

Additionally, the assumption he seems to make that senators would give more weight to a nominee's particular policy positions (such as his or her stance on economic or civil liberties issues) than they would their overall personal ideology is tenuous. It seems easier and more realistic for a senator to simply assess whether a nominee is generally liberal or conservative. Making a policy-based assessment would undoubtedly be more complicated, as senators are typically not motivated by a single issue; they may agree with a nominee in one policy area but disagree with him or her in another, leading to a potentially complex calculation that senators may not feel like engaging in. It might be more advantageous for senators to make such thought-

out, detailed calculations, but given how many factors come into play when deciding how to vote on a nominee to the Court, it is not always practical.

Further, Songer points out at the beginning of his work that there have been "no systematic explanations for why a majority of nominations remain essentially noncontroversial and are unanimously confirmed" (Songer 1979, 929). However, his study provides few if any answers to this puzzle, nor does he attempt to construct a model that explains voting behavior in both consensual and conflictual cases. Finally, Songer says that it "was assumed that the policy areas which were considered important by the president making the nomination and the policy areas containing the greatest number or most controversial cases decided by the Supreme Court in the period immediately preceding the confirmation vote would be most salient to the senators" (Songer 1979, 931). It is unclear as to why he makes this assumption, as he provides no explanation to back it up. Perhaps senators would be interested in the same policy areas as the president, and it may be true that senators focus on those policy areas addressed by the Court that are most controversial or that appear most frequently. The lack of explanation from Songer as to what leads him to believe this, however, makes for an ungrounded assumption that one should be cautious before making.

Sulfridge (1980) makes a similar argument regarding controversial nominations and ideological voting. In his study, Sulfridge contrasts Senate votes on what he deems the four most controversial nominations of the twentieth century –Fortas, Haynsworth, Carswell, and Rehnquist – with senators' ideological positions to determine how much of a factor ideology played in shaping how senators voted. Sulfridge notes that each of the four nominations had its share of emotional issues, from concerns over pornography and crime to charges of racial prejudice. He asserts that in order for these emotional issues to play a decisive role in defeating

a nomination, however, they must "either be very clear and relate to the nominee in a direct, personal (rather than general or philosophical) way…or they must be used in conjunction with a more technically ethical or legal issue" (Sulfridge 1980, 566). This was the case, he finds, in the Fortas, Haynsworth, and Carswell nominations, but not in Rehnquist's, thus explaining why he was the only one of the four who was confirmed. Further, after examining both the issues raised against the four nominees and senators' ACA ideological ratings, Sulfridge concludes that ideology, more than the charges of dishonorable conduct themselves, determined the majority of votes. He states, "Although ideology alone is not sufficient to excite strong opposition to a nominee, it appears to play a significant role in determining which senators will and which will not oppose a nominee when other issues are raised" (Sulfridge 1980, 567).

Sulfridge's findings present a valuable base on which scholars such as Massaro (1990) have been able to build upon – that of the importance of emotional issues when it comes to activating enough ideological opposition to defeat a nomination. Additionally, his discovery of the instances in which emotional issues can cause a nomination's failure is constructive. As has been mentioned, he finds that two factors must be present in order for significant amounts of opposition to be created – first, strong emotional issues that excite public interest must be present. Second, the issues at hand must need to be linked to the nominee in a direct, personal way (as opposed to a philosophical or general way) or must be combined with an ethical or legal issue. Sulfridge's identification of this caveat provides a fuller understanding of when emotional issues can be influential and when they most likely will not be. Further, his study of four specific cases allows us to gain greater insight into how idiosyncratic factors affected the confirmation odds of different nominees. It has been argued that characteristics distinctive to each nomination should not be overlooked when attempting to ascertain what influences

confirmation votes, and Sulfridge makes a noteworthy contribution to the literature by doing case studies and taking these factors into consideration, rather than simply running a quantitative model of confirmation voting over a period of time. Finally, Sulfridge cites emotional issues as an explanation of why nominations become controversial; other studies (Rohde and Spaeth, 1976; Songer, 1979) have failed to ascertain why some votes are conflictual and others are not. In this way, Sulfridge at least attempts to address an important but at that point unanswered question.

The main weakness in Sulfridge's work suffers from is the fact that his study does not take into account nominee ideology or qualifications – rather, he assumes (seemingly based on party of the nominating president) that those who voted in favor of Fortas but against Rehnquist, Carswell, and Haynsworth were liberal and those who voted in the opposite fashion were conservative. Though his model found "a clear division between those taking consistently (four of four) or predominantly (three of four) liberal stands and those taking consistently or predominantly conservative stands," a more precise comparison between senatorial and nominee ideology (if at all possible to construct) would have been advantageous (Sulfridge 1980, 566). Further, Sulfridge only focused only the effects of ideology when examining how senators voted on the four nominations. It would have been interesting to see him examine at least in passing a few other factors that could have influenced (and, according to Massaro, did) the votes on the four controversial nominations, such as same party status and year of the president's term. These factors, like emotional issues, could have affected instances in which ideology motivated senators' votes, but Sulfridge failed to mention this possibility.

In a work similar to Sulfridge's, Massaro (1990) discusses how ideological factors influence the confirmation process, though he claims that in order for ideology to truly exert an

influence on a nominee's odds of confirmation, at least one of a few other factors must come into play. "What is most important is not simply the presence of latent ideological opposition, but the extent of that political resistance and the likelihood it will be activated," he states (Massaro 1990, 138). The degree of opposition and the ability to activate it, he claims, are enhanced by both the timing of the vacancy and presidential management of the appointment. He states that the timing of a vacancy can be influential when the nomination is made during the initial period after a new president takes office, during the last year of a president's term, or during a time when the president's party is the minority in the Senate. Presidential management can impact Senate consideration of a nominee when presidents "nominate individuals who are vulnerable to non-ideological, non-partisan charges," when presidents are seen as having conducted a slipshod screening of nominees, when presidents do not sufficiently supervise the adoption of devices intended to implement his confirmation strategy, or when presidents do not put sufficient amounts of time and energy into sustaining positive relationships with senators (Massaro 1990, 140-142). He argues that both presidential management and timing can generate opposition by themselves, but when coupled with ideological clashes, they make defeat of a nomination much more likely.

To buttress his claims, Massaro looks at the Fortas, Haynsworth, and Carswell appointments to the Court to determine what roles ideology, timing, and presidential management played in defeating their nominations. He discovers that senators reacted to all three nominations based on whether or not they agreed with the judicial philosophy that the nominees would bring to the Court. However, he argues that ideology alone would likely not have been enough defeat the nominees. He finds that presidential management contributed to the failure of all three nominations and that unfortunate timing of the vacancy also contributed to the

defeat of Fortas (though all three nominations were forwarded under unfavorable conditions, with Fortas being nominated at the end of Johnson's term and Haynsworth and Carswell being nominated during a time when President Nixon's party was the minority in the Senate). Massaro also discusses the Bork and Ginsburg nominations in brief and asserts that they follow a similar trend of what senators consider when debating a nomination to the Court. Massaro concludes that though it is not possible to predict when a Supreme Court nominee will be refused confirmation in the future, the failures of the Fortas, Haynsworth, and Carswell nominations "can suggest the setting and factors likely to be present when the Senate withholds its consent," and he asserts that the Senate's refusal to confirm a nominee in the future "will be, as it always has been, supremely political" (Massaro 1990, 197).

Massaro's work is noteworthy for a couple of reasons. To begin with, his use of presidential papers and senatorial anecdotes provides unique insight into what senators consider when considering a nomination to the Court (though it can be argued that taking senators' statements at face value is treading on dangerous ground). Additionally, he adds to the literature espousing the importance of ideology in Senate confirmation decisions by explaining in greater detail instances when it is most likely to lead to a nomination's failure. Instead of merely relying on ideology alone to explain the failures of Fortas, Haynsworth, and Carswell, he goes into greater depth by focusing on how the idiosyncratic factors of individual nominations can enhance the effect of ideological opposition and alter a nomination's odds of confirmation. His work indicates how important examining the context of individual nominations can be when attempting to understand why some nominations fail while others are easily confirmed, and it does a worthwhile job of highlighting the complexities inherent in the Supreme Court confirmation process – something that some quantitative studies are unable to do. Finally, the

two methods that he used to test the weight of ideology versus party in the three cases was useful, as it not only provided further evidence of the preeminence of ideology to party but also provided a strong introduction to his exploration of how ideology affects senators' confirmation votes.

The main concern I have with Massaro's work is that he fails to detail instances when unfortunate circumstances in timing or a lack of presidential management has occurred in nominations that have succeeded. Such an omission does not detract very much from his work, as he has been able to successfully explain the failures of three important nominations of the twentieth century. However, a discussion of other cases would be advantageous and – assuming that he could provide some explanation as to why those nominations succeeded and the Fortas, Haynsworth, and Carswell nominations failed – would provide additional strength to his work. Additionally, his definition of presidential management is somewhat amorphous, allowing him to attribute several factors (some which are out of the president's control) as being a failure in presidential management. This lack of specificity and misspecification may weaken his argument regarding the influence of this factor. Ultimately, admitting that some factors are simply out of a president's control would be the most beneficial solution to this problem.

Partisanship and Institutional Factors

Segal (1987) proposes four related models of confirmation, all of which assume that both partisan and institutional politics motivate senators' votes. He outlines various issues, such as anti-presidential motivations, control by the president's party of the Senate, a pro-Senate bias, public opinion, and a president's electoral base, that have been suggested as being influential factors in determining how senators cast their confirmation votes. Using those factors that can easily be measured, Segal's four models explain between 38 percent and 42 percent of variance

and correctly predicts between 87 percent and 88 percent of the cases in the 138 confirmation decisions he examines. He finds that the strongest factors influencing senators' votes were control in the Senate of the president's party, the fourth year of a president's term, membership of the nominee in the president's cabinet, and extended national legislative experience by nominees. The percent of the electoral college vote received by the president and whether or not the president was elected or was in a succession term were not found to have a strong influence on senators' confirmation votes.

Segal's study is valuable largely due to the fact that his model incorporates both institutional and partisan factors and provides a worthwhile comparison of the weight of the two. It was beneficial to see how factors such as anti-presidential sentiment, anti-Court sentiment, and pro-Senate biases have affected nominations; several studies have suggested that these factors possess importance, but they have not empirically tested them, particularly in tandem. It is to Segal's benefit that he not only tested them, but compared their influence to the oft-cited factor of partisan politics. It is evident that institutional factors in fact did need to be empirically tested, as they were evidenced to be "at least as important" as partisan politics in predicting confirmation decisions (Segal 1987, 998).

Most of the difficulties in Segal's study lie in his measures (or lack thereof). To begin with, it seems that measuring "partisan concerns" by simply using whether or not the president's party controls the Senate is rather weak. The use of a dichotomous variable is in and of itself a bit troubling; while he provided some explanation of why he did not use an interval variable for this measure, I believe that it would have been helpful to have included it at least for the sake of comparison in terms of how well it "fit" versus the dichotomous variable. What would have been better still would have been far more interesting and would have been much stronger for his

study had he in some way been able to break down the Senate vote on each nominee to see where there were outliers in terms of party voting. If it was possible to use a measure of the degree to which senators broke party rank with each nomination, I believe his measure of the influence of partisan factors would have been more convincing.

Additionally, his omission of certain factors in his model (some of which have been proven influential in explaining confirmation voting) is somewhat troubling. The explanation he offers for omitting ideology is sufficient, though it undoubtedly affected his results, given how influential ideology has been proven to be upon confirmation voting. Other explanations, however, are not as strong. Segal omits public opinion because it "cannot be measured" and presidential popularity ratings due to the fact that it is "impossible for most observations" (Segal 1987, 1002). Though presidential popularity ratings and public opinion measures did not exist as far back as Segal was testing, it seems that he could have constructed a measure including those measures for those nominations where the data did exist to at least see if they had some effect. Such a model would not be perfect, but it would at least give some indication as to the influence of those two factors. Finally, Segal chooses to omit qualifications, as he says there are "few available measures" (Segal 1987, 1002). He neglects to explain, however, why he chooses not to employ one of the methods that did exist. It is of some comfort to know that he later helped develop nominee qualifications scores with Cameron and Cover (1990), thus preventing the omission of nominee qualifications from his future works.

Ideology and Qualifications

Cameron, Cover, and Segal (1990) developed a neoinstitutional spatial model of Senate roll call voting to test the influence of several factors on Supreme Court confirmation votes. The authors begin by pointing out that prior studies of confirmation voting are lacking because they

have not clarified the extent to which nominee ideology or qualifications affect votes, and they have not been able to explain why some confirmation votes are conflictual while others are consensual. The authors claim that senators are focused on satisfying their constituents with their confirmation votes and, as a result, will engage in rationally non-strategic voting behavior, as it allows them to do a better job of taking positions and credit-claiming when voting for Supreme Court nominations. Given this focus, senators will concentrate on two characteristics of nominees that are closely scrutinized during confirmation hearings and by the press and their constituents – qualifications and ideology (Cameron et al 1990, 528). They point out that the president can also exert some influence on senators' votes and argue that he will have more resources (and will be able to use them more effectively) when his party controls the Senate and when he is not in the fourth year of his term (thus resulting in a "strong" position). This effect is heightened, they believe, on senators who share the same party as the president, as well as on those who are undecided on how to vote based merely on nominee characteristics.

The authors then test nominee ideology, nominee qualifications, desired ideology for nominees held by constituents (as perceived by their senator), strong presidency, and same party status against 2,054 confirmation votes on nominations from Earl Warren to Anthony Kennedy using probit analysis. They find that confirmation voting "is decisively affected by the ideological distance between senators and nominees" and that qualifications are equally important (Cameron et al 1990, 530). The strongest influence, however, is the interaction between nominee qualifications and ideology. They also find that presidential influence and same party status "have a powerful impact on voting probabilities, especially for senators who remain undecided after examining the characteristics of the nominee" (Cameron et al, 531). The authors conclude that senatorial behavior "emerges as sensible, predictable, and readily

understandable" and that the real puzzle in confirmation votes lies in how presidents select nominees (Cameron et al 1990, 532).

By focusing on roll call votes of individual senators over numerous confirmation votes and by including both consensual and conflictual votes, the authors produce a provocative study that addresses a problematic gap in confirmation voting literature. Their model also adds to the literature by demonstrating an ability to distinguish between conflictual and consensual votes; the model accurately identifies all consensual votes and seven of nine (78 percent) of conflictual votes (Cameron et al 1990, 531). Further, their results are robust, and the model's explanatory power is noteworthy, correctly explaining 93 percent of the proportion of votes.

However, this work suffers from several weaknesses. To begin with, I am uncertain as to whether their measure of constituent ideology is adequate. The authors are unable to measure the perceived preferences of senators' constituencies about nominee ideology, so they developed an "inferential measure" using senators' liberalism ratings as determined by Americans for Democratic Action (ADA). While there is little doubt that measuring constituent preferences is difficult, this measure, at least on its face, seems imprecise. The authors admit in a later extension of their study (1992) that changes in their measure of constituent influence were in fact necessary – specifically, that constituent influence needed to be measured more directly and that senators' personal ideologies needed to be eliminated from ADA scores (Segal et al 1992, 97). Making these adjustments strengthened their later study but evidenced the weakness of this one.

Of additional concern is the authors' assumption that ADA scores can be directly compared with Segal-Cover scores (the scores used for nominee ideology). Epstein, Lindstadt, Segal, and Westmoreland (2006) assert that Cameron, Cover, and Segal's assumption that the two scores can be compared is "questionable" and, as a result, they invoke a bridging mechanism

in their study to generate Common Space scores for the nominees that would allow nominee ideology to be directly compared with senatorial ideology. The "leap of faith" that must be made when comparing ADA and Segal-Cover scores somewhat diminishes the strength of Cameron, Cover, and Segal's study (Epstein et al 2006, 299).

Finally, the authors do not in my opinion offer a strong enough explanation of why they chose to examine the influence of constituent ideology instead of senators' personal ideology. They provide a few reasons as to why it is desirable to focus on the electoral connection, and they admit that senators inevitable have other goals in mind as they make their decisions, but they fail to sufficiently explain why they believe that focusing on perceived constituent preferences will explain senatorial motivations more fully or accurately than senators' personal preferences. The authors admit as much when they state, "The framework assumes senators are 'single-minded seekers of reelection,' but we know this is not so." They concede that a more attractive framework "would allow senators to trade off among competing goals in their roll call votes," particularly when it comes to determining the extent to which senators vote with their constituents versus the tendency to "shirk," or vote based on their own preferences (Cameron et al 1990, 532). While this weakness does not significantly diminish the worth of their study, the potential problems stemming from their assumption about the preeminence of constituent preferences in senators' confirmation votes should not be quickly dismissed.

In an update to their model, Segal, Cameron, and Cover (1992) again used a spatial model of roll call voting to ascertain the influence of the distance between constituent ideology and nominee ideology, senators' personal ideology, the strength of the president, and interest group testimony on Supreme Court confirmations. The authors measure these factors against

1,475 confirmation votes cast from the nomination of John Harlan through that of Anthony Kennedy, this time using logit analysis for their model.

The authors' results are similar to those of their prior study – specifically, that confirmation voting was strongly affected by the ideological difference between senators' constituents and the nominees, that perceived qualifications had a moderate effect on voting, that the effect of qualifications was stronger when interacted with constituent ideology, and that that presidents were more successful when they were in a strong position than when they were not. This study also revealed that the individual policy preferences of senators, even when measured indirectly, had "a significant impact" on voting, though the authors were unable to make determinations regarding the ideological difference between senators and nominees. Further, they found that interest group mobilization against a nominee could cause significant damage to a nominee's chances of confirmation, while interest group mobilization in support of a nominee caused a slight substantive (but statistically significant) effect (Segal et al 1992, 109).

In this study, Segal, Cameron, and Cover have made much needed improvements to their 1990 work. To begin with, they addressed the problems with their measure of constituent ideology, devising a measure that seems more precise than not only their previous work, but than that of other roll call studies of confirmation votes. The authors decided to regress individual senator's ADA score against state-level presidential election results from the elections of 1964, 1972, and 1984 (which were chosen due to their highly ideological nature and the lack of a strong third party candidate running). They provided sufficient explanations as to why they chose to use state-level presidential election results, and they adequately elucidated why they chose those three elections over others. By using this measure, the authors seem to successfully expunge senators' partisanship and personal ideology from the measure (though they admit that

due to the "two constituencies" hypothesis, the measure will have to represent partisan distances as well as ideological distances). Additionally, in this study, the authors do a more sufficient job of taking senators' personal ideology into account and find that even though it is measured indirectly, it has a consequential impact on senatorial votes.

Further, the authors' inclusion of interest group involvement is a worthwhile addition to their work, as they address an area in Supreme Court confirmation voting literature on which almost no systematic empirical studies had been performed (despite the fact that organized interests had been shown throughout history to have influenced the confirmation process). Finally, by using logit analysis instead of probit, the authors are able to interpret their results in terms of probabilities, something that they had not been able to do in their prior work. This greatly aids in the understanding of the significance of their results; for example, with respect to the ideological distance between senators' constituents and nominees, a one standard deviation increase in distance was found to decrease the probability of a yes vote by .32, while switching from a weak to a strong president increases the probability of a yes vote from an undecided senator to .79 (Segal et al 1992, 109, 111).

While this work does tackle some of the problems inherent in their 1990 study, there are still a few areas that might be improved. To begin with, their measure of interest group involvement seems to be lacking. Caldeira and Wright (1998) are able to construct a more thorough measure for interest group involvement by administering surveys to organized interest to ascertain their involvement in the Bork, Thomas, and Souter nominations (though this measure was likely time-consuming and perhaps impractical to put together). Though interest group testimony is certainly an indicator of involvement, it is not the only indicator of involvement; interest groups employ many techniques in attempting to sway senators' votes, not

to mention the fact that all groups that participate in the process do not necessarily appear before the Judiciary Committee to testify. Though they did find that group involvement exerted influence on senators' votes, their results could well have been even stronger had they used a better measure of group involvement.

Additionally, I have to wonder if their measure of senators' personal ideology is the best they could have come up with. They admit that it is an indirect measure and, as such, the effects of ideological distance between nominees and senators cannot be assessed. That is unfortunate, as such an assessment would be valuable and would make for an interesting comparison with constituent-nominee ideological distance. A measure was able to be devised at a later time that in my opinion is stronger and more provocative than the one employed here by Segal, Cameron, and Cover (Epstein & Segal, 2005; Epstein, Lindstadt, Segal, and Westmoreland, 2006). This point should not be seen as detracting considerably from Segal, Cameron, and Cover's work; it is simply worth mentioning due to the fact that the results they found were significant and could be even more so had a more sophisticated measure been employed.

Constituent Opinions

Addressing an area that has largely been overlooked by scholars studying judicial confirmations, Overby, Henschen, Walsh, and Strauss (1992) study constituent effects on senatorial votes in the Clarence Thomas confirmation. The authors claim that constituent effects have been demonstrated in numerous areas of congressional behavior, but few studies have addressed their influence on Senate Supreme Court confirmation votes. This is due in part, they say, due to the difficulties inherent in operationalizing measures of constituency impact. They argue that the Thomas confirmation "provides an excellent opportunity to investigate the impact of constituencies on senators' voting behavior" due to the fact that the nomination was

contentious and nonconsensual, because there was an clearly identifiable constituency (African-Americans) whose size differs from state to state (which the authors argue allows for testing using a multivariate regression model), and because most African-American interest groups opposed the nomination while the majority of African-American citizens supported it, allowing the authors to differentiate between interest groups effects and the effects of constituencies (Overby et al 1992, 998, 1001).

The authors use a logistical regression model to ascertain whether or not the preferences of African-American constituencies exerted an appreciable effect on Senate confirmation votes for Thomas. To test for constituency effects, they include three independent variables – race (the percentage of African-Americans in a state's population based on 1980 census data), electoral proximity (since previous studies have evidenced that constituent effects are enhanced when a senator is up for re-election), and an interaction of the two. The authors include a variable for party and use senators' Americans for Democratic Action (ADA) score from 1990 to measure ideology. They find that ideology and partisanship perform in the direction they predicted – that is, Democrats and those possessing liberal ideologies were more likely to vote against confirmation. The authors assert that the variables correctly predict 88 percent of the confirmation votes. When it came to the effects of constituency, the authors state that while the results "are not dramatic, they are significant" (Overby et al 1992, 999). The results were again in the predicted direction and were statistically significant. Further, the model including constituency had more predictive power than the one excluding it, correctly predicting 90 percent of confirmation votes (Overby et al 1992, 1000). The results for the interaction term were also in the predicted direction, and the results for the re-election term were negative and statistically significant, which the authors believe indicates that senators (especially those facing re-election)

may have felt torn between their African-American constituents, who supported Thomas and saw him as a role model, and those in their constituency who felt that Thomas was not fit for the bench due to his policy positions and his alleged improprieties with Anita Hill. The third model including both the re-election term and the interaction variable proved to be the strongest predictor, correctly predicting 94 percent of confirmation votes.

The authors conclude that adding constituency variables to their model "not only aids in the prediction of votes, but does so in ways that are generally substantively interesting," and they assert that they "established that constituency considerations can significantly affect confirmation outcomes, at least in highly salient cases" (Overby et al 1992, 1001). They conclude, "In an age of divided party government…when such votes promise to be less consensual, constituency concerns may be of considerable significance in terms of the results of close contests," they state (Overby et al 1992, 1002).

The main strength of the authors' work is that it successfully fills a hole in literature on both judicial confirmations and constituent influence on congressional behavior. By using the Thomas nomination, the authors' study successfully avoids the usual difficulties in operationalizing measures of constituency effect. The Thomas case also allows the authors to distinguish the differences exerted by organized interests and constituencies, providing yet another interesting and valuable aspect to their work. Their inclusion of an electoral proximity variable, as well as a term interacting race and re-election, is also valuable, as it provides further explanatory power as well as additional insight into the pressure senators face when confronting confirmation decisions.

However, their study suffers from the difficulty that it is almost certainly not generalizable. The Thomas nomination is undoubtedly an excellent case for the authors;

however, few if any nominations possess the unique characteristics (namely, the easily identifiable constituency) of the Thomas nomination. As such, generalizing about other nominations based on this one would be difficult at best. Given the fact that there are not many nominations that are of great interest to such an easily identifiable constituency, analyzing constituent effects in those cases would prove much more difficult. The authors' work is of great value as a case study, and it evidences that constituent influences should at the very least be considered by presidents and senators when nominating and confirming nominees. However, it would be unwise to make blanket assumptions about the strength of constituent influence based on the results of their analysis.

Critical Nominations

Ruckman (1993) scrutinized yet another source of influence on Supreme Court confirmation votes – critical nominations. Critical nominations can be defined as those "which involve the threatened loss of representation on the Court, institutional restructuring of the Court, and substantial shifts in the balance of the Court's partisan or ideological coalitions" (Ruckman 1993, 794). Ruckman believes that differentiating among nominations in terms of the degree to which each is "critical" will allow researchers to better understand what shapes confirmation voting. He examines 19 critical nominations (11 in the 1800s and eight in the 1900s) and creates a variable representing critical nominations; he then tests this variable, along with variables for the president's electoral status and year of term, the percent control in the Senate of the president's party, whether or not the nominee was a cabinet member, senatorial courtesy, and whether or not the vacancy was of chief justice, to determine its contribution and predictive power.

Ruckman's results show that while the other variables are influential and confirm conventional literature regarding Supreme Court nominations, the critical nomination variable "has the highest partial correlation coefficient in the model…and its relationship to confirmation outcomes attains the highest level of statistical significance" (Ruckman 1993, 800). Further, his model accurately predicts 94 percent of successful nominations to the Court and 74 percent of unsuccessful nominations, which, as the author points out, is considerably more accurate than Segal's 1987 model. Ruckman admits that while the confirmation process "is one where a host of idiosyncratic and wholly unpredictable factors may partially or wholly affect the voting decision," his model serves to "contribute to our understanding of the more universal factors relating to senatorial rejection in the population of nominations" (Ruckman 1993, 803).

Ruckman's work is most beneficial in that it indicates how the nature of a vacancy to the Court – a feature that has admittedly received a lack of emphasis – affects the confirmation process. He backs up his hypothesis by arguing that qualifications and characteristics "can be overshadowed or at least equaled by considerations focusing on the seat which is to be filled," citing prior literature that evidenced how chief justice vacancies, senatorial courtesy, and the promotion of an associate justice to the chief justice position have shown that vacancies to the Court are not equivalent (Ruckman 1993, 795). Ruckman successfully expands upon this work by showing how both power and representation can significantly influence how vacancies on the Court are treated. In this way, his contribution to the literature on the confirmation process is valuable. Further, Ruckman is able to construct a model with strong predictive power; as has been mentioned, 94 percent of successful nominations and 74 percent of failed nominations were correctly predicted, providing greater predictive power than the Segal (1987) model, which correctly predicted only 55 percent of unsuccessful nominations (Ruckman 1993, 801). Finally,

Ruckman provides an explanation of why some nominations are contentious while others are consensual, thus providing at least one answer to a puzzle that had not yet been solved.

Ruckman's work does suffer from a few shortcomings. First, it is not clear whether Ruckman's omission of ideology from his work is acceptable. He states, "Recent nominations may, in fact, incline some to perceive this model's omission of ideology as fatal. I would, however, warn against premature dismissal" (Ruckman 1993, 803). He argues that his model "falls comfortably short of misspecification in that it does a respectable job of controlling for variables through which ideology may have indirect effects." He further asserts that he rests "on the premise that ideology is related (although not perfectly) to the partisan identification of central actors in the process." As an example of his argument, he asserts that ideology of nominees would in all probability be a straightforward reflection of the president's ideology, which he states would result in the Senate's outcome, in theory, being directly related to nominees' ideology. Ruckman's assumptions are questionable at best and seem too dangerous to make. He concludes with little more than the statement that ideology "might very well contribute little above what is already controlled for" (Ruckman 1993, 803). It does not seem satisfactory to rest upon the statement that ideology *might* not contribute further explanatory power – he seems to lack the empirical support to be able to definitively make this statement. It is disconcerting to see him set aside the use of ideology with such little concern.

Further, Ruckman's focus seems to be only on nominations that would result in opposite party replacement as being indicative of breaks in representation. He does not seem to take into account that breaks in representation can occur even when there is not opposite party replacement. He seems to assume, for example, that if a Republican replaces another Republican on the bench then there would not be a noteworthy ideological shift. It appears that he fails to

realize that replacing one justice of a particular party with another of the same party does not always result in the replacement being "an ideological twin" (Ruckman 1993, 797). The Alito case will evidence this difficulty; even though a Republican president (Reagan) nominated a Republican justice (O'Connor) to the Court, it cannot be said that Bush's nomination of Alito to replace O'Connor has resulted in an ideologically similar replacement. O'Connor is well-known for her moderate stance and swing-vote position on the Court. As such, it is hard to argue that there was not a shift in the ideological balance when Alito (widely known as a strong conservative) took the bench, despite the fact that both O'Connor and Alito were nominated by Republican presidents and that both likely identify themselves as Republicans. One needs to look no further than O'Connor and Alito's Segal-Cover scores to verify this assertion. It would have been beneficial, then, had Ruckman focused not on party of the nominating president but on nominee's ideological scores when considering replacements to the Court, since party is not always an accurate indicator of a nominee's ideological or policy positions.

Presidential Capital

Johnson and Roberts (2004) study presidential capital in order to ascertain how influential presidents' efforts to "go public" are upon Senate confirmation votes. The authors examine all Supreme Court nominations between 1949 and 1994 and perform a content analysis on all public statements made by presidents from the time when the nomination is announced and the date when the Senate acts on a nomination. They intend to not only shed light on presidential efforts to "go public" during the appointments process but to also reveal how these public appeals aid presidents in their battle to secure confirmation for their nominees (Johnson and Roberts 2004, 664). The authors hypothesize that if presidents make public appeals for their

nominee, then these endeavors should influence the process by helping their nominees win confirmation (Johnson and Roberts 2004, 670).

Using a generalized event count model, the authors code each sentence of a president's public statements, as well as all answers presidents have given to questions from the press, regarding the Supreme Court. To ascertain the impact of going public, the authors regress the difference between the expected number of votes against confirmation and the actual number of "nay" votes that each nominee received on the president's use of public statements. The authors predict that the relationship between the variables will be positive, since the Senate should cast fewer "nay" votes than predicted if presidential efforts to "go public" are successful. The authors also include a variable that measures the elapsed time between when the nomination was announced and when the Senate took action (since they believe that drawn-out confirmation battles often occur because of an unanticipated factor from a nominee's background that could cause more "nay" votes than predicted) and a variable for the year of the nomination (as the authors expect more recent nominations to be more political and, consequently, more controversial) (Johnson and Roberts 2004, 678).

The authors' results solidly support their hypothesis – presidents' public support of their nominees significantly decreased the number of "nay" votes and produced a smaller number of "nay" votes than the number that other models predicted, even when contentious nominations and the year of the nomination are taken into account. "The bottom line is that there is a definite relationship between a president's strategy to go public and the fate of that nominee when the Senate finally takes action," they conclude (Johnson and Roberts 2004, 679).

The authors' focus on presidential capital is beneficial due to the fact that most studies regarding presidential effects on Supreme Court confirmation voting focus on the influence of

factors such as approval rating, same party status, and year of a president's term, factors largely out of a president's control. Johnson and Roberts turn their attention to how presidents can more actively influence confirmation votes and discover strong support for their hypotheses. Additionally, the preponderance of literature on Supreme Court appointments focuses on presidents' behavior and strategies during the nomination phase, rather than his influence upon the confirmation process. The authors' work answers questions about when presidents strategically "go public" during the process as well as how their efforts influence confirmation votes. Further, the study dovetails nicely with other works that cite the influence of presidential management of nominations on confirmation odds and adds empirical strength to scholarly assertions regarding presidents' strategic behavior in speaking out for their nominees.

A few things would, however, have added strength to the authors' study. In testing their initial hypothesis regarding presidents' strategic behavior in "going public," the authors measured the influence of three independent variables – ideological distance between the Court's median justice and the Senate filibuster pivot, the distance between the president's nominee and the filibuster pivot, and the distance between the president and the Senate (Johnson and Roberts 2004, 669-670). However, they did not use these variables when testing to see how influential these factors are on confirmation votes. It would have been interesting at the very least to see if presidents' efforts to go public were more influential in some circumstances than in others; for example, presidents may find less success going public when the ideological distance between himself and the Senate is great than when the distance between the Court's median justice and the filibuster pivot is significant. This is not to take away from the contribution their model offers, but is merely intended to be a suggestion as to what would make the picture a bit clearer regarding the influence of presidential capital on confirmation votes. Additionally, their study

might have been even stronger had they had included controls for the aforementioned same party status, presidential popularity, and year in the president's term to allow them to assess how those presidential factors influence confirmation votes vis-à-vis presidential capital. The authors' omission of these factors is not critical, but their inclusion would, in my view, be beneficial.

Bork Nomination

Finally, Epstein, Lindstadt, Segal, and Westerland (2006) analyze the effect of the Bork nomination on senators' confirmation votes. Specifically, the authors looked at two factors - ideology and qualifications – to see if senators' attention shifted more from qualifications to ideology following the failed Bork nomination. The authors updated the Cameron, Cover and Segal (CCS) model – specifically, the model's determination of ideological distance between nominees and senators – by generating Common Space scores for the nominees, thus allowing nominee ideology to be directly compared with senatorial ideology. The authors test the modernized CCS model on all nominations from Hugo Black to John Roberts and find that ideology and qualifications "remain crucial to confirmation politics," attaining both statistical and substantive significance (Epstein et al. 2006, 300).

The authors then test to determine not only whether the balance between qualifications and ideological distance has shifted since Bork's nomination, but also when such a shift took place. They estimate two sets of models for each of the nominations between Vinson and Kennedy, one which considers votes over all of the nominees before, and one which models votes during and after their candidacies. The authors discover that while there was a small decline in attention to qualifications, it occurred not in 1987, but during the early 1970s. With regards to ideology, they found that for every nomination after Harlan, ideology grew in importance over time. "The clear implication here is that the 'new' emphasis on ideology did

not begin with Bork, just as Bork himself claims, but had its genesis some three decades earlier in the late 1950s," the authors claim, though they add that they "cannot ignore the real break that occurs after his failed 1987 confirmation" (Epstein et al 2006, 302). The results for qualifications were not as striking; according to the authors, the qualifications score that would be necessary for a nominee who was moderately distant ideologically from a senator to obtain a yea vote decreased only slightly following the Bork nomination. The authors conclude that while merit continues to exert a moderate influence on senators' confirmation votes, ideology – especially since the Warren Court era – is of overwhelming importance and has become even more salient since Bork's nomination.

The authors' study is advantageous for several reasons. To begin with, it empirically tests the commonly forwarded claim that the Bork nomination was a turning point in confirmation politics which "affected the decisions of senators, such that their votes now reflect ideology to a far greater extent than qualifications" (Epstein et al 2006, 297). Their study was both statistically and substantively significant and provided noteworthy implications for future nominations to the Court, some of which have already been proven with the Alito nomination (Epstein et al 2006, 305). Additionally, the authors do a commendable job modifying and updating the Cameron, Cover, and Segal (CCS) model. They recognized that methodological developments since the development of the CCS model "raise some concerns over the way that Cameron and his collaborators assessed a key covariate of Senate voting: the ideological distance between judicial candidates and senators," leading them to "take advantage of those technological improvements to offer a more valid measure of this critical concept." The authors construct a seemingly strong replacement of the CCS measure of ideological distance between senators and nominees by building a bridging mechanism to create Common Space scores for

each nominee to the Court so that they would be directly comparable to the Common Space scores of senators. Future scholars can employ this model without being forced to "make the leap of faith inherent in the CCS study" (Epstein et al 2006, 299), and Epstein et al's study is made considerably stronger than the works of their predecessors (who relied a great deal on the original CCS model) as a result.

However, a couple of drawbacks in this study should be noted. First, the distinct possibility exists that the authors are placing too much weight on one factor – the Bork nomination – as being the "transformative moment" in confirmation politics (Epstein et al 2006, 297). The authors fail to note potentially important institutional factors that could have produced the shift in importance placed upon ideology, judicial philosophy, and party. The Bork nomination occurred during a particularly contentious time in judicial confirmations; since his first term, Reagan had focused on appointing conservative ideologues to both the Supreme Court and lower courts, thus invoking the ire of Senate Democrats. Conflict between the Senate and Reagan over nominations became intense, with Reagan creating a special committee to screen judicial appointments and employ a constant ideological gauge while Senate Democrats called for increasingly strict standards by which to examine nominees (Silverstein 1994, 121). Additionally, television coverage of confirmation hearings began in 1981 with the O'Connor nomination. Television coverage itself, along with the overall increase in media reporting on nominations since then, has been thought to have increased the contentious, ideologically-driven nature of confirmation hearings. Further, interest group testimony in confirmation hearings (which began to rise in the early 1970s) increased significantly starting with the O'Connor nomination in 1980. As with expanded media coverage, the increase in interest group testimony has been cited as furthering contentiousness, especially along ideological lines. To seemingly

ignore the institutional context in which the Bork nomination took place seems to be a bit negligent, and the authors would have done well to at least propose the possibility that institutional context, as opposed to a single nomination, drove the shift to greater focus on ideology by senators in confirmation voting.

Additionally, if the authors are intent upon finding a dividing line between when nominations were less ideologically driven and when they became moreso, it might have been advantageous to have tested other nominations to see if they produced results similar to that of Bork. Testing at least one other nomination from around the time of Bork's might have shed additional light on whether or not the Bork nomination, rather than the contentious Reagan era in which it occurred, was truly driving the shift in importance placed on ideological factors. Alternatively, the authors could have tested other scholars' claims regarding when ideology became paramount to the Senate, such as during the first year of Reagan's presidency (Silverstein, 1994), the Fortas nomination (Fleisher and Bond, 1998), or at some point during the Warren Court era (Bork, 1990). Regardless, testing additional dividing lines would have been an interesting if not beneficial addition to their work.

HYPOTHESES

The confirmation votes in the Roberts and Alito cases present an interesting research question – why did Alito receive considerably fewer "yea" votes than Roberts, given that the two possess similar ideological scores and were nominated by the same president under similar conditions of timing? As has been evidenced, several factors are thought to be influential on Senate confirmation votes for Supreme Court nominees and could be used to explain this puzzle. My theory is centered around Ruckman's interesting (though not as widespread) theory regarding the influence of critical nominations.

As has been discussed, Ruckman argues that the nature of a vacancy to the Court – specifically, whether or not a nomination is "critical" – can have considerable influence on whether or not a confirmation is successful. He finds that almost half of the critical nominations that he examined failed and non-critical nominations were 12 times more likely to be confirmed by the Senate. Further, the critical nominations hypothesis correctly predicted 94 percent of successful nominations, 74 percent of failed nominations, and, when applied to associate justice positions, correctly predicted 82 percent of rejections and 94 percent of confirmations (Ruckman, 793).

To reiterate, Ruckman's definition of critical nominations were those "which involve the threatened loss of representation on the Court, institutional restructuring of the Court, and substantial shifts in the balance of the Court's partisan or ideological coalitions" (Ruckman 1993, 794). Though Alito was nominated to replace a Republican justice (and hence would not be an attempt at opposite party replacement), O'Connor was widely considered to be a moderate swing voter and did not always vote as Republicans would have liked her to. Alito's nomination therefore could fall under the category of "critical" due to the fact that his replacement of O'Connor would result in a shift in the balance of the Court's ideological coalitions (adding another voter to the conservative coalition to which O'Connor never firmly belonged and making the Court overall more ideologically conservative) as well as result in a threatened loss of representation on the Court (namely, the loss of a moderate swing voter in O'Connor).

Evidence of the considerable difference in ideology between Alito and O'Connor need not be merely speculative. When one looks at the Segal-Cover scores of O'Connor and Alito, the difference is striking. On a 0 to 1 scale, with 0 being the most conservative and 1 being the most liberal, O'Connor is rated .415, while Alito receives a rating of .100 (Segal and Cover

2005, np). There is little doubt that replacing O'Connor with Alito would shift the Court towards a more conservative stance and would result in a loss of the representation of a vital swing voter – one who many Democrats counted on in many instances to support their cause. However, the importance of O'Connor's replacement goes beyond shifts in the Court's ideological balance. O'Connor's appointment was of great historical importance. To begin with, she was the first female justice on the Court. Further, she was one of the most – if not the most – prominent swing voters in Court history.

Epstein and Segal also hint at how the nature of the O'Connor vacancy could influence that nominee's treatment by the Senate when they state, "We expect that whoever replaces Sandra Day O'Connor – perhaps the swing justice to end all swing justices – will face a far bumpier road to confirmation than even Bush's candidate for the chief justice spot" (Epstein and Segal 2005, 109).

In comparison, Roberts' replacement of Rehnquist was considerably less likely to influence the ideological balance of and representation on the Court. Rehnquist possessed an ideological score of .045, while Roberts' score is .100 – a difference that was clearly nowhere near as remarkable as that between O'Connor and Alito (Segal and Cover 2005, n.p). Moreover, Roberts was considered by many to be Rehnquist's ideological twin – he had even begun his career as a clerk for Rehnquist in 1980 and 1981. Given these factors, it is easy to understand what made Alito's appointment a distinctly different affair than that of Roberts'.

The fact that the Alito nomination is in all likelihood a transformative, critical nomination, while Roberts' is not, could well have caused the vote difference between the two. That leads to the following hypothesis:

Hypothesis 1: If a nomination is transformative to the Court (a critical nomination), then the vote margin will be closer than would be the case in a non-critical nomination, all other factors being held constant.

Since the Alito nomination is critical and Roberts' is not, and given that a 20 vote difference existed between Roberts and Alito, the difference in vote margin between the two could well be explained by the critical nomination factor. In order to test this hypothesis, I will examine the statements of the 20 senators who voted for Roberts but against Alito – specifically, their statements on the Senate floor and in news reports – to see what factors they mentioned as having influenced their vote. A lack of evidence supporting theories of ideological or partisan influence will further serve to strengthen the argument that the transformative nature of a nomination – rather than party or ideology – best explains why Alito received fewer votes than Roberts.

One of the two alternative hypotheses that will be tested is the influence of ideology. As has been discussed, numerous scholars have found in their studies that ideology is a strong, if not overriding, factor in Supreme Court confirmation votes. Sulfridge (1980), Songer (1979), Segal, Cameron, and Cover (1992), Massaro (1990), and Epstein, Lindstadt, Segal, and Westerland (2006) all found that ideology (or, in the case of Songer, predicted dissatisfaction in policy-related voting of the nominee once he or she takes the bench, which can be considered ideologically-based opposition) is influential.

Other scholars have also indicated how significant ideology is in judicial confirmations. Epstein and Segal (2005) performed a quantitative test to determine the influence of ideology on senators' votes for Supreme Court nominees, collecting every senator's votes on all Supreme Court nominees since the mid-twentieth century. The authors compared nominees' Segal-Cover

ideological scores to senators' Americans for Democratic Action (ADA) ideological scores and found that nominees who were ideologically distant from senators obtained about 57 percent of their votes. When nominees were ideologically similar, however, they received 98 percent of their votes (Epstein and Segal 2005, 112-113).

Additionally, Massaro (1990) evidenced the importance of ideology by comparing it with party affiliation to see which factor was dominant in the Senate confirmation votes on Fortas, Haynsworth, and Carswell. In making this comparison, he first counted party and ideological "deviants" (those who voted either against their party or in contradiction to their ideology) to see which factor generated the fewer number of deviants, thus providing the best explanation of Senate voting in the three nominations. Additionally, he compared the indexes of likeness (which measures the difference between two groups in how they vote on a specific roll call) for Senate groups along ideological and party lines to see which generated the most variation in group voting (thereby making it the better explanatory factor). In the first comparison, the Senate divided along ideological instead of party lines. In the second, there was greater dissimilarity in group voting when ideology was used to divide the Senate (rather than party affiliation). Massaro concludes that ideology, more than party affiliation or non-ideological concerns, influenced senators' votes in these cases (Massaro 1990, 12-16).

Further, Comiskey (2004) argues that ideology "emerged in the latter half of the twentieth century as the nearly exclusive focus of confirmation politics" as other factors (such as patronage, regionalism, and personal rivalry) declined in importance (Comiskey 2004, 6). He adds that both quantitative and case studies of Senate confirmation votes "leave no doubt that issues, or ideological questions, exert a powerful – probably the most powerful – influence on senators' confirmation voting (Comiskey 2004, 56).

This evidence leads to the following hypothesis regarding the difference in confirmation votes for Roberts and Alito:

Alternative Hypothesis 1: If Roberts and Alito are considered to be ideologically distant from one another, with Alito being considerably more conservative than Roberts, then senators most likely put considerable weight on ideology of the nominees when casting their confirmation votes for the two nominees. If Roberts and Alito are deemed ideologically similar, then senators most likely did not put a great deal of weight on ideological considerations when making their confirmation votes.

A simple way of ascertaining the ideological distance between two nominees is by using Segal-Cover ideology scores. The scores were computed through a content analysis of editorials from two liberal and two conservative newspapers and range from 0-1, with 0 being most conservative and 1 being most liberal. If Roberts and Alito are found to have considerably different Segal-Cover scores (especially if Alito is shown to be significantly more conservative than Roberts), then ideology could be a strong explanation as to why 20 senators voted in favor of confirming Roberts but in opposition to confirming Alito.

There are several reasons why Segal-Cover scores are used. To begin with, they are widely employed in literature studying the ideology of Supreme Court justices (Cameron, Cover, and Segal 1990; Kearney and Sheehan 1992; Sheehan, Mischler, and Songer 1992; Segal, Cameron, and Cover 1992; Mischler and Sheehan 1993; Segal and Spaeth 1993; Segal, Epstein, Cameron, and Spaeth 1995; Johnson and Roberts 2004; Epstein and Segal 2005; Epstein, Lindstadt, Segal, and Westerland 2006). In addition, Epstein and Mershon (1996) state that "authoritative textbook accounts of judicial decision making have cited the Segal/Cover approach with approval" (Epstein and Mershon 1996, 265).

Additionally, the Segal-Cover scores, having been updated and backdated, include ideological scores for Justices Roberts and Alito. The few other measures of the ideology of Supreme Court justices that exist do not include the two justices. Further, those measures suffer from considerable weaknesses. Attitude surveys, typically used to ascertain the ideology of sitting lower court judges, "have their limitations when most of the justices being analyzed are dead" (Tate 1981, 365). Using past votes to put justices on a left to right scale can be useful but may not be able to parse out justices' attitudes from sources independent of votes (Epstein and Mershon 1996, 264). Another method, developed by Danelski (1966), uses pre-nomination speeches to identify ideological values. However, it is also inadequate because it was limited to two justices (Brandeis and Butler) and because it appears to be less easy to replicate and update than Segal-Cover scores (Epstein and Mershon 1996, 265). Additionally, as Segal and Cover argue, some justices did not give speeches prior to their nomination to the Court (Segal and Cover 1989, 560).

Moreover, Segal-Cover scores seem to be accurate. "We believe the scores accurately measure the perceptions of the justices' values at the time of their nominations," the authors assert. "While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are, expectedly, the most liberal, while Scalia and Rehnquist are the most conservative" (Segal and Cover 1989, 559-560).

Finally, the considerable amount of thoughtfulness the authors displayed in both selecting their criteria and in analyzing numerous potential measures adds strength and value to their measures. When attempting to build an indirect method of measuring justices' ideological values, the authors realized that any measure they used must have some kind of content analysis; they then came up with four criteria that led them to choose to use newspaper editorials: the data

they sought had to have ideological content, had to exist in a comparable form for each justice, had to be free of systematic errors in the data, and had to be independent of the votes that justices have already cast (Segal and Cover 1989, 560). They then considered and dismissed several potential measures. Coding cases decided by justices while they were on lower courts was not acceptable, as some justices have not served on lower courts, while opinions written by justices are inappropriate since they are not independent of votes cast. Using speeches or articles from justices, when they are ideologically driven, "may be rationalizations or defenses of decisions previously cast;" further, such speeches and articles are independent only of votes that have not been cast, and some justices have not published articles or speeches prior to being selected for the Court. Senate confirmation hearings, while including ideological content and containing comparable data for most justices, were deemed unsuitable because of the likelihood of systematic bias in the data – that is, in non-controversial hearings, nominees will be unlikely to provide much ideological information in their statements, and when such information is offered, it is "usually done in an attempt to satisfy senators that the nominee is not as liberal or conservative as commonly believed" (Segal and Cover 1989, 560-561). Newspaper editorials, however, usually have ideological content, are independent of votes cast later by the justices, and exist on every nominee since Earl Warren, making them suitable for Segal and Cover's purposes.

Still, there are a few weaknesses in the scores that should be mentioned. Segal and Cover themselves point out the fact that the measures "must be used with caution" as they are measures of perceived values and are, therefore, not a perfect measure of justices' actual values (Segal and Cover 1989, 559-560). Additionally, it might be inappropriate to measure ideology using a single score. For example, one justice could be strongly pro-life and pro-environment while another is strongly pro-business but pro-choice. Both justices would be ranked as "moderates"

but would differ ideologically; additionally, neither would truly be moderate on issues such as abortion and the environment, but their scores would indicate that they were.

When it comes to the potential inappropriateness of using a single score to measure ideology, it seems that this issue could be most problematic when using the scores to predict the votes of justices, not when used to assess ideology generally. Further, this issue would likely be more likely to manifest itself when the ideological scores of numerous justices were being compared, as the increased number of justices being compared would lead to an increased chance of an incorrectly specified ideological assessment. In this case, however, only two justices are being compared, thus reducing the odds that the use of a single score could be problematic. Additionally, given Roberts' and Alito's memos and judicial records, it is known that the justices are in fact ideologically similar on several issues, such as abortion, school prayer, and the notion of judicial activism. Therefore, this potential weakness should not prove to be a problem in this study.

With respect to the imperfect nature of measuring perceived values, it appears that at this time, it is the best that can be hoped for. "In a world more attuned to the needs of researchers, Supreme Court justices would annually complete attitude questionnaires on each issue the Court would consider during the year," they state. "Neither this nor a single questionnaire completed at each justice's appointment are likely to happen any time soon. We must turn instead to indirect methods of measuring the ideological values of justices" (Segal and Cover 1989, 560). Given the aforementioned strengths of the scores and the few weaknesses they possess, it seems that Segal-Cover scores are the most appropriate measures for use in this study.

The second alternative hypothesis under examination involves the effects of party. Several studies have indicated the importance of party affiliation in Senate confirmation votes.

As previously mentioned, Epstein and Segal (2005) and Segal (1987) discovered in their studies that party played an important role in how senators voted on Supreme Court nominations. Additionally, Cameron, Cover, and Segal (1990) found that senators being of the same party as the president was influential on confirmation votes, especially when senators were undecided following an examination of nominee characteristics (Cameron, Cover, and Segal 1990, 531).

Relatedly, Comiskey (2004) notes that party polarization has been on the rise during the latter part of the twentieth century. As a result, party-line voting and party unity scores have also risen during this time (Comiskey 2004, 17). Wittes (2006) also discusses the influence of party polarization on Supreme Court confirmation votes, stating that by the time Bork was nominated, "the parties had largely aligned themselves across the central divisions of the day." Accordingly, Bork's confirmation votes followed along almost perfect party lines, and Wittes argues that the trend has only solidified since (Wittes 2006, 80, 92).

Additionally, O'Brien (1988) asserts that the Senate's standards when it comes to confirmations "are basically parochial – based on each senator's personal views and partisanship." He adds that party affiliation "remains the controlling consideration" when it comes to who sits on the Court (O'Brien 1988, 76, 95). Epstein and Segal (2005) add that a senator's support for a candidate "has never been unrelated to the supporter's own party affiliation" and believe that while partisanship does not provide a full explanation of senators' votes, it "continues to play an important role" (Epstein and Segal 2005, 2, 107).

As with ideology, it is evident how influential party can be in shaping confirmation votes. This evidence leads to my second alternative hypothesis:

Alternative Hypothesis 2: If the senator's party differs from the nominating president's, then he or she will vote against confirmation. If the senator's party is the same as the nominating president's, then he or she will vote for confirmation.

To determine if party can explain the difference in the Roberts and Alito votes, I will examine the individual votes of senators to see whether Democrats consistently voted against Roberts and Alito and whether Republicans voted for them. Further, the party of the nominating president and the nominees will be taken into account in order to see if any differences exist that could explain, in terms of party, why the Roberts and Alito votes differed.

In addition to these three hypotheses, a few other factors are worth brief examination, given the influence they have been shown to have in prior studies. To begin with, the conditions in which President Bush made the two nominations will be examined to see if traditional hypotheses regarding a strong versus a weak position for the president hold in these two cases. Specifically, a president is considered to be "strong" if his party controls Congress and if he is not making the nomination in the last year of his term and is considered "weak" otherwise. Given that Bush made the nominations during the second year of his term and his party controlled the Senate, it is posited that his nominees will secure confirmation, thus providing further substantiation of the strong versus weak president theory.

One aspect that is not frequently mentioned when assessing whether a president is making a nomination from a strong or weak position is how a failed nomination can affect the fate of the president's subsequent selection. Though Bush was operating from a strong position by typical standards, the failure of his nomination of Harriet Miers to Justice O'Connor's seat inevitably weakened his standing and could have influenced how senators treated his nomination

of Alito. As such, I will discuss the failed Miers nomination and the possibility that Alito faced a more conflictual environment and greater scrutiny because of Miers.

Additionally, presidential approval ratings will be taken into consideration, as they have been shown in some cases to influence a president's chances of success. President Bush's approval ratings from the time the nominations were announced to the time the Senate cast confirmation votes will be examined to see if the president's public approval ratings created an environment conducive to the mobilization of opposition to his nominees, thereby affecting his ability to secure confirmation for either of his nominees.

Finally, some thought will be given to nominee qualifications, as numerous studies (Cameron, Cover, and Segal, 1990; Segal, Cameron, and Cover, 1992; Epstein and Segal, 2005; Epstein et al, 2006) have found that qualifications can influence how senators vote. In order to understand whether this factor may or may not have played a role in the vote difference between Roberts and Alito, the nominees' Segal-Cover qualifications scores will be compared to see if there is a considerable enough difference to have caused 20 senators to vote for Roberts' confirmation but against Alito's. The nominees' American Bar Association (ABA) scores will also be compared, as it is widely known that senators take these ratings into consideration when considering a nominee. Finally, statements made by the 20 senators who voted for Roberts but against Alito will be examined to see if those senators mentioned Alito's qualifications and, if so, how frequently and in what way.

CONCLUSION

In the next two chapters, I will examine the two most recent nominations and confirmations made to the Supreme Court – Chief Justice John Roberts and Justice Samuel Alito. I will begin by describing the circumstances surrounding their nominations, as well as

information about the nominees' judicial background. Then, I will discuss which actors played prominent roles in the process (as well as what roles they played), after which I will lay out what took place during the confirmation hearings. Finally, I will then analyze the confirmation process of each nomination in order to ascertain whether or not my hypotheses were validated in these appointments.

Chapter Three: The Nomination and Confirmation of John Roberts

After almost three weeks of speculation regarding who would take retiring Justice Sandra Day O'Connor's moderate swing voter position on the Supreme Court, President George W. Bush satisfied Republicans and provoked Democratic vows of thorough investigations with his nomination on July 20 of U.S. Circuit Judge John Roberts Jr., a 50 year-old U.S. Court of Appeals judge for the District of Columbia.

Following the announcement, Bush stated that Roberts "has devoted his entire professional life to the cause of justice and is widely admired for his intellect, his sound judgment and personal decency." Standing at Bush's side, Roberts said of his nomination, "It is both an honor and very humbling to be nominated to serve on the Supreme Court" (CNN.com 7/20/2005a, np).

After graduating from Harvard Law School in 1979, Roberts began his career by clerking in 1980 and 1981 for Justice William Rehnquist. Roberts then served in the Reagan administration, initially as a special assistant to Attorney General William French Smith, then as an associate White House counsel. From there, Roberts worked as deputy solicitor general during President George H.W. Bush's presidency. Roberts argued 39 cases before the Supreme Court as deputy solicitor general and as a private-practice appellate attorney.

Roberts was also a member of a team of Republican lawyers and former Supreme Court clerks who helped the Bush-Cheney campaign during the clash over the 2000 presidential election. Roberts held his most recent position as a Court of Appeals judge since 2003 following

a two-year hold-up of his nomination by Senate Democrats and had written 60 opinions during his tenure.

Bush said he and his staff conferred with 70 senators on the nomination. "I received good advice from both Republicans and Democrats," Bush said. Among those who Bush and Vice President Dick Cheney met with were Senate Majority Leader Bill Frist, a Tennessee Republican; Senator Harry Reid, a Nevada Democrat; Senator Arlen Specter, a Pennsylvania Republican and party chairman of the Judiciary Committee; and Senator Patrick Leahy of Vermont, the committee's ranking Democrat. "These senators share my goal of a dignified confirmation process that is conducted with fairness and civility," Bush asserted (CNN.com 7/20/2005a, np).

Given the fact that Bush was providing the first Court nomination in almost 11 years, and considering the role that O'Connor played on the court as a moderate, it was expected that interest groups of all kinds would be mobilized into action. It was also suspected that Democrats in the Senate would begin almost immediately scrutinizing the nominee for any hints of conservative extremism.

A LOOK INTO ROBERTS' PAST VIEWS

The release of government documents regarding Roberts' past began less than a week after Roberts was nominated to the Court. The CNN political unit publicized what they considered to be highlights of the 15,000 pages of documents released by the National Archives on July 27, 2005. The documents, written between September 1981 and November 1982, were produced during the time when Roberts was a special assistant to U.S. Attorney General William French Smith.

The papers, among other things, detailed an argument Roberts wrote by request of the attorney general regarding placing limits of the power of federal courts to rule on school prayer cases, outlined the "harsh words for a positive report on affirmative action" in a memo to the attorney general, described how he favored restrictions of habeas corpus protections, and illustrated his advocacy of a constricted reading of sex discrimination laws. The documents also revealed Roberts' arguments on issues such as judicial activism, limiting the Supreme Court's appellate jurisdiction, busing and school desegregation. According to the CNN analysis, the Roberts papers "reveal a conservative" (CNN.com 7/27/2005, np).

The Ronald Reagan Library and the National Archives also released over 5,000 pages of documents in mid-August. Those documents, requested by the Senate Judiciary Committee, revealed more of Roberts' views on many issues, such as prayer in public school, gender equality on worker wages, and courts. In one memo from November of 1985, Roberts expressed disapproval over the Supreme Court's decision forbidding voluntary prayer or meditation in Alabama schools, saying that the ruling's deduction that the Constitution does not allow for a moment of quiet reflection or prayer "seems indefensible." In another, Roberts spoke out against three Republican congresswomen who supported a 1983 Washington state supreme court ruling, which found the state guilty of discrimination because it paid women less than men for jobs of equivalent worth. The ruling, according to Roberts, was a classic example of judicial activism and represented "a total reorientation of the law of gender discrimination." (CNN.com 8/15/2005, np).

However, the Bush administration refused to turn over documents from Roberts' years as deputy solicitor general for George H.W. Bush, stating that executive privilege allowed them to prevent the documents' release.

BEHAVIOR OF MAJOR ACTORS FOLLOWING THE NOMINATION

Democratic senators emerged cautiously following the nomination, promising a fair hearing but also stating that they would perform a thorough investigation of Roberts. "The Senate must review Judge Roberts' record to determine if he has a demonstrated commitment to the core American values of freedom, equality, and fairness," Reid said, adding that he would not "pre-judge this nomination." Senator Leahy asked for "the cooperation of the nominee and the administration" in the confirmation process. "We need to consider this nomination as thoroughly and carefully as the American people deserve," Leahy said. "No one is entitled to a free pass to a lifetime appointment on the Supreme Court" (CNN.com 7/20/2005a, np).

Senator Barbara Boxer did not exclude the possibility of a filibuster and referred to her concerns regarding issues such as the environment and abortion. "Everything has to be on the table, because we have to do our work," she stated. "A filibuster is on the table. Hopefully, we don't have to use it." However, three members of the Senate's Gang of 14 – a group of seven Senate moderates from each party who established a pact in May stating that Democrats would not filibuster any of Bush's judicial nominees unless there were "extraordinary circumstances and, in return, Republicans would block attempts by the GOP to use the "nuclear option" – talked down the chances of a Democratic filibuster attempting to block the nomination (CNN.com 7/20/2005b, np).

Republicans came out in support of Roberts, with Senator John Cornyn, a member of the Senate Judiciary Committee, stating that Roberts was "an exceptional judge, brilliant legal mind and a man of outstanding character who understands his profound duty to follow the law." Senator Frist said that Roberts "is the kind of outstanding nominee that will make America proud. He embodies the qualities America expects in a justice on its highest court – someone

who is fair, intelligent, impartial and committed to faithfully interpreting the Constitution and the law" (CNN.com 7/19/2005b, np). Additionally, Senator John McCain stated that Roberts "deserves an up-or down vote," and Senator John Warner said that Roberts "has the right stuff and will do the right thing for America" (CNN.com 7/20/2005b, np).

House Majority Whip Roy Blunt also expressed satisfaction with Bush's choice. "Roberts…has proven himself as a judge who applies the law impartially with an eye towards the strict interpretation of the Constitution, rather than legislating from the bench," he said. "I look forward to a swift and deliberate confirmation process this fall" (CNN.com 7/19/2005b, np).

Senators spoke out further regarding the nomination as the media's interest in the nomination continued to grow. Senate Judiciary Committee chairman Arlen Specter asserted that Roberts' circuit court decisions would be analyzed carefully during "full, fair, and complete" hearings. Senator Leahy said that he had "an interesting and a good meeting" with Roberts and that he had advised him to "be open about every question" (CNN.com 7/20/2005b, np).

Senator Charles Schumer, a New York Democrat on the Judiciary Committee, stated that Roberts should answer more questions than he did during his 2003 confirmation hearings. "It is vital that Judge Roberts answer a wide range of questions openly, honestly and fully in the coming months," he said. "The burden is on the nominee to the Supreme Court to prove that he is worthy, not on the Senate to prove that he is unworthy" (CNN.com 7/23/2005, np).

Senator Dianne Feinstein, a California Democrat, expressed to a group of California lawyers the questions she wanted answers to before she decided whether or not to confirm Roberts. Among other issues, Feinstein said that she wanted to find out whether or not Roberts believed *Roe v. Wade* should be overturned, if he respected precedent, whether or not he would stand firm against judicial activism, and if he would follow the law, rather than attempt to create

it. "It is my hope that Judge Roberts would play a role similar to Justice O'Connor's on the Court, and bring with him a voice defined by temperance and open-mindedness," she asserted. (CNN.com 8/24/2005, np).

The president used his role in the appointment process to praise Roberts in the media. "Judge Roberts has a stellar record of achievement," Bush said during his weekly radio address a few days after making his announcement. "He has the qualities Americans expect in a judge – experience, wisdom, fairness and civility." He added that Roberts would "strictly apply the Constitution and laws, not legislate from the bench" and said that America "is fortunate to have a man of such wisdom and intellectual strength willing to serve our country." Bush repeatedly urged the Senate to promptly confirm Roberts before the Court reconvened on October 3rd (CNN.com 7/23/2005, np).

Interest groups reacted in a variety of ways to the Roberts nomination. Progress for America, a conservative group, assembled in front of the Supreme Court building in Washington the night of the nomination and carried signs that read "Confirm." The president of the group, Brian McCabe, stated that Roberts is "a man of great character who deserves genuine consideration and not automatic attacks and partisan indignation" (CNN.com 7/19/2005b, np; 7/20/2005a, np).

People for the American Way, a liberal interest group, sent out 400,000 e-mails to their supporters following the announcement. "We're extremely disappointed that the president did not choose a consensus nominee in the mold of Sandra Day O'Connor," the group said in a statement. "Replacing O'Connor with someone who is not committed to upholding Americans' rights, liberties, and legal protections would be a constitutional catastrophe" (CNN.com 7/19/2005b, np).

Additionally, Nan Aron, the president of the Alliance for Justice displayed uncertainty about Roberts' judicial values. "Given the administration's track record of selecting ideologically driven, divisive candidates for the bench, it would be unsurprising if Judge Roberts embraces a judicial philosophy that is insensitive to the rights and protections that…have brought us closer to realizing the twin ideals of freedom and equality," she said in a statement (CNN.com 7/19/2005b, np).

The Leadership Conference on Civil Rights expressed dismay at Bush's choice to replace O'Connor. "We are saddened that President Bush chose the politics of conflict and division over bipartisan consensus," the group said in a statement. "At first blush, John Roberts may not appear to be an ultra right judicial activist, but his approach to issues of protecting the rights and freedoms of individual Americans are, at beast, unclear and, in some instances, deeply troubling" (CNN.com 7/19/2005b, np).

As the weeks passed following Roberts' nomination, interest groups stepped up their campaigning for and against the nominee. Ralph Neas, president of People for the American Way, predicted that if Roberts was confirmed, he would "turn back the clock on civil liberties." The group also expressed their fear that, if confirmed, Roberts would shift the balance of power on the Court to the right for decades to come. The group distributed a 50-page report detailing Roberts' record on privacy and civil rights. The report said that Roberts "often came down to the right of ultraconservatives" and that, if confirmed, he would "undermine Americans' rights and freedoms" (CNN.com 8/24/2005, np).

Furthermore, the group took legal action towards the end of August to retrieve documents from Roberts' tenure with the solicitor general's office during the senior Bush's administration.

The current Bush administration refused to release the documents, leading Neas to implore the Senate to reject Roberts if the documents were not released (CNN.com 8/24/2005, np).

NARAL Pro-Choice America took to the airwaves and began airing a nationwide ad criticizing Roberts by stating that he had "filed court briefs supporting violent fringe groups and a convicted court bomber." The ad said, "America can't afford a justice whose ideology leads him to excuse violence against other Americans" (CNN.com 8/12/2005, np).

However, on August 11, NARAL chose to withdraw the ad after receiving a caustic letter from Senator Specter saying that the ad was "blatantly untrue and unfair." The president of NARAL, Nancy Keenan, said that they would replace the ad with one that "examines Mr. Roberts' record on several points, including his advocacy for overturning *Roe v. Wade*, his statement questioning the right to privacy, and his arguments against using a federal civil rights law to protect women and their doctors and nurses from those who use blockades and intimidation" (CNN.com 8/12/2005, np).

IndependentCourt.org also began running a few ads in August, which aired on cable television networks. The ads criticized the Bush administration for "withholding important documents from Senators. We need the facts. Before the Senate votes to give John Roberts a lifetime appointment" (JAS 8/26/2005, np).

Despite these ad campaigns by opposition groups, by the end of August, Roberts' supporters had outspent his opponents on television advertising by roughly 8 to 1 since Roberts' nomination. Progress for America released several ads in support of Roberts, such as one that stated, "Shouldn't a fair judge be treated fairly?" Another said, "A far left Democratic group is making a desperate and false attack recklessly distorting Judge Roberts' record" (JAS 8/26/2005, np).

A group of female leaders calling themselves "Women for Roberts" also came out in defense of Roberts. Bridget Benitez, a member of the Republican National Lawyers Association, stated that no one had presented any reasons why Roberts should not be confirmed. Linda Chavez, a member of the Center for Equal Opportunity, said that Roberts' opinions are well within the mainstream and that he does not "have a sexist bone in his body." Mary Ellen Bork, wife of failed Supreme Court nominee Robert Bork, condemned critics who were attempting to misrepresent Roberts' record. "Many of these groups are aligned with the left, and leftist causes, because they want the Supreme Court to enact their agenda instead of going through the legislative process," Bork said (CNN.com 8/24/2005, np).

Several advocacy organizations who claimed to speak for minority groups also came out in support of Roberts. Members of the Congress of Racial Equality, the National Center for Neighborhood Enterprise, the Center for New Black Leadership, the U.S. Commission on Civil Rights, and Project 21 asserted that the liberal interest groups who had come out against Roberts' nomination in no way represented all minorities. "We are not a monolith," said Jennifer Braceras, a member of the U.S. Commission on Civil Rights. "We come from many different religious backgrounds and different socioeconomic backgrounds." With regards to recent attacks on Roberts by liberal groups, Braceras said they were "as predictable as the sunrise and as preposterous as the man in the moon" (CNN.com 8/27/2005, np).

Niger Innis, a spokesman from Congress for Racial Equality, led the coalition of individuals and organizations. Innis said that he was speaking out on behalf of the black community regarding issues such as education, assuring that government money is available for faith-based organizations, and school vouchers. Regarding these issues, Innis said that the voice

of the coalition "represents a large segment of the African-American community that is standing behind John Roberts and his nomination" (CNN.com 8/27/2005, np).

Additionally, the U.S. Chamber of Commerce came out in support of Roberts, saying that Roberts' experience "will serve the Court and the nation favorably." Thomas Donohue, the president and CEO of the Chamber, said that Roberts "has attracted broad, bipartisan support for his fairness, keen intellect, open-mindedness and judicious practice of the law" and that he was "highly regarded and well respected by the legal and business communities" (CNN.com 8/24/2005, np).

Though it is clear that many groups released statements regarding their stance on Roberts, the television ad war that was predicted to heat up as the confirmation hearings grew closer did not come to pass. The majority of ads were forwarded by Roberts' supporters, and those put forth by groups opposing Roberts ran for the most part prior to Roberts being selected to succeed Rehnquist instead of O'Connor, suggesting that the opposition that was generated may have been due to the significance of O'Connor's seat, rather than overt opposition to Roberts himself. Justice at Stake observed that just before the start of confirmation hearings, none of the groups who had spoken out about Roberts ran any new television ads; only two groups – Progress for America and NARAL Pro Choice America – continued to run television ads. Deborah Goldberg, the director of the Democracy Program at the Brennan Center for Justice at New York University School of Law, speculated, "Interest groups that planned to run TV advertising may be conserving their resources in anticipation of the next high court nomination" (Justice at Stake [JAS] 9/15/2005, np).

Goldberg's statement seemed to be buttressed a week later, when Justice at Stake found that television advertising regarding Roberts "sputtered to a virtual halt on the eve of the

Judiciary Committee's vote, suggesting that interest groups are saving their war chests for the next battle." No major groups ran ads during the week of September 12 to 18, and in the end, groups favoring Roberts spent $1.68 million, while groups opposing him spent just over $554,000 (JAS 9/22/2005, np).

Members of the media also began speculating about Roberts nomination almost immediately following Bush's announcement, adopting the role of educator from the very start. John King, a CNN correspondent, said in an interview following the announcement that Roberts "is a familiar face to conservatives" and that they "will be very happy with this appointment." He stated that Roberts "seems to be more conservative than Sandra Day O'Connor and will tilt the Court a bit to the right" but is also "someone who has had bipartisan support in the past" (CNN.com 7/19/2005a, np).

CNN senior legal analyst Jeffrey Toobin also speculated about the Roberts nomination shortly after Bush held his press conference. Toobin referred to Roberts as "an intellectual heavyweight," adding that he is "one of the most accomplished Supreme Court advocates of his generation." He hypothesized that Roberts "is likely to be a very good witness on his own behalf, because this is a very smart guy and he is used to…arguing before the Supreme Court…Roberts should be very well suited for that task." Finally, he stated that Roberts is "100 percent conservative" but that it would be "very difficult for the Democrats to define him in some extreme way, because there's no paper trail, there is no documentation that will support that theory" (CNN.com 7/19/2005c, np).

Additionally, CNN's Carlos Watson referred to Bush's pick as "the safe choice: a Washington insider, a solid conservative with several key Democrats to recommend him, and an impressive Harvard pedigree." He predicted that Roberts "will be subject to the normal poking

and prodding in the run up to his Senate confirmation, but by most reasonable calculations, ultimately be will get at least 51 votes and win the confirmation."

Once the news of the nomination had settled in, media pundits increased their analysis of Roberts' odds of confirmation and made predictions regarding how the confirmation hearings would play out. Edward Lazarus, a FindLaw columnist, said that it was improbable that Democrats would attempt to block Roberts' nomination, largely due to the fact that Roberts would be a tough target. "Roberts is whip-smart and has terrific credentials," he said. He also asserted that Roberts "is telegenic, articulate, and well-liked even by ideological adversaries" and that "his command of the law is superb, and he's sharp enough to be able easily to separate what the law is, from what he'd like it to be" (CNN.com 7/22/2005, np).

Robert Novack, a political analyst, also speculated about the Roberts nomination and the actions of major players involved in the process. Specifically, he evaluated the initial attacks against Roberts by the abortion lobby, stating that they were "part of an intricate game that not only determines the occupant of one seat on the Supreme Court but can set its ideological course for the next generation." By keeping the number of confirmation votes low, Novack argued that groups would make it more difficult for Bush to name a similarly conservative justice to the next vacancy in the Court, which Novack said could occur soon. "With his [Roberts'] confirmation unlikely to be blocked, both sides are concentrating on the next vacancy," he said (CNN.com 8/11/2005, np).

The public also put forth its initial thoughts the day after the nomination. In a CNN/USA Today/Gallup poll, over three-fourths of those surveyed stated that they needed to learn more about Roberts before deciding whether or not to support him (CNN.com 7/20/2005b, np). Over the next several weeks, public opinion regarding Roberts began to crystallize and showed that

the majority of the public viewed the Roberts nomination positively. In a CNN/USA Today/Gallup poll taken in early August surveying 1,004 adult Americans (443 of who said they were Republicans and 466 who identified themselves as Democrats), 51 percent said the Senate should confirm John Roberts to the Court. 28 percent said he should not be confirmed, and 21 percent said they were uncertain (CNN.com 8/8/2005, np).

In another CNN/USA Today/Gallup poll taken after the conclusion of the confirmation hearings, 60 percent of the 818 adults surveyed stated that they supported Roberts' confirmation. 26 percent opposed confirmation, while 14 percent said they had no opinion (CNN.com 9/19/2005, np).

AN UNEXPECTED TWIST

Before Roberts' confirmation hearings began on September 6, Chief Justice William Rehnquist died on September 3. President Bush was then confronted with the task of replacing both a chief justice and a retiring associate justice. He had several options available to him in filling Rehnquist's seat, such as asking Justice O'Connor to delay her retirement and serve as chief justice or elevating a sitting conservative associate justice, such as Justice Thomas or Justice Scalia, to the chief justice position. However, Bush chose to nominate Roberts to the chief justice position and select another nominee to take O'Connor's place.

"It is fitting that a great chief justice be followed in office by a person who shared his deep reverence for the Constitution, his profound respect for the Supreme Court and his complete devotion to the cause of justice," Bush said during a September 5 press conference. Roberts, who was at Bush's side as he made the announcement, stated that he was "honored and humbled by the confidence that the president has shown in me" and added that he was "very

much aware that, if I am confirmed, I would succeed a man that I deeply respect and admire, a man who has been very kind to me for 25 years" (CNN.com 9/5/2005a, np).

Roberts had in the past been compared to Rehnquist in terms of his judicial philosophy and prudence, especially since Roberts had clerked for Rehnquist during the early 1980s, had been a lawyer for a Republican White House, and sometimes cited Rehnquist's works when composing policy memos for Reagan and legal briefs for the first President Bush. These comparisons of Roberts and Rehnquist became even more frequent once Roberts was chosen to succeed Rehnquist. An Associated Press report stated that Roberts, like Rehnquist, is "deeply conservative" and that there are "striking similarities between the two men… Both were first in their class in law school, enjoyed reputations for brilliance and were known as good writers" (Associated Press 9/6/2005, np).

Walter Dellinger, a former U.S. solicitor general, stated, "It's hard to imagine a choice more similar to Chief Justice Rehnquist than John Roberts. They both love the law and they both are among a handful of the most intellectually accomplished legal minds" (USA Today 9/06/2005, np). Ted Cruz, a former law clerk of Rehnquist's and a current Texas solicitor general, asserted that he believed that Rehnquist's judicial restraintist position was shared by Roberts. "Both believe it is principally the role of the democratically elected officials to make policy," he said (USA Today 9/06/2005, np).

Mary Cheh, a law professor at George Washington University, said Roberts is similar to his mentor because he endorsed a modest approach on the court and "would generally defer to judgments made elsewhere." Further, she states that comments from Roberts regarding Roe v. Wade were "remarkably similar" to writings by Rehnquist, who wanted to overturn the case (St. Petersburg Times 9/16/2005, np).

It was also frequently asserted that replacing Rehnquist with Roberts would result in little if any shift in the Court's ideological balance. Bill Schneider, a CNN political correspondent, argued that having Roberts replace Rehnquist "would not appear to change the balance on the high court." Therefore, according to Schneider, Bush sidestepped an extended confirmation battle for Roberts and avoided exhausting his political capital (CNN.com 9/6/2005, np).

The aforementioned Associated Press report also stated, "The Roberts-for-Rehnquist nomination would not affect the balance, but Bush could force an ideological shift by replacing O'Connor with a reliably conservative vote" (Associated Press 9/6/2005, np). A story from the Boston Globe noted, "With Roberts tapped to replace Rehnquist instead of O'Connor, one aspect of the confirmation fight is likely to change. O'Connor has been a moderate voice on the court and a frequent swing vote, while Rehnquist was a consistent conservative. Therefore, confirming Roberts to replace Rehnquist is unlikely to alter the political balance on the high court in the same manner that having him step in for O'Connor would" (Boston Globe 9/6/2005, np). Further, Jeffery Toobin remarked, "A trade of Roberts for Rehnquist will probably not shift the balance of power in any significant way. Roberts will probably vote the same way Rehnquist would have on most issues" (The New Yorker 9/12/2005, np).

Others weighed in more generally regarding the nomination. Toobin stated that while Roberts was going to be an "outsider" coming in as chief justice, Roberts "is part of the institution. He clerked on the Court…He worked in the solicitor general's office, which is sometimes called the office of the 10th justice, the people who appear so frequently by the Court. He's someone who the justices know." He stated that Roberts "looks like a chief justice. He is not a person of wild mood swings, emotions. He does not have in his history great loud partisanship for one way or the other. He's scholarly, he's very knowledgeable about the law."

He asserted that Roberts "will fit into the institution very well" and that he foresaw no problems that would prevent a quick confirmation for Roberts (CNN.com 9/5/2005b, np).

THE CONFIRMATION HEARINGS

Roberts' confirmation hearings began on September 12. Senator Specter opened the hearing and stated of Roberts, "Your prospective stewardship of the Court, which could last until the year 2040 or longer…and would present a very unique opportunity for a new chief justice to rebuild the image of the Court away from what many believe it has become as super legislature" (CNN.com 9/13/2005, np).

Democrats on the committee said in their opening remarks that they intended to present tough questions to Roberts. "This hearing is the only chance that 'We the People' have to hear from and reflect on the suitability of the nominee to be a final arbiter of the meaning of the Constitution," Senator Leahy said to Roberts. "Open and honest public conversation with the nominee in these hearing rooms is an important part of this process" (CNN.com 9/13/2005, np).

Senator Feinstein stated that she was concerned with Roberts' views on abortion rights and told Roberts that the right to privacy would be one of the most important issues he would need to address. "It would be very difficult for me to vote to confirm someone to the Supreme Court whom I knew would overturn *Roe v. Wade*," she said (CNN.com 9/13/2005, np).

Additionally, Senator Schumer told Roberts that he would have to be forthcoming about his judicial ideology. "To me, the pivotal question, which will determine my vote is this: Are you within the mainstream – albeit the conservative mainstream – or are you an ideologue who will seek to use the Court to impose your views upon us?" Schumer stated (CNN.com 9/13/2005, np).

Meanwhile, Republicans told Roberts that he had the right to refuse to provide precise details, especially regarding hot-button issues, and advised him to exercise caution when discussing how he would rule on certain matters. Senator Orrin Hatch of Utah stated, "Some have said that nominees who do not spill their guts about whatever a senator wants to know are hiding something from the American people. Some compare a nominee's refusal to violate his judicial oath or abandon judicial ethics to taking the Fifth Amendment. These might be catchy sound bites, but they are patently false" (CNN.com 9/13/2005, np).

Senator Cornyn told Roberts, "Don't take the bait. Don't go down that road. Do exactly the same thing every nominee, Republican and Democrat alike, has done. Decline to answer any question that you feel would compromise your ability to your job" (CNN.com 9/13/2005, np).

Following the remarks of the 18 senators on the committee, Roberts presented his opening statement in which he expressed his vision of a judge's role. "Judges are like umpires," Roberts said. "Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire." Roberts stated that he came before the Senate Judiciary Committee "with no agenda" but instead with a commitment, and he later revisited his baseball analogy by stating that he "will remember that it's my job to call balls and strikes and not to pitch or bat." Roberts concluded his statement by stating that if confirmed, he would "be vigilant to protect the independence and integrity of the Supreme Court" and "work to ensure that it upholds the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans" (CNN.com 9/12/2005, np).

Roberts spent the second and third day of his confirmation hearings tackling questions on a number of critical issues, such as the right to privacy, *Roe v. Wade*, executive power, and equal

protection rights for women. Roberts carefully sidestepped providing specific answers and was able to avert tough questions regarding his judicial philosophy and his past court decisions.

With regards to abortion, Roberts declined to answer Specter's question regarding his reverence for precedent of *Roe v. Wade*, telling Specter, "I should stay away from discussion of specific cases." However, Roberts did say that deferring to precedent guarantees "predictability, stability and legitimacy." Roberts later told Feinstein that he would tackle challenges to *Roe* by the principle of *stare decisis*. Roberts said that cases such as *Planned Parenthood v. Casey*, a 1992 Court decision upholding *Roe*, are "entitled to respect under principles of *stare decisis* like any other precedent of the Court" (CNN.com 9/14/2005b, np).

When questioned about the right to privacy – specifically, a 1981 memo in which he rejected *Roe*'s presumption that the right to abortion is based on what he referred to as "the so-called right to privacy" – Roberts said the opinions expressed in the memo were not necessarily his views at that time, nor were they his views now. Roberts also stated that he believes the right to privacy is present in the Constitution. "The right to privacy is protected under the Constitution in various ways," he said (CNN.com 9/14/2005b, np). "The Court has – it was a series of decisions going back 80 years – has recognized that personal privacy is a component of the liberty protected by the due process clause." Roberts also mentioned that the right to privacy was protected under the First, Third, and Fourth amendments (CNN.com 9/14/2005c, np).

Roberts also faced questions about his judicial philosophy. Hatch asked, "An originalist, a strict constructionist, a fundamentalist, perfectionist, a majoritarian or minimalist – which of those categories do you fit in?" Roberts responded, "Like most people, I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge. And, to me, that means some of the things that you talked about in those other labels. It means an appreciation that the

role of the judge is limited" (CNN.com 9/14/2005c, np). Further, Senator Charles Grassley, an Iowa Republican, asked, "Is there any room in constitutional interpretation for the judge's own values or beliefs?" Roberts stated, "No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources" (CNN.com 9/14/2005c, np).

Finally, Roberts was questioned about equal protection rights by Feinstein, who referred to a memo from his time with the Reagan administration in which Roberts questioned whether or not it was good for housewives to become attorneys – a memo which led some to believe that Roberts was antagonistic toward equal rights for women. He said that the statement he made was meant to be a "lawyers' joke" and that he in fact wholly supports women's rights, adding, "The notion that that was my view is totally inconsistent and rebutted by my life," referring to his wife, an attorney, and his three sisters, who all held jobs outside the home (CNN.com 9/14/2005b, np).

During the hearings, Roberts reiterated that he considers himself "a modest judge" who "appreciates the role of a judge is limited. It is not to legislate or execute the law" (CNN.com 9/14/2005b, np).

The questioning occasionally became testy, and a few heated words were exchanged between Roberts and Senators Kennedy and Joe Biden, a Delaware Democrat. Kennedy repeatedly questioned Roberts over memos he wrote during the 1980s in which he discussed whether or not federal anti-discrimination laws should be extended to include universities' faculty hiring, housing, and athletic programs, among others, that were not funded by the U.S. government. Kennedy believed that Roberts took a stance in the memos that would have dramatically restricted the civil rights of minorities, had those viewpoints been adopted. Roberts

responded by stating, “You’ve not accurately represented my position. I was not formulating policy. I was articulating and defending the [Reagan] administration’s position,” he argued (CNN.com 9/14/2005b, np).

Biden claimed that asking Roberts questions was “like pitching to Ken Griffey” and later accused Roberts of filibustering when Roberts declined to answer specific questions and compared his answers to those given by Justice Ruth Bader Ginsburg during her confirmation hearings. Roberts responded to the filibustering accusation by stating, “That’s a bad word, Senator” (CNN.com 9/14/2005b, np).

During the third day of his hearings, which spanned 11 hours, Roberts was peppered with questions regarding several issue areas dominating the headlines, including property rights, patient rights, and church-state disputes.

When questioned about property rights (specifically, a contentious 2005 Supreme Court ruling allowing governments to take possession of private property and hand it over to private developers for public use to promote local economies), Roberts declined to state whether or not he thought the ruling was correct, instead stating, “The Court was saying there is this power, and it is up to the legislature to decide if this power is available. It leaves the ball in the legislature” (CNN.com 9/14/2005a, np).

When questioned about capital punishment, he stated that, hypothetically, he would vote to permit a stay of execution to let a death row inmate continue to appeal his case. Roberts believed “it makes a lot of sense” to give those sentenced to capital punishment increased latitude in contesting their sentences. When asked about his view on a federal court ruling stating that the Pledge of Allegiance could not be read in public schools because of the words “under God,” Roberts stated that the Court has consistently had its share of difficulties in

interpreting the constitutional prohibition of government endorsement of religion. "That is an area in which I think the Court can redouble its efforts to try to come to some consistency in its approach," he said (CNN.com 9/14/2005a, np).

Roberts also faced additional questions about abortion. Two senators tried to glean Roberts' opinion regarding when he believed life begins. Roberts restated his refusal to make statements on cases that could come before him in the future. He responded similarly when questioned about the rights of the terminally ill to end their own lives with the assistance of a doctor.

After the third day of questioning, several Democratic senators were left dissatisfied with Roberts' responses. "With all due respect, you've told me nothing," Biden argued. "It's kind of interesting, this kabuki dance we have in these hearings here, as if the public doesn't have a right to know what you think about fundamental issues facing them…We are rolling the dice with you, Judge" (CNN.com 9/14/2005a, np).

Schumer made similar comments to Roberts. "Why this room should be a cone of silence is beyond me," he said. "You'll answer only as many questions as necessary to get confirmed. It's not the right thing to do." (CNN.com 9/14/2005a, np). He found that Roberts' lack of specificity in his answers gave senators little to work with. "What we need to know are the kinds of things that are coming before the Court now," he stated. "And it makes it hard to figure out what kind of justice you will be, particularly in light of the fact we have little else to go on." Schumer did praise Roberts for his modest legal philosophy and his intellect, saying that he has "an amazing knowledge of the law" and that Roberts "may very well possess the most powerful intellect of any person to come before the Senate for this position" (CNN.com 9/15/2005, np).

Feinstein also expressed her uncertainty with Roberts, stating, "I don't know what I'm going to do. My impression today is that you are a very cautious, very precise man…and that concerns me more" (CNN.com 9/16/2005, np).

However, numerous Republican senators lauded Roberts' work as a government lawyer and federal judge and praised him for his intellect. Senator Jon Kyl of Arizona assured Roberts that he had his vote (CNN.com 9/14/2005a, np).

On September 22, the Senate Judiciary Committee voted 18-5 in favor of sending the Roberts nomination to the full Senate for a vote, with every Republican senator voting for Roberts. Senator Max Baucus of Montana and Mary Landrieu of Louisiana were two of the three Democrats that also voted in Roberts' favor. Five Democrats, including Senators Kennedy, Clinton, Bayh, and Feinstein, voted against him.

THE FINAL VOTE AND SWEARING IN OF CHIEF JUSTICE ROBERTS

The full Senate voted on September 29 on Roberts' confirmation. Roberts was confirmed in a 78-22 vote, with all 55 Republicans voting to confirm. 22 Democrats and one independent senator joined the Republicans. Though there was little doubt that Roberts' confirmation would easily pass, some Democratic senators continued to express their uncertainty about Roberts. "I hope I am proven wrong about John Roberts," Kennedy said on the Senate floor shortly before the vote. "I have been proven wrong before on my confirmation votes. I regret my vote to confirm Justice Scalia, even though he, too, like Judge Roberts was a nice person and a very smart Harvard lawyer" (CNN.com 9/29/2005b, np).

Senator Mitch McConnell, a Kentucky Republican, felt more certain Roberts' leadership potential on the Court. "I do not know, none of us do, the mark that Chief Justice Roberts will leave on the Court. With his many fine qualities he may be a great administrator, he may leave

some great reform of our court system, he may revolutionize some areas of law – but he will be a successful leader" (CNN.com 9/29/2005b, np).

Before the swearing in ceremony, Bush stated, "The Senate has confirmed a man with an astute mind and a kind heart." Roberts was sworn in by John Paul Stevens, the senior associate justice, in the White House's East Room. Following his swearing in, Roberts thanked Stevens and said to Bush, "There is no way to repay the confidence you have shown in me other than to do the best job I possibly can do, and I'll try to do that every day." He added, "I'll try to ensure, in the discharge of my responsibilities, that, with the help of my colleagues, I can pass on to my children's generation a charter of self government as strong and as vibrant as the one that Chief Justice Rehnquist passed on to us" (CNN.com 9/29/2005b, np).

Chapter Four: The Nomination and Confirmation of Samuel Alito

After President Bush chose to nominate John Roberts for chief justice, talk began to circulate regarding who he would choose to replace O'Connor. It was widely know that Bush was facing calls from both Democrats and from within his own party to name a minority or a woman to replace O'Connor. "Justice O'Connor has been a voice of moderation and reason on the court, and should be replaced by someone who, like her, embodies the fundamental American values of fairness, liberty, and equality," said Senator Reid (ABC News 10/31/2005, np). CNN analyst Bill Schneider asserted that Bush's next selection to the Court "will be tougher and more sensitive, politically, than his original choice of Roberts in July," Schneider asserted (CNN.com 9/6/2005, np). Senator Schumer authenticated this prediction when, following the Roberts confirmation vote, he stated, "While this nomination did not warrant an attempt to block this nominee on the floor of the Senate, the next one might. I hope and pray the president chooses to unite, rather than divide – that he chooses consensus over confrontation" (CNN.com 9/29/2005a, np).

Facing these circumstances, Bush's first choice for O'Connor's replacement was White House counsel Harriet Miers. Initial reaction of senators to her nomination was cautious, with Democrats adopting a wait-and-see attitude and Republicans expressing concern over his pick. Public opinion was mixed, as was evidenced in a CNN/USA Today/Gallup poll taken shortly after the announcement of the nomination. Of the 803 surveyed, 44 percent of respondents believed the Miers nomination was "excellent" or "good," while 41 percent labeled it "fair" or "poor." 15 percent held no opinion on the nomination. Of particular interest was conservatives'

views of Miers nomination, contrasted with their opinions on the Roberts nomination. Of those who considered themselves conservatives, 58 percent thought the Miers nomination was "excellent" or "good," while 77 percent of conservatives surveyed in July thought the Roberts nomination was "excellent" or "good" (CNN.com 10/5/2005, np).

Interest group response to the nomination was mixed, especially within conservative groups and leaders. Some were dissatisfied with Bush's choice, expressing the hopes they had held that Bush would nominate a more outspoken conservative to O'Connor's seat and stating their concern regarding the lack of qualifications Miers possessed. Others seemed pleased with the nomination, arguing that Miers shared Bush's conservative viewpoints and that Bush chose the person who he trusted most and felt he knew the best.

Concerns about Miers' fitness for the bench grew over the following weeks, with opposition growing from both liberals and conservatives. Three weeks following Bush's announcement, Miers withdrew her nomination due to growing concerns from both Republicans and Democrats regarding her lack of judicial experience, her almost non-existent record on hot-button issues, and the fact that it appeared that Bush nominated one of his political cronies.

Following Miers' withdrawal, Bush moved quickly to announce another nominee. He chose Samuel Alito, a 55-year-old 3rd U.S. Circuit Court of Appeals judge with 15 years of experience as a federal appellate judge. Bush praised Alito's judicial record, stating, "This record reveals a thoughtful judge who considers the legal merits carefully and applies the law in a principled fashion." He also referred to Alito as "fair-minded and principled," and he urged the Senate for a prompt up-or-down confirmation vote (CNN.com 10/31/2005a, np).

"Federal judges have the duty to interpret the Constitution and the laws faithfully and fairly, to protect the constitutional rights of all Americans, and to do these things with care and

with restraint, always keeping in mind the limited role that the courts play in our constitutional system," Alito said shortly after the nomination was announced. He further stated, "I pledge that, if confirmed, I will do everything within my power to fulfill that responsibility" (CNN.com 10/31/2005a, np).

Alito was a graduate of Yale law school who served as assistant to Solicitor General Rex E. Lee from 1981 to 1985, arguing 12 cases before the Supreme Court. He was first appointed to the U.S. Court of Appeals by President George H.W. Bush in 1990. Prior to that, Alito served as U.S. attorney for New Jersey.

A LOOK INTO ALITO'S PAST VIEWS

Much of the analysis of Alito's prior court decisions and memos centered on how he and O'Connor differed in their opinions on various issues and cases. One of those issues – one that that promised to become prominent in his confirmation hearings – was his stance on abortion. This is due in part to what was perhaps Alito's most well-known – and controversial – ruling in *Planned Parenthood v. Casey*, decided in 1991. Alito was the sole dissenter in the case, which struck down a Pennsylvania law requiring women who wanted abortions to inform their husbands. The Supreme Court, with O'Connor providing the deciding vote, later upheld the ruling, which has been viewed as an affirmation of the core principles of *Roe v. Wade*.

Alito's views on abortion were also revealed in 1985 memo, part of some documents from his work in the federal government recently released by the Reagan and Bush presidential libraries. In the memo, which was an application for the position of deputy assistant attorney general, Alito wrote, "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this administration." In another part of the document, Alito writes regarding his achievements, "I am particularly proud of my contributions

in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect the right to abortion" (CNN.com 11/14/2005, np).

An additional memo from 1985 regarding Alito's views on abortion surfaced in early December, causing a bit of a stir among Democratic senators. In the memo, Alito stated, "No one seriously believes that the Court is about to overrule *Roe v. Wade*." He added that when the Court accepted the cases, it "may be signaling an inclination to cut back" on abortion rights. "There may be an opportunity to nudge the Court…to provide greater recognition of the states' interest in protecting the unborn throughout pregnancy," he wrote. "I find this approach preferable to a full-frontal assault on *Roe v. Wade*…It makes our position clear, does not tacitly concede *Roe*'s legitimacy, and signals that we regard the question as live and open" (CNN.com 12/2/2005, np).

Alito conflicted with O'Connor in other areas. With respect to presidential power, O'Connor "has played an important role in checking presidential power" such as in *Hamdi v. Rumsfeld* and *Morrison v. Olson*. Alito has criticized *Morrison*, asserting that it "restricted the executive's constitutionally guaranteed appointment power." With regards to environmental protections, in 1997, Alito cast the deciding vote in ruling that citizens lacked standing to sue a company over violations in the Federal Water Pollution Control Act, as it must be established that there had been "actual, tangible injury" to the environment in order to bring a case to court. In 2000, O'Connor ruled in direct contrast to this decision, stating that injury to the plaintiff, not injury to the environment, was relevant when assessing standing (People for the American Way nd, np).

In 1996, Alito dissented in a ruling that struck down a public school board policy allowing for student-led prayer at school-sponsored high school graduation ceremonies, established by a vote of graduating seniors. In 2000, O'Connor joined in a majority that struck down a similar public school board policy that authorized student-led prayer at high school football games, based on a student vote (People for the American Way, nd, np). In 2000, Alito ruled in that the Family and Medical Leave Act, which required time off for medical and family emergencies could not be used to sue state employers for damages. In 2003, O'Connor, as part of the majority, ruled that it could. In 2004, Alito ruled that the death sentence of a convicted Pennsylvania murderer was to be upheld, stating that defense attorneys had met the minimum standard required by the Constitution. Once the case reached the Supreme Court, O'Connor cast the fifth vote to reverse Alito's decision (Washington Post 11/1/2005, A01).

During his time on the 3rd Circuit U.S. Court of Appeals, Alito ruled on several other hot-button issues. In a case regarding holiday religious displays, Alito agreed with the majority that a holiday display at the Jersey City city hall containing a menorah, a crèche, secular symbols of the holiday season, and a banner stating that the city was devoted to diversity did not go against the constitutional ban on government establishment of religion. He did state, however, that displaying religious symbols by themselves would be on unstable constitutional ground (CNN.com 1/8/2006a, np).

In a case involving jury discrimination, Alito agreed with the majority, which granted a writ of habeas corpus to an African-American prisoner due to the fact that state courts would not allow a witness to testify who said he heard a juror make racist remarks following the conclusion of the trial. In a case regarding freedom of religion, Alito agreed with the majority that Muslim

police officers were unlawfully fired for refusing to shave off their beards due to their religious beliefs. (CNN.com 1/8/2006a, np).

In a gun control case, Alito disagreed with the majority, which held that the federal government could persist in banning machine guns and some assault weapons. He wrote that states should be allowed greater latitude in the regulation of gun ownership (CNN.com 1/8/2006a, np). Finally, in a case that addressed free speech in public school, Alito sided with the majority, which struck down a public school district's anti-harassment policy based on the fact that the policy, which included non-school-sponsored and non-vulgar speech, violated the First Amendment (CNN.com 1/8/2006a, np).

Further, a CNN analysis of 300 opinions written by Alito revealed that Alito has "a careful, often cautious approach to the law, devoid of the often provocative, sharp-elbowed rhetoric for which Scalia and other judges are known" (CNN.com 1/8/2006a, np).

BEHAVIOR OF MAJOR ACTORS FOLLOWING THE NOMINATION

The Alito nomination was intensely controversial from the very start. Many of the criticisms of Alito, both from interest groups and senators, centered on the effect his nomination would have on the ideological balance of the Court, given that he was replacing the moderate O'Connor. Democrats on the Senate Judiciary Committee were particularly critical of the nomination, stating that Bush was being too submissive towards his conservative constituents and had chosen a divisive nominee. "This is a needlessly provocative nomination," Leahy said. "Instead of uniting the country through his choice, the president has chosen to reward one faction of his party, at the risk of dividing the country" (CNN.com 10/31/2005a, np). As with Roberts, Leahy stated that he would withhold making a decision regarding Alito until he learned more about him.

Schumer also unfavorable remarks towards Bush's decision. "The initial review of Judge Alito's record shows that there's a real chance that he will, like Justice Scalia, choose to make law rather than interpret law and move the Court in a direction quite different than it has gone," he said (CNN.com 10/31/2005a, np). Kennedy also spoke negatively of Bush's selection. "If confirmed, Alito could very well fundamentally alter the balance of the Court and push it dangerously to the right, placing at risk decades of American progress in safeguarding our fundamental rights and freedoms" (Truthout 11/1/2005, np).

Reid criticized Bush's choice of a white male to replace O'Connor, stating, "This appointment ignores the value of diverse backgrounds and perspectives on the Supreme Court. The President has chosen a man to replace Sandra Day O'Connor, one of only two women on the Court…President Bush would leave the Supreme Court looking less like America and more like an old boys club" (Truthout 11/1/2005, np).

Republicans reacted by praising Alito. Specter noted that he was pleased with Alito's judicial record and stated that the committee would have a great deal of material from Alito's past to look over. "We have a very good idea as to his approach to jurisprudence," he said. Specter added that he did not believe the nomination would meet the standards that would permit a filibuster under the conditions agreed upon by the Gang of 14, which calls for the use of filibusters only under "extraordinary circumstances." Frist, however, said he was concerned about the partisan argument that could take place over the nomination. "It's going to be tough," he said (CNN.com 10/31/2005a, np).

Senator Mike DeWine, an Ohio Republican, met with Alito and said that he was a "good, solid pick by the president." He added that he found Alito to be in the conservative mainstream and called him a "very experienced judge." "It's hard for me to envision anyone thinking about

filibustering this nominee," he said (CNN.com 11/2/2005, np). Senator McCain said he is "very favorably disposed" to Alito and that he believed that Alito would be confirmed. (CNN.com 11/3/2005, np).

In the weeks following the nomination, senators began establishing more firm opinions of Alito, especially as documents from his government work were released. Criticism of Alito was intense, especially on issues of women's rights and abortion – issues that many believed Alito would differ greatly on in comparison to O'Connor. The release of memos by the Reagan and Bush libraries regarding Alito's views on abortion rights caused concern among Democratic senators and left Alito having to defend his position on how he would treat precedent on abortion rights. Following the release of the memos, Alito faced questioning from Feinstein. Alito told her that the situation "was different then. I was an advocate seeking a job. It was a political job." Alito also told Feinstein that 1985 was a "very different" time and that, having been a judge for 15 years, he examines legal matters in a different way than he did during his time as an advocate for the Reagan administration. Feinstein stated that she felt Alito was being truthful in his remarks to her (CNN.com 11/15/2005, np).

Despite the discussion Feinstein had with Alito, Democratic senators were still disturbed by his comments. "I'm concerned about documents that show an eager and early partisan in the ranks of ideological activists in his party's extreme right wing," Leahy said. Additionally, Schumer referred to the 1985 letter as "the strongest statement we've seen from a nominee on this very controversial subject for a long time." He added, "This puts a much stronger onus on Judge Alito to answer questions on this subject" (CNN.com 11/15/2005, np).

Kennedy also expressed his dissatisfaction with Alito's statements. "He needs to make clear that he no longer questions constitutionally established remedies for discrimination and

protections for the right to vote, and that he will not come to the Court with an agenda to roll back women's rights," he said (CNN.com 12/2/2005, np).

The president exercised his influence by praising Alito throughout the appointment process. Following the conclusion of the confirmation hearings, Bush appealed to Congress in his weekly radio address to swiftly confirm Alito. "During this week's hearings and over the course of his career, Judge Alito has demonstrated that he is eminently qualified to serve on our nation's highest court," he said. "Now the Senate has a duty to give Judge Alito a prompt up-or-down vote." Bush went on to state that Alito "forthrightly answered questions with grace and composure, and showed his personal humility and legal brilliance – qualities that have made him one of America's most accomplished and respected judges" (CNN.com 1/14/2006, np).

Additionally, members of the Bush administration both praised Alito and defended him against his critics. Following the conclusion of the hearings, Attorney General Alberto Gonzales spoke to reporters about Alito. "Here's someone who's demonstrated that he understands the law. He's committed to follow the law," he said. "He's demonstrated in these hearings a mastery of constitutional principles. And for all these reasons we believe he's worth of a confirmation vote in an expeditious manner" (CNN.com 1/13/2006, np).

Activist groups on both sides of the ideological spectrum reacted strongly to the nomination, especially women's rights groups, who voiced their disappointment in Bush's decision to select a nominee who they believed to be vastly different ideologically from O'Connor. "Judge Alito would undermine basic reproductive rights, and Planned Parenthood will oppose his confirmation," said the group's interim president, Karen Pearl. "It is outrageous that President Bush would replace a moderate conservative like Justice O'Connor with a conservative hardliner" (CNN.com 10/31/2005a, np).

People for the American Way also came out quickly against the nomination. "He has demonstrated hostility toward the principles undergirding a woman's constitutionally protected right to govern her own reproductive choices," the group said (CNN.com 10/31/2005b, np). The Center for American Progress also promptly released a statement, which read, "Throughout her years on the Court, Justice O'Connor has embodied those qualities. In a series of moderate, pragmatic decisions, she has played a central role in preserving and defending those core liberties. A preliminary review of his judicial record suggests that, if confirmed, Judge Alito would take a very different path, bringing about a seismic shift in the ideological balance of the Court. His record shows scant respect for constitutional rights and a troubling tendency to second-guess the authority of Congress to protect and advance them" (American Progress 10/31/2005, np).

Nan Aron, president of Alliance for Justice, asserted, "If confirmed to the pivotal O'Connor seat, Judge Alito would fundamentally change the balance of the Supreme Court, tipping it in a direction that could jeopardize our most cherished rights and freedoms" (Truthout 11/1/2005, np). Similarly, Marcia Greenberger, co-president of the National Women's Law Center, said, "Justice O'Connor was the fifth vote in many 5-4 decisions that protected women's fundamental rights and freedoms. In nominating Judge Alito, President Bush has chosen someone who threatens the very existence of core legal rights that Americans, especially women, have relied on for decades" (San Francisco Chronicle 11/20/2005, np).

Conservative groups, however, reacted with enthusiasm. "Harriet Miers was a feminist who had no judicial experience and her strongest qualification was that she's a friend of the president's," Phyllis Schlafly, president of Eagle Forum, said. "Alito has a terribly impressive record as a judge and as a prosecutor" (CNN.com 10/31/2005a, np). Additionally, Progress for

America almost immediately put together an ad praising Bush's new judicial appointment, which stated, "Urge the Senate to give Samuel Alito a fair up or down vote" (Justice at Stake [JAS] 11/3/2005, np).

Concerned Women for America also gave a favorable response to the nomination. "He has all the qualifications needed: intellect, knowledge, and experience in constitutional law, integrity, competence, humility and judicial temperament," the group's chief counsel Jan LaRue said (CNN.com 10/31/2005b, np). Additionally, the president of the American Values organization, Gary Bauer, and televangelist Pat Robertson both called Alito "a grand slam home run," and James Dobson, the founder of Focus on the Family, stated, "Any nominee who so worries the radical left is worthy of serious consideration" (CNN.com 11/2/2005, np).

As the weeks passed following the nomination, interest groups on both sides of the nomination escalated their campaigns, especially with regards to television ads. Many of the ads focused on Alito's stance on abortion and women's right – once again highlighting the seeming concern of anti-Alito groups that the nominee would treat issues in a considerably different fashion than had O'Connor. Conservative groups spent more than liberal groups early on, outspending them almost 3:1. However, in the weeks following, liberal groups began airing television ads at a pace exceeding that of conservative groups. "In the last two weeks, the opposition to Judge Alito has become more pitched," Jeremy Creelan, deputy director of the Democracy Program at the Brennan Center for Justice stated. Bert Brandenburg, executive director of the Justice at Stake Campaign, added, "This could mark a turning point in the national debate over Judge Alito… Liberals are turning up the heat and conservatives are unlikely to cede them the field as the confirmation hearings approach" (JAS 12/8/2005, np).

The intensity of some liberal groups' campaigns against the nominee grew even greater following the release of the 1985 memos in which Alito discussed the constitutionality of abortion. "Combined with his judicial record, Judge Alito's letter underscores our concern that he would vote to turn back the clock on decades of judicial precedent protecting privacy, equal opportunity, religious freedom, and so much more," said Ralph Neas, president of People for the American Way. "And it is further evidence that if Samuel Alito is confirmed to replace Sandra Day O'Connor, he will shift the Supreme Court dramatically to the right for decades to come" (CNN.com 11/14/2005, np).

Another of Alito's memos sparked criticism from the interim president of Planned Parenthood Federation of America, Karen Pearl. "In this memo, Judge Alito sets forth a road map first to eviscerate *Roe v. Wade*, with the hope of eventually overruling the case altogether," she said. "What this document makes clear is Judge Alito's commitment to gutting women's access to essential reproductive health services" (CNN.com 12/2/2005, np).

As the confirmation hearings began, many groups continued their assault against Alito. IndependentCourt.org sent out an e-mail to its supporters entitled, "Judge Alito: Cannot be trusted to uphold settled precedent" (CNN.com 1/9/2006a, np). Additionally, the American Civil Liberties Union (ACLU) came out during this time with its formal opposition to Alito. In testimony submitted to the Judiciary Committee, ACLU Executive Director Anthony D. Romero stated that by replacing Justice O'Connor, Alito "could dramatically change the direction of the Court." He asserted that O'Connor's legacy of practicality and restraint would be threatened by Alito, who has expressed "particular pride" in his position as a Reagan official opposed to women's reproductive choice and affirmative action (ACLU 1/19/2006, np).

Further, the Feminist Majority Foundation had organized a campaign against Alito in conjunction with the National Organization for Women (NOW) and National Congress of Black Women (NCBW). The group's president, Eleanor Smeal, stated, "Make no mistake about it. Alito is no Sandra Day O'Connor." Lisa Bennet of NOW added that replacing O'Connor with Alito "will take us back to the days when sexual harassment and discrimination was all in a day's work for women. It will take us back when illegal, unsafe abortions were the norm" (OneWorld 1/5/2006, np).

The Republican Majority for Choice, a GOP political group, also announced its formal opposition to the nomination during the confirmation hearings. The group, with which several moderate senators such as Specter, Chafee, and Olympia Snowe and Susan Collins of Maine are affiliated, said that Alito was "out of step with mainstream Americans on the issue of abortion and maintaining the legal right to choose" (CNN.com 1/11/2006b, np).

The conservative group Concerned Women for America spoke out as the hearings began, stating that they were frustrated with liberal activists' ploys of "deception, distortion, and delay" (CNN.com 1/9/2006a, np). Once the hearings wrapped up, some groups, such as Progress for America Voter Fund and IndependentCourt.org, stated their intent to use the time between the hearings and the committee vote by releasing new radio and television ads (CNN.com 1/13/2006, np).

During this time, the spending gap between Alito's supporters and his opponents widened, with anti-Alito groups maintaining their lead on overall television spending over pro-Alito groups. In only one week, both sides spent $650,000, equaling the amount they had spent in the prior two months. "Now that the hearings have begun, interest groups seeking to influence the national debate over Judge Alito will have to react to what's happening in the Senate

Judiciary Committee," Brandenburg said. "They haven't emptied their war chests, and they'll be looking carefully for opportunities based on Judge Alito's answers to the senators' questions" (JAS 1/11/2006, np).

Once again, though, predicted air wars over the Alito nomination seemed to fizzle as Alito's confirmation hearings took place. Pro- and anti-Alito groups combined to spend just over $2.5 million through January 22, far less than both sides had stated they would spend on the campaigns, and considerably less than the estimated $5-$10 million groups spent on ads in 2005 during the battles over judicial filibusters (JAS 1/19/2006, np; 1/26/2006, np). In the end, liberal groups spent $1.36 million on ads, three times what they spent on ads against Roberts. Conservative groups spent $1.04 million, just under one and a half times what was spent for Roberts (JAS 1/31/2006, np).

As with the Roberts nomination, media coverage was filled with nominee analysis and confirmation predictions. As was the case with senators and interest groups, much of the coverage centered on the differences between Alito and O'Connor. Shortly after the nomination was announced, CNN's Jeffrey Toobin made some initial predictions regarding the nomination. "The qualifications issue, I don't think will cut against him at all. The big issue will be judicial philosophy," CNN's Toobin said. "He is very conservative, and the issue that he is most publicly identified with is abortion" (CNN.com 10/31/2005a, np). He also said that if Alito turns out to be pro-life, he "could have a big impact very fast" (CNN.com 10/31/2005c, np).

Edward Lazarus, a FindLaw columnist, speculated shortly before the confirmation hearings that Alito could have more trouble than Roberts when attempting to sidestep direct answers regarding abortion. "The trouble for Alito is he has much more of a record than Roberts," he said. "He's going to be accountable for the things that he's written in his 15 years

on the bench. So I think that Roberts does provide some markers for Alito to shoot for when he's giving answers, especially on issues like *Roe v. Wade*, where Roberts was able to talk about his reverence for precedent, and I suspect you'll see much the same for Alito" (CNN.com 1/9/2006b, np).

A story in the Washington Post stated, "The record is clear: On some of the most contentious issues that came before the high court, Alito has been to the right of the centrist swing voter he would replace" (Washington Post 11/1/2005, A01). In an ABC News story, Steven R. Shapiro, national legal director of the ACLU, stated, "Justice O'Connor has provided more than a swing vote. She has been a moderating voice on critical civil liberties issues ranging from race to religion to reproductive freedom. Judge Alito's position on each of these issues has been more hostile to civil liberties than positions taken by Justice O'Connor. His nomination therefore calls into question the court's delicate balance that Justice O'Connor has helped to shape and preserve." In addition, Brad Berenson, an ABC News consultant and former associate White House counsel during Bush's first term, stated, "Because it's O'Connor's seat, and because of the changed political dynamics over the last 60 days, the Democrats will be much more oppositional than they were with Roberts" (ABC News 10/31/2005, np).

A story in the Christian Science Monitor claimed that the prospective replacement of O'Connor with Alito "sets the stage for a series of significant shifts in the legal landscape of the U.S. Supreme Court…It would bring into play some of the nation's most divisive issues, including abortion, affirmative action, campaign-finance reform, and the death penalty. And it would fundamentally alter the internal dynamics of the sharply divided nine-member Court in which Justice O'Connor has single-handedly shaped much of American law by deftly wielding a decisive fifth vote in major cases." Bruce Fein, an attorney in Washington, D.C. who served

with Alito in the Reagan Justice Department, told the Monitor, "It seems to me pretty clear that you can identify a half-dozen areas of law that will probably change decisively from an O'Connor to an Alito vote." The story went on to remark, "Not since the 1987 nomination of Judge Robert Bork to replace retiring moderate Justice Lewis Powell has the high court faced such an abrupt move to the right in so many areas at once" (Christian Science Monitor 1/6/2006, np).

Nina Totenberg, a court reporter for National Public Radio, asserted that "if the 55-year-old New Jersey native is confirmed, it is widely expected that he will move the Court dramatically to the right, not just because he's a conservative, but because he's a conservative star who's widely admired for his intellectual brilliance." Larry Lustberg, a former federal prosecutor and long time acquaintance of Alito, remarked to *The New York Times*, "Make no mistake: he will move the Court to the right, and this confirmation process is really going to be a question about whether Congress and the country want to move this Court to the right" (Americans United 12/2005, np). Further, just after the confirmation hearings began, a story in the Milwaukee Sentinel-Journal stated, "Alito is expected to get far fewer Democratic votes than Roberts did. Republicans say the reasons are purely political. Democrats say the explanation is that Alito has a more extensive public record of taking sharp conservative positions and, unlike Roberts, Alito is replacing a swing vote on the Court, that of Justice Sandra Day O'Connor" (Milwaukee Sentinel-Journal 1/12/2006, np).

The public made its thoughts on the Alito appointment well known through public opinion polls, and it became apparent that Alito's nomination would be contentious from the public's viewpoint as well. Early public approval of Alito was similar to that of Miers and was not as high as Roberts. A CNN/USA Today/Gallup poll of 603 respondents showed that 43

percent of those responding stated that they thought Alito was an "excellent" or "good" nominee, while 39 percent said he was "fair" or "poor." Of those who identified themselves as conservatives, 66 percent thought Alito was an "excellent" or "good" nominee, compared to 77 percent for Roberts and 58 percent for Miers. 38 percent of those surveyed said that they believed Alito favored overturning *Roe v. Wade*, while another 38 percent believed he did not. Additionally, 53 percent of respondents believed that the Senate should not vote to confirm Alito if he would overturn *Roe*, while 37 percent said it should. The poll also showed a gender gap, with 49 percent of men rating Alito as "excellent" or "good" compared to 39 percent of women (CNN.com 11/2/2005, np).

A CNN/USA Today/Gallup poll taken just before Alito's confirmation hearings began revealed that of those surveyed, 56 percent said they would not support Alito's nomination if they became convinced during his hearings that he would overturn *Roe v. Wade*, while 34 percent said they would still back the nomination in those circumstances. Of those surveyed, 53 percent identified themselves as "pro-choice," and 42 percent stated they were "pro-life" (CNN.com 1/9/2006c, np).

In addition, 52 percent of respondents believed that Alito's judicial views were in the mainstream, while 30 percent said they were too extreme. Further, 49 percent said Alito was "about right" on the liberal-conservative continuum; 29 percent believed him to be too conservative, and 6 percent said he was too liberal (CNN.com 1/9/2006c, np).

The public's increased interest in the Alito nomination was also evident from the polling results – 63 percent of those polled said they intended to follow the confirmation hearings closely, and 18 percent said they would watch the hearings very closely. In contrast, 59 percent

of those surveyed in August stated they would follow the Roberts confirmation hearings closely (CNN.com 1/9/2006c, np).

After the confirmation hearings, a CNN/USA Today/Gallup poll revealed that support for Alito had increased following the hearings. Of the 1,006 surveyed, 54 percent supported Alito's confirmation; the percentage who opposed Alito's confirmation did not change. 34 percent said they thought Alito would overturn *Roe v. Wade*, while 44 percent said they believed he would not and 21 percent said they were not sure. Relatedly, 66 percent of those polled stated that they believed *Roe* should stand, whereas 25 percent stated it should be overturned (CNN.com 1/23/2006, np).

THE CONFIRMATION HEARINGS

Alito's confirmation hearings began on January 9. The day comprised of opening statements from all 18 senators on the Committee and Alito. Two politicians from Alito's home state of New Jersey – Democratic senator Frank Lautenberg and former Republican governor Christie Whitman – formally presented Alito to the Committee. Whitman, who supports abortion rights, told committee members that while she likely disagreed with Alito on certain issues, he was a man of high intelligence and integrity and he would "serve with distinction" on the Court (CNN.com 1/9/2006a, np).

Republicans focused their initial remarks on praising Alito's 15 years on the federal bench, his commitment to the rule of law, and his judicial disposition. Democrats discussed their concern regarding whether or not Alito's views were too far outside the mainstream and questioned his sensitivity to individual rights.

In Specter's opening statement, the senator revealed the area on which much of the hearings would focus. "Perhaps the dominant issue is the widespread concern about Judge

Alito's position on a woman's right to choose," he said. Specter said the issue had arisen partly because of Alito's 1985 statement that there is not a constitutionally protected right to abortion. "This hearing will give Judge Alito the public forum to address the issue, as he has with senators in private meetings, that his personal views and prior advocacy will not determine his judicial decision" (CNN.com 1/9/2006a, np).

Leahy stated that his focus would be on whether or not Alito would be excessively deferential to executive authority. "In a time when this administration seems intent on accumulating unchecked power, Judge Alito's views on executive power are especially important," Leahy stated. "It is important to know whether he would serve with judicial independence or as a surrogate for the president who nominated him" (CNN.com 1/9/2006a, np).

Kennedy went a step further, stating that he was "gravely concerned by Judge Alito's clear record of support for vast presidential authority unchecked by the other two branches of government." He added, "He has supported a level of overreaching presidential power that, frankly, most Americans find disturbing and even frightening" (CNN.com 1/9/2006a, np).

Biden told Alito that he intended to closely study the judge's rulings regarding women's rights, since Alito would be taking the place of moderate swing voter Justice O'Connor.

Senator Hatch, along with other Republican senators, warned their Democratic counterparts against making the hearings into a personal assault on Bush and Alito. Hatch said that the committee members should "consider Judge Alito's entire record and apply a judicial rather than a political standard" (CNN.com 1/9/2006a, np).

Senators vowed to present tough questions to Alito throughout the hearings, including inquiries about his views on abortion and his perspective on executive power. Issues such as gun control, job discrimination, and police searches were also mentioned.

In his opening statement, Alito began by stating that he was "deeply honored" to have been nominated to the Court and that he was "humbled" to have been nominated to replace O'Connor, who Alito said "has been a pioneer" (CNN.com 1/10/2006b, np). He added, "I would try to emulate her dedication and her integrity and her dedication to the case-by-case process of adjudication" (CNN.com 1/13/2006, np).

Alito attempted to make a distinction between his role as a government lawyer for the Reagan administration during the 1980s and his current position on the bench. "The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand. But a judge can't think that way. A judge can't have any agenda," Alito said. "The judge's only obligation, and it's a solemn obligation, is to the rule of law" (CNN.com 1/9/2006a, np). He also tried to gently deflect some of the criticism that he would be a hard-line conservative on issues like abortion. "Good judges are always open to the possibility of changing their minds based on the next brief that they read, or the next argument that's made by an attorney who's appearing before them, or a comment that is made by a colleague during the conference on the case," he said (CNN.com 1/9/2006a, np). However, he did not provide specifics regarding how he would respond to questions posed by the senators.

During the second day of hearings, which lasted over nine hours, Alito was faced with several hot-button issues, such as presidential power and abortion, but seemed to be able to avoid controversy during questioning. At no point did Alito refuse to answer a question, but he did avoid addressing precise issues.

The questioning began by Specter, who asked Alito whether or not repeated prior rulings should inhibit the right to an abortion from being overturned. Alito stated that abiding by precedent was "very important" and that overturning prior decisions would require "special

justification." However, he added that adhering strictly to past rulings was not "an inexorable command" (CNN.com 1/11/2006a, np).

Alito was also questioned by Schumer and Feinstein about his views on *Roe v. Wade*, with the questioning by Feinstein becoming heated at times. Feinstein asked for examples of what Alito considered to be a "special justification" for overturning a case, to which Alito replied by referring to situations in which a ruling "is proven to be unworkable" or when "changes in the situation in the real world can call for the overruling of a precedent." Alito added that he did believe that the Constitution protected a right to privacy. Schumer referred to Alito's reluctance to directly tackle *Roe* "troubling" and stated he was left to assume that Alito would overrule the case if he had the chance (CNN.com 1/11/2006a, np).

During the questioning, Alito also attempted to assuage senators' concerns about the remarks he made in a 1985 memo advocating a legal method of disassembling *Roe v. Wade*. Alito admitted that his statements were "a true expression of my views at the time" but added that he "was performing a different role" at that time as an attorney for the Reagan administration.

Additionally, Alito addressed the 1985 job application in which he stated that he felt that the Constitution did not protect the right to an abortion. He asserted that his position as a judge over the prior several years required him to put aside his personal views. If presented with an abortion case while on the Court, he said that "the first question I would ask" would be whether or not precedent should prevail. Alito also tackled his controversial ruling in *Planned Parenthood v. Casey*, stating that at the time, "I did it because that's what I thought the law required" (CNN.com 1/11/2006a, np).

When faced with questions about executive power from the first five senators who questioned him, Alito steered clear of providing specific answers on whether President Bush had the authority to unilaterally make the decision to perform surveillance of U.S. citizens. "No person is above the law, and that means the president, and that means the Supreme Court," Alito said. "Our Constitution applies in times of peace and in times of war. And it protects American citizens in all circumstances." He added that certain issues regarding executive power are in a "twilight zone" and would necessitate assessment on a case-by-case basis (CNN.com 1/11/2006a, np).

Alito commented on a number of other issues throughout the day. Regarding interpretation of the Constitution, Alito said, "I think the Constitution is a living thing in the sense that matters, and that is that it is – it sets up a framework of government and a protection of fundamental rights that we have lived under very successfully for 200 years. And the genius of it is that it is not terribly specific on certain things" (CNN.com 1/10/2006a, np). With respect to the role of the judiciary, Alito asserted, "My general philosophy is that the judiciary has a very important role to play…the judiciary has to protect rights. And it should be vigorous in doing that. And it should be vigorous in enforcing the law and in interpreting the law in accordance with what it really means and enforcing the law even if that's unpopular" (CNN.com 1/10/2006a, np).

In terms of legal precedent, Alito said he believed the doctrine of stare decisis "is a very important doctrine," stating that it is "a fundamental part of our legal system." He added that it was critical "because it limits the power of the judiciary" and because "it reflects the view that the courts should respect the judgments and the wisdom that are embodied in prior judicial decisions" (CNN.com 1/10/2006a, np).

Other issues that were touched upon during the first day of questioning included police powers, the 2000 *Bush v. Gore* case, and the ability of Congress to shield children from Internet pornography without infringing upon First Amendment free speech rights.

On the second day of questioning, Alito again faced a number of pointed questions. One of the key issues he faced had to do with his membership in Concerned Alumni of Princeton (CAP). Alito had joined the group in 1985 but told the committee he did not remember becoming a member. He firmly condemned the group's supposed support of admission restrictions on minorities and women.

Though Alito kept his composure, Specter and Kennedy traded angry remarks. Kennedy criticized Alito for being a member of the group, then expressed his desire to subpoena the group's records. He asked Specter to rule at once on the matter, to which Specter responded that he had not previously heard Kennedy make such a request. The two then argued over whether or not that was the case. Later, outside the hearing, Kennedy discussed doubts he had about Alito's testimony. "It's extraordinary to me that this nominee can remember all 67 of his dissents in great detail…and he still is mystified about his association with a CAP organization that he used as a job reference," he said (CNN.com 1/11/2006b, np).

Kennedy was not the only senator who held doubts about Alito's testimony. Leahy told Alito during questioning that he was "concerned that you may be retreating from part of your record." He added, "A number of us have been troubled by what we see as inconsistencies in some of the answers." Additionally, Durbin said that while Alito promised during the hearings to keep an "open mind" on the abortion rights issue, he felt that Alito's past remarks revealed "a mind that sadly is closed in some instances" (CNN.com 1/11/2006b, np).

Throughout the day, senators brought up several issues that had been discussed during the prior day, including *Roe v. Wade*. Alito again refused to discuss specifics on the case and did not reveal whether or not he felt the decision should be re-examined. Additionally, he resisted recurring attempts by Durbin and Feinstein to state that the case was "well settled" in the law, a term used by Chief Justice John Roberts during his confirmation hearings to depict the impact of *Roe*. Instead, he pointed out that the case had survived numerous attempts to overturn it and, as a result, it was a significant case worthy of reverence (CNN.com 1/11/2006b, np).

Alito also answered questions regarding his support of "big business," the involvement of courts in end-of-life arguments, and whether or not cameras should be allowed in the Supreme Court.

Republican senators attempted to encourage Alito near the end of the day. "They tried to sack you and they haven't done a very good job at it," said Senator Charles Grassley, an Iowa Republican. He further stated that Alito's critics "are very desperate" (CNN.com 1/11/2006b, np). Additionally, Graham, referring to the day's earlier questioning regarding the Concerned Alumni of Princeton, said, "Are you really a closet bigot? No, sir, you're not." He then referred to Alito as "a decent, honorable man" and added, "I am sorry that you've had to go through this" (CNN.com 1/11/2006b, np).

During a CNN interview on the second day of questioning, Schumer stated that in terms of *Roe v. Wade*, he "came to a conclusion that in all likelihood he would vote to overturn. That was increased this morning by Senator Durbin's questioning, made it – you know, it seemed even more so. And that's something that'll have to be weighed along with the other issues" (CNN.com 1/11/2006c, np). Schumer also said in the interview that he did not believe Alito had been forthcoming enough during questioning. "On most issues he stated some broad platitudes

that don't really tell you anything, that just about every nominee from Justice Ginsburg to Justice Thomas would say," he said. "And so you have to probe further. I tried to do that on the issue of choice yesterday, and I think I made some progress" (CNN.com 1/11/2006c, np).

Alito's third day of questioning featured the testimony of seven current and former judges who had worked with Alito on the 3rd Circuit U.S. Court of Appeals and were invited to testify by Specter. The judges, who testified in Alito's absence following the nominee's testimony, did not reveal details about specific cases but did commend Alito for both his judicial record and his personal attributes. "I have never seen a chink in his armor of integrity," said Becker. Judge Anthony Scirica added, "He is attentive and respectful of all views and is keenly aware that judicial decisions are not academic exercises but have far-reaching consequences on people's lives" (CNN.com 1/12/2006b, np).

The testimony caused concern among Democrats, who saw it as a possible violation of the judicial code of conduct and a potential conflict of interest if those judges' cases came before Alito on the Supreme Court. Leahy was the sole senator arguing about the code of conduct issue, pointing to a section of the judicial code that stated, "A judge shall not testify as a character witness." However, that same portion of the code also stated that judges could in fact participate as witnesses in the judicial selection process. Additionally, Specter pointed out to the committee that prior history of Supreme Court confirmation hearings had seen instances of judges testifying for a nominee, though he did not specifically name such instances (CNN.com 1/12/2006b, np).

Alito also faced questions about right-to-die cases during the fourth day of hearings. Alito told the committee that he supports increasing the rights of family members in cases where the right to die is in question. Additionally, Alito's alleged CAP membership was touched upon,

with Specter telling the committee that his staff, after looking through four boxes of documents released by the organization, was unable to find any mention of Alito's name (CNN.com 1/12/2006a, np).

Following the day's hearings, Leahy expressed his indecision about how to vote, stating, "I continue to be worried – and I pressed the questions again today, as I have all week long," he said. "He is not clear that he would serve to protect America's fundamental rights" (CNN.com 1/12/2006a, np).

During the final day of Alito's confirmation hearings, during which he faced no questioning, testimony was heard from legal experts, friends of Alito's, and issue activists. The testimony of the legal experts varied a great deal in their evaluation of Alito's judicial background. Three attorneys, invited by committee Democrats, concluded that Alito would likely be most similar ideologically to Justice Scalia. "With the vote of Judge Alito, Justice Alito, the Court will cut back on *Roe v. Wade*, step by step," said Lawrence Tribe, a professor of law at Harvard. "Not just to the point where, as the moderate American center has it, abortion is cautiously restricted, but to the point where the fundamental underlying right to liberty becomes a hollow shell" (CNN.com 1/13/2006, np).

Other witnesses applauded Alito's judicial methodology. Charles Fried, a solicitor general in the Reagan administration, said of Alito's approach to upholding *Roe v. Wade*, "We don't know what the future holds, but I don't expect him to do things outside the reasonable traditions" recognized by the case. "It would be disruptive to overrule it. He wouldn't enter that territory" (CNN.com 1/13/2006, np).

At the end of the hearings, Democrats told Alito that they were disappointed with the partial and ambiguous answers he had offered at times. "Unfortunately, by refusing to confront

our questions directly and by giving us responses that really don't illuminate how you think, as opposed to real answers, many of us have no choice but to conclude that you still embrace those views completely or in large part and would continue in a similar fashion on the Supreme Court," Schumer told Alito (CNN.com 1/12/2006a, np).

Republicans, conversely, extolled Alito's composure as well as his judicial background. Specter gave Alito his strong support, stating, "We've gone deeply into Judge Alito's background…He's gone about as far as he could go" (CNN.com 1/13/2006, np).

Following the hearing's conclusion, several senators spoke with the press about the upcoming confirmation vote. Cornyn told reports that he felt the vote would likely run along party lines. Reid stated that Democratic senators would meet within the coming week to talk about the nomination in order to further study Alito's testimony. DeWine and Graham both praised Alito's qualifications. Additionally, Schumer predicted, "I don't think he's going to get many votes from Democrats on the committee. As for a filibuster, it's something we'll have to discuss. So it's not on the table or off the table right now" (CNN.com 1/13/2006, np).

The week before the committee vote, Senator Ben Nelson, a Nebraska Democrat, came out as the sole Democratic supporter of Alito, stating that he would vote for Alito "because of his impeccable judicial credentials, the American Bar Association's strong recommendation and his pledge that he would not bring a political agenda to the Court" (CNN.com 1/18/2006, np). Other Democrats, such as Max Baucus of Montana and Barbara Mikulski of Maryland told the media of their intent to vote against Alito. "He's just not right for Montana, he's just not right for America," Baucus stated. "He's very polished and he answered all of the questions I was going to ask. There is just a little too much inconsistency." Mikulski stated that she had "a lot of unanswered questions" and would be voting against Alito as a result (CNN.com 1/18/2006, np).

Later in the week, Leahy, Durbin, and Kennedy stated that they would vote against Alito. "I'm not going to lend my support to an effort by this president to move the Supreme Court and the law radically to the right and to remove the final check within our democracy," said Leahy CNN.com 1/19/2006, np). Durbin stated, "Based on his record, I'm concerned that Judge Alito will not be willing to stand up to a president who is determined to seize too much power over our personal life" (CNN.com 1/19/2006, np).

The committee vote took place on January 24 and fell along strict partisan lines, with all Republican committee members voting for and all Democratic committee members voting against Alito. Several senators spoke out following the vote about their choices.

"Like America's founders, Judge Alito clearly believes in self-government, that the people and not judges should make law, and that judges have an important role but must know and stay in their proper place," said Hatch. Schumer, however, conveyed his concern that Alito would shift the Court too far to the right, saying, "He still believes that the Constitution does not protect a right to an abortion, but does not want to tell the American people because he knows how unpopular that view is" (CNN.com 1/24/2006, np).

Feinstein continued to raise concerns about Alito's views on women's rights. "If an originalist analysis was applied to the Fourteenth Amendment, women would not be provided equal protection under the Constitution, interracial marriages could be outlawed, schools could still he segregated, and the one man, one vote would not govern the way we elect our representatives," she said (MSNBC.com 1/26/2006, np).

THE FINAL VOTE AND SWEARING IN OF JUSTICE ALITO

Debate on Alito's confirmation began in the full Senate on Wednesday, January 25. Before the debate began, it was widely known that Alito had enough support to make his

confirmation certain. Democrats at that point showed little interest in a filibuster, and it seemed as if Alito had a very good chance of being confirmed before the end of the month. Still, it was speculated that the Alito vote could be more partisan than had been seen on the Court in many years. At the time the debate in the full Senate began, 22 Democrats (the same number that had voted against Roberts in October) had pledged to vote against Alito, with 21 Democrats, independent Jim Jeffords, and four Republicans having not yet publicly decided to vote one way or the other.

Things took a slight turn on Thursday, however. Hard-line Democrats decided to try to prevent a vote on Alito's confirmation, with Senator John Kerry of Massachusetts leaving early from his trip to Switzerland to lead the filibuster effort on Friday.

More moderate Democratic senators such as Landrieu and Ken Salazar of Colorado and expressed their intent to oppose a filibuster of Alito. "I don't think that a filibuster is worth trying under these circumstances," Salazar stated upon learning of Kerry's return from Switzerland. "I don't think a filibuster here will ultimately prevail…The amount of political energy that would be consumed in a fight over the filibuster followed by the fight over the 'nuclear option' would very much distract the Congress from the business it should be doing" (MSNBC.com 1/26/2006, np). Landrieu added, "Because we have such a full plate of pressing issues before Congress, a filibuster at this time would be, in my view, very counterproductive" (CNN.com 1/26/2006, np).

Other Democrats – Senator Robert Byrd of West Virginia and Tim Johnson of South Dakota – not only spoke out against the filibuster attempt, but also defended Alito. "I am troubled by Judge Alito's apparent views on matters such as executive power, his past opposition to the principle of one person, one vote, and his narrow interpretation of certain civil rights

laws," Johnson said. "Even so, I cannot accept an argument that his views are so radical that the Senate is justified in denying his confirmation" (CNN.com 1/26/2006, np). Byrd said that he would not be made "simply to toe the party line when it comes to Supreme Court justices." He added, "My considered judgment…leads me to believe [Alito] to be an honorable man, a man who loves his country, loves his Constitution and a man who will give of his best. Can we really ask for more?" (CNN.com 1/27/2006a, np).

Kerry, however, felt an obligation to attempt a filibuster, as he expressed in statements e-mailed by his press office and his campaign committee on Thursday evening. "People can say all they want that 'elections have consequences.' Trust me, I understand. But that doesn't mean we have to stay silent about Judge Alito's nomination," Kerry stated. "We have every right – in fact, we have a responsibility – to fight against a radical ideological shift on the Supreme Court" (MSNBC.com 1/26/2006, np).

Kerry received immediate support in his efforts by Kennedy, who said, "The nominee is deficient in his commitment…to individual rights, individual liberties, women's rights and racial equality." Kennedy admitted that the battle would be an "uphill climb" but thought a filibuster was possible (MSNBC.com 1/26/2006, np). Senators Clinton and Feinstein later added their support to Kerry's attempt.

Additionally on Thursday, Frist filed a cloture motion following an objection by Minority Leader Harry Reid to an attempt by Republican Senate leaders to schedule the final vote for Monday afternoon. The cloture motion was scheduled to be voted upon on Monday afternoon and, if successful, would have senators voting on Tuesday morning to confirm Alito's nomination.

More senators spoke out against Kerry's attempt on Friday. Most all of the members of the Gang of 14 pledged not to help Kerry in his efforts. Five of the seven Democrats in the group stated their intent to vote in favor of Alito or, at the very least, oppose efforts to filibuster his nomination. The two other Democrats – Senator Daniel Inouye of Hawaii and Senator Joe Lieberman of Connecticut – said they planned to vote against Alito, but neither revealed whether they would go along with a filibuster. Additionally, Reid said that Kerry would be unlikely to gain the 41 votes necessary to sustain a filibuster. "Everyone knows there are not enough votes to support a filibuster," he said. Minority Whip Dick Durbin also asserted his intent to oppose a filibuster attempt. "One of the first responsibilities of someone in Congress is to learn how to count," he said. "Having made a count, I have come to the conclusion it is highly unlikely that a filibuster would succeed" (CNN.com 1/27/2006b, np).

Indeed, as Friday came to a close, the 55 Republicans of the Senate, along with seven Democrats, vowed to vote in favor of cutting off debate, giving the movement to prevent a filibuster two more votes than it needed.

On Monday afternoon, Frist's cloture motion came up for vote, and by a vote of 72-25, debate over the nomination was ended, putting the death knell to Kerry's filibuster attempt. 53 Republicans and 19 Democrats, including all members of the Gang of 14, voted in support of the cloture motion, while 24 Democrats supporting the filibuster (CNN.com 1/30/2006, np).

The final vote for Alito's nomination took place on Tuesday morning. The Senate voted 58-42 to confirm Alito, with all but one Republican voting for Alito and all but four Democrats voting against him. Alito received the smallest number of senators in the opposing party of the president supporting him in recent history, with Roberts receiving 22 Democratic votes and Justice Thomas receiving 11 Democratic votes.

Following the confirmation vote, Kerry stated, "United States senators refused to stand silent while President Bush packed the Supreme Court with far-right ideologues. Those who believe in privacy rights, who fight for the rights of the most disadvantaged, who believe in the balance of power between the president and Congress took a stand in support of our country and our Constitution." Durbin stated, "A chill wind blows. A chill wind, which will snuff out the dying light of Sandra Day O'Connor's Supreme Court legacy" (Voice of America 2/2/2006, np).

Hatch, meanwhile, reprimanded the "very bitter partisanship" that occurred over the nomination and censured Democrats for their divisive behavior. "When you have a man who has the decency, the legal ability and the capacities that Judge Alito has treated this way, I think it's despicable," he said (CNN.com 1/31/2006, np).

Analysts also commented on Alito's confirmation. A.E. Dick Howard, a Supreme Court and constitutional law scholar at the University of Virginia, stated that replacing O'Connor with Alito will shift the Court to a more conservative ideological position. "Abortion regulation, relations between religion and government, questions of capital punishment, affirmative action would be another," he said. "There are several different areas in which the court was divided and in which O'Connor's vote was often the fifth and critical vote" (Voice of America, 2/2/2006).

Alito was sworn in as the 110th Supreme Court justice on January 31, 2006 by Chief Justice Roberts in a private ceremony at the Court shortly before Bush's State of the Union address. He was ceremonially sworn in the next day in the East Room of the White House.

Chapter Five: Analysis of the Confirmation Votes of John Roberts and Samuel Alito

The first factor that can be analyzed to determine if it can account for the difference in confirmation votes between the Roberts and Alito confirmations is ideology. To assess whether or not ideology of the nominees can explain why senators treated them so differently in their votes, one can simply look at the nominees' Segal-Cover ideology scores (which were calculated by a content analysis of editorials from four newspapers – two liberal, two conservative – and range from 0-1, with 0 being most conservative and 1 being most liberal) to assess whether or not a significant ideological difference exists. Roberts' Segal-Cover score is .120, while Alito's is .100 – a difference of merely .020 (Segal and Cover 2005, np). In fact, Roberts and Alito, based on Segal-Cover scores, are ideologically closer to one another than they are with any other justice on the Court. As can be seen in Table 1, the next closest relationship is between Roberts and Justice Thomas, who has an ideological score of .160. It is unlikely that the senators who voted for Roberts but against Alito would consider a .020 difference in ideology as being significant enough to change their vote, especially considering that it was 20 senators – not just a handful – who voted differently for the two nominees. It is apparent that some other factor was at play in shifting the votes of these senators outside of ideology.

The second factor that can be examined to ascertain whether or not it is responsible for vote differences between Roberts and Alito is party. Table 2 shows the confirmation vote breakdown by party in the Roberts case, and Table 3 shows the breakdown in the Alito case. In Roberts' confirmation, party correctly predicts all of the votes of Republican senators but does a poor job of accounting for half the votes of Democratic senators. Given the bipartisan nature of

the Roberts vote, it can safely be said that party does not sufficiently explain senatorial votes in that case. Alito's confirmation vote, however, seems to fall along strict party lines; only one Republican (Chaffee) voted against Alito, and just four Democrats (Byrd, Conrad, Ben Nelson, and Johnson) voted for him. Therefore, outside of a few outliers, party accounts for votes in the Alito case quite well.

Overall, however, party cannot be used to explain why Alito's vote differed so greatly from Roberts. Individually, party could have played an influence (at least in the case of Alito), but when the cases are taken together, the outcomes make little sense. Both Roberts and Alito were nominated by the same Republican president, and both are (presumably) members of the Republican party themselves – there was no difference between the nominees in terms of party. Given this fact, if Democrats were voting strictly based on party lines, Roberts' vote should have been divided in much the same way the Alito vote was.

Given that ideology and party fail to account for the differences in votes, it is now appropriate to address my main hypothesis – the fact that the Alito nomination was a critical, transformative nomination led to his nomination being treated in a considerably different manner than Roberts and caused a noteworthy difference in confirmation votes between the two.

The argument as to why the Alito nomination is considered critical has already been presented; the task that remains is to assess whether or not this factor can explain the vote difference between Roberts and Alito. A good way to test the influence of this factor is to examine what senators themselves said regarding the Alito appointment.

Much can be gleaned from the previous chapter on Alito with regards to the atmosphere surrounding his nomination and the reaction of various actors in the process to it. In particular, it is evident that the focus of Democratic senators (as well as interest groups and media coverage)

from the start was how Alito, if confirmed, would affect the ideological balance of and representation on the Court. Two of Ruckman's three factors characterizing critical nominations – the threatened loss of representation on the Court and a substantial shift in the balance of the Court's partisan or ideological coalitions – were frequently invoked in the Alito appointment. Numerous Democratic senators stated how important O'Connor's moderate swing vote had been to the Court and how there was a fear that Alito's confirmation would result in a loss of representation on issues that were important to them and a potentially dangerous ideological shift of the Court to the right. Democrats had come to count on O'Connor's moderate position to at times swing in favor of their policy positions, and throughout the nomination and confirmation process, they stated their concern that not just the loss of O'Connor but the addition of Alito could spell trouble in ensuring that the issues they considered most important – especially abortion and checks against executive power – were protected.

Though the statements presented in the Alito narrative buttress these assertions, perhaps the strongest evidence proving this fact are the words of senators who voted for Roberts but against Alito (Table 4 lists the senators who voted in this fashion). What did these senators have to say about Alito? How did they justify their "nay" votes? An examination of statements made by these senators regarding their confirmation votes reveals a great deal about why they chose to vote against Alito.

Most senators who voted for Roberts but against Alito directly referenced Justice O'Connor's role on the Court as being a deciding factor in their decisions. The following are statements were made either in news reports or in statements on the Senate floor:

- Max Baucus – Montana (D) – In a news report: Stated that he opposes Alito because his judicial views are "insufficiently mainstream" and stated, "It just seems to me he's too

much over to the right wing. That's extremely important because of the judge who he would be replacing on the Court" (Bloomberg 1/18/2006, np).

- Jeff Bingaman – New Mexico (D) – In his statement on the Senate floor: "I believe Justice O'Connor charted a moderate course in terms of Congress' authority to enact legislation aimed at protecting the welfare of Americans, and with regard to upholding the rights of citizens vis-à-vis their government. I believe that it is important to maintain this course. This isn't to say that I always agreed with Justice O'Connor's decisions, but her swing vote has helped maintain a balance on the Court that has kept many decisions within the mainstream. I believe that Judge Alito's confirmation will sway the existing balance on the Court in a manner that will jeopardize many of the protections afforded to the American public, many of which were the result of long years of struggle" (Senator Jeff Bingaman 1/26/2006, np).
- Tom Carper – Delaware (D) – In his statement on the Senate floor: "After carefully reviewing his testimony, discussing that testimony with Democrat and Republican members of the Senate Judiciary Committee, meeting with him and other interested parties, and talking to colleagues who knew and worked with him, I concluded that John Roberts was a worthy successor to Chief Justice Rehnquist and was not likely to shift the balance of the Court in a significant way. After we confirmed Justice Roberts…I urged President Bush to send us a nominee similar to the person he or she would replace – Justice Sandra Day O'Connor…In my view, we needed that type of consensus candidate to replace Justice O'Connor and her legacy on the Court. For more than 20 years, Justice O'Connor has been a voice of moderation during often difficult and tumultuous times…Unfortunately – and with some regret – I rise today unconvinced that Judge

Samuel Alito is the right person to replace Justice O'Connor on the Supreme Court. I'm concerned that, if confirmed, Judge Alito, during the decades he's likely to serve, will take the Court in a new direction that serves to undermine our systems of checks and balances, threatening the rights and freedoms that many of us hold dear" (Senator Tom Carper 1/26/2006, np).

- Christopher Dodd – Connecticut (D) – In his statement following the Senate Judiciary Committee vote: "Judge Alito was nominated to replace Justice Sandra Day O'Connor, who I supported and who met the test of independence. Regrettably, he did not demonstrate that he is an independent-minded jurist in the mold of Justice O'Connor. On the contrary, his legal philosophy is outside the mainstream" (Senator Christopher Dodd 1/24/2006, np).
- Byron Dorgan – North Dakota (D) – In his statement on the Senate floor: "Judge Alito is replacing Justice Sandra Day O'Connor on the Court. Justice O'Connor has been a key swing vote on so many issues that been decided by a 5 to 4 vote in recent years. I believe that Judge Alito's nomination, if approved by the Senate, would tilt that court in a direction that will restrict personal freedoms, strengthen the role of government and corporations in our lives, and allow the expansion of power of the presidency" (Senator Byron Dorgan 1/30/2006, np).
- Herb Kohl – Wisconsin (D) – In a news report: Said that he would consider the fact that Alito would be replacing O'Connor when making his voting decision, adding, "I think that in my mind I have to conclude he isn't going to occupy her place. I would have liked to see somebody [nominated] whom I could imagine as being more at the center of the court and able to see themselves voting left of center or right of center. I think this man is

more clearly going to be consistently at the right edge of the Court" (The Milwaukee Journal Sentinel 1/12/2006, np).

- Mary Landrieu – Louisiana (D) – In her statement on the Senate floor: "If confirmed, Judge Alito will replace one of the most important justices on the Court today, Sandra Day O'Connor. Justice O'Connor is a conservative, appointed by a conservative president. Over time, she became a consensus builder on the Court who took great pains to strike a careful balance in her opinions, never forgetting that the Court's decisions have real consequences for real people. She was open-minded and independent. Her influence on the Court was tremendous and her reasoning always carried great weight. Justice O'Connor...was a swing vote on a number of important decisions. Whether you or I agree with her individual opinions or not, I think she acted responsibly: someone committed to equal justice under the law, who applied the law to the facts as presented to her and did not "overreach" from the bench. She showed proper respect for the legislative branch and was careful not to cater to Executive authority…Judge Alito's record gives me cause for concern. His opinions and dissents on the bench leave open very serious questions as to how he views fundamental civil rights for all Americans and how he views protecting the individual rights of average citizens, especially when they are threatened by powerful forces, including the government itself. Judge Alito's non-answers to so many questions presented to him at the confirmation hearing added to those troubling concerns" (Senator Mary Landrieu 1/31/2006, np).
- Patrick Leahy – Vermont (D) – In a statement prior to Senate Judiciary Committee vote: "I am concerned that if confirmed this nominee will further erode the checks and balances that have protected our constitutional rights for more than 200 years. This is a

critical nomination, one that can tip the balance on the Supreme Court radically away from constitutional checks and balances and the protection of Americans' fundamental rights" (Senator Patrick Leahy 1/24/2006, np).

In his statement on the Senate floor: "I began the hearing on this nomination by putting forward what for me was the ultimate question during the consideration of a successor to Justice Sandra Day O'Connor: Would Judge Alito, if confirmed by the Senate to the Supreme Court, protect the rights and liberties of all Americans and serve as an effective check on government overreaching? I strongly believe that Judge Alito's judicial philosophy is too deferential to the government and too unprotective of the fundamental liberties and rights of ordinary Americans for his nomination by President Bush to be confirmed by the Senate as the replacement for Justice O'Connor.

"Justice O'Connor served as a model Supreme Court Justice. She is widely recognized as a jurist with practical values and a sense of the consequences of the legal decisions being made by the Supreme Court. Of fundamental importance, she has come to provide balance and a check on government intrusion into our personal privacy and freedoms…As the Senate prepares to vote on President Bush's current nomination…for a successor to Justice O'Connor, we should be mindful of her critical role on the Supreme Court. Her legacy is one of fairness that I want to see preserved. Justice O'Connor has been a guardian of the protections the Constitution provides the American people" (Senator Patrick Leahy 1/30/2006, np).

- Carl Levin – Michigan (D) – In his statement on the Senate floor: "The liberties of our people are in the hands of the Supreme Court…While I am hopeful Judge Alito will join the long and revered list of Supreme Court justices who have protected our Constitution's

checks and balances, I have too many doubts to be confident that he will do so, and that he will stand up to excessive exercises of executive power as...Justice O'Connor and other justices have done" (Senator Carl Levin 1/26/2006, np).

- Patty Murray – Washington (D) – In her statement on the Senate floor: "I am very mindful of the seat that is open on the Supreme Court and its significance. Justice Sandra Day O'Connor was a pioneer in the field of law and justice, and her decisions will shape the lives of the American people for generations to come. As I said when she announced her resignation, we live in a better America due to her 24 years of service on the Court. Justice O'Connor was often a swing vote on critical decisions. Her successor could easily change the balance of power on the Court, which could dramatically shift the Court's rulings on so many issues. Because this is a swing seat that could tip the Court's balance of power, we need to make sure that the person we confirm is someone who will protect our rights and liberties…Judge Alito – through his writings, rulings and non-answers – does not inspire confidence in me that he will protect all our rights. Because so much is on the line and because I do not believe he will be sufficiently independent or will uphold our rights and liberties, I will respectfully vote against his confirmation to the Supreme Court" (Senator Patty Murray 1/25/2006, np).
- Bill Nelson – Florida (D) – In his statement on the Senate floor: "I always have greeted judicial nominations with an open mind, voting for 96 percent of President Bush's nominees, including Chief Justice John Roberts, but Judge Alito's legal writings, judicial opinions and evasive answers convinced me he would tilt the scales of justice against the average Joe. Because Judge Alito is not the centrist voice I believe this nation needs to replace the retiring Justice Sandra Day O'Connor, who fiercely defended the rights and

liberties of all Americans, I will vote against his confirmation" (Senator Bill Nelson 1/27/2006, np).

- Ken Salazar – Colorado (D) – In his statement on the Senate floor: "Judge Alito's confirmation vote is particularly important for our country because this seat on our Supreme Court has been held by a champion of justice and mainstream America for a quarter century: Justice Sandra Day O'Connor…Justice O'Connor served as an exemplary role model for all of us, including women, succeeding at the very highest level of our national government. Unfortunately... this nomination signals an undesirable retreat from diversity on the United States Supreme Court.

  "Beyond the principle of gender diversity, Justice O'Connor consistently defined the center of the Supreme Court on many issues. She used her wisdom and her judgment to advance reasonable, common-sense, and legal mainstream doctrines that affect the lives of all Americans. That is why the choice of the replacement for Justice O'Connor is so important for our collective future…I have evaluated Judge Alito's qualifications, using the same criteria I used to evaluate Chief Justice John Roberts, for whom I voted. I have reviewed Judge Alito's record for evidence of his fairness, impartiality, and his proven record of upholding the law. However, I have decided that my concerns here require that I vote against him…I believe that Judge Alito will move the Supreme Court too far to the conservative side of American legal jurisprudence" (Senator Ken Salazar 1/26/2006, np).
- Ron Wyden – Oregon (D) – In his statement released prior to the Alito vote: "At this time when the country so desperately needs a judge who will approach issues with a sense of neutrality, Judge Alito leaves me unconvinced that he will bring an impartial viewpoint to

the nation's highest court. In my lifetime, it has never been more critical for a President to select a nominee to the Supreme Court who possesses the desire and inclination to transcend personal beliefs, to approach issues with legal neutrality, and to heal the wounds that cut our society so deeply. The departing Justice Sandra Day O'Connor possesses these skills; Judge Alito's record strongly suggests that he does not. If appointed to the Court, I fear that Judge Alito's beliefs will color his approach and pre-ordain his outcomes on a variety of critical issues certain to come before the Court in the coming years" (Senator Ron Wyden 1/20/2006, np).

- Jim Jeffords – Vermont (I) – In his statement on the Senate floor: Discussed his concern about a shift in the balance of the Court, which he says becomes evident when one looking at important cases where Justice O'Connor "provided the critical fifth vote for a moderate, common-sense position," such as cases involving environmental protections and abortion. He went on to assert, "I am concerned that Judge Alito did not provide complete answers on many important topics... On the other hand, Chief Justice Roberts did provide answers to these questions during his nomination hearing and I voted for Justice Roberts. Given the importance of a Supreme Court justice replacing Sandra Day O'Connor, we should expect even more complete answers than we received from Judge Alito. After careful deliberation, I have concluded that the addition of Judge Alito to the Supreme Court would unacceptably shift the balance of the Court on many critical issues facing our country" (Senator Jim Jeffords 1/26/2006, np).

Additionally, Russ Feingold, a Wisconsin Democrat, stated at the beginning of Alito's confirmation hearings: "The stakes for this nomination could hardly be higher. Justice O'Connor was the swing vote in many important decisions in the past decade. Her successor could well be

the deciding vote in a number of cases that have already been argued this term, but may have to be reargued after a new Justice is confirmed. The outcome of these cases could shape our society for generations to come" (Senator Russ Feingold 1/9/2006, np).

Those senators who did not explicitly refer to Justice O'Connor when discussing their opposition to Alito still made noteworthy remarks about the issues about which they were concerned, especially executive power, women's rights, environmental protections, and the Commerce Clause. As was discussed in the previous chapter, Alito's rulings on the 3rd Circuit Court conflicted with those of O'Connor on those issues. It is likely, given the particular issues that these senators mentioned, that they were well aware of O'Connor's voting history on these topics and were uncomfortable at best in allowing Alito to take her place on the Court and potentially shift how the Court rules on these matters in the future.

The following are senators' remarks about the issues they were concerned about:

- Russ Feingold – Wisconsin (D) – In his statement on the Senate floor, Feingold discussed several issues on which Alito and O'Connor differed in their rulings, beginning with executive power. "Judge Alito's record and his testimony have led me to conclude that his impulse to defer to the executive branch would make him a dangerous addition to the Supreme Court at a time when cases involving executive overreaching in the name of fighting terrorism are likely to be such an important part of the Court's work." He also forwarded concerns regarding Alito's testimony and record regarding reproductive rights, asserting that Alito's judgments on the 3rd Circuit Court "raise a legitimate concern that he will, if given the opportunity, be inclined to narrow reproductive rights." Further, he stated that he "found Judge Alito's answers to questions about the death penalty to be chilling. He focused almost entirely on procedures and deference to state courts, and

didn't appear to recognize the extremely weighty constitutional and legal rights involved in any case where a person's life is at stake" (Senator Russ Feingold 1/24/2006, np).

- Joseph Lieberman – Connecticut (D) – In his statement on the Senate floor, he stated, "Based on his personal statements during the 1980s when he was a government attorney, and particularly on his 15 years of judicial opinions, I am left with profound concerns that Judge Alito would diminish the Supreme Court's role as the ultimate guarantor of individual liberty in our country." He goes on to cite concerns regarding civil rights cases, regarding which he says Alito "has repeatedly established a very high bar, an unusually high bar, for entrance to our Courts for people who believed they've been denied equal opportunity and fair treatment based on race or gender." He also mentioned Alito's strict reading of the Commerce Clause, which he argues "casts a shadow on federal legislation passed to protect the rights of individual Americans which has been, and will be, based on the Commerce Clause." Finally, he asserts that he possessed "serious concerns that Judge Alito would not uphold the basic tenets of Roe and that is a very troubling conclusion" (Senator Joseph Lieberman 1/26/2006, np).
- Blanche Lincoln – Arkansas (D) – In her statement to the Senate floor, she said, "After thoroughly reviewing Judge Alito's record during his time on the federal bench, I am left with grave and serious concerns about his views on the power and scope of Executive Branch authority, discrimination against parents in the workplace, his general disposition toward cases involving civil rights, and his views on the scope of voter rights. Because of these concerns, I can not in good conscience support his nomination to the Supreme Court to replace Sandra Day O'Connor." She focused in particular on executive power, regarding which she states that Alito, during the course of his career, "has compiled a

troubling record of personal statements and court decisions that signal his willingness to defer authority to the Executive Branch when questions of presidential powers are deliberated before the Supreme Court. This issue is especially significant because Judge Alito would replace Justice Sandra Day O'Connor, who recently ruled in a 2004 case on executive authority that 'a state of war is not a blank check for the President when it comes to the rights of the nation's citizens'" (Senator Blanche Lincoln 1/26/2006, np).

- Jay Rockefeller – West Virginia (D) – In his statement on the Senate floor: "Just four months ago I voted in support of Chief Justice John Roberts, a true conservative, because I concluded that he would consider fully the lives of average people, the lives of those in need and those whose voices often are not heard…Although Judge Alito is a well-qualified jurist, I cannot in good conscience support a nominee whose core beliefs and judicial record exhibit simply too much deference to power at the expense of the individual…These are core questions: What is the scope of presidential power under the Constitution? What is the appropriate balance between the President and the Congress? When must the constitutionally protected rights of average Americans – workers' rights, families' rights, and individuals' rights – prevail? At the end of the day, I am left with the fear that Judge Alito brings to the court a longstanding bias in favor of an all-powerful presidency and against West Virginians' basic needs and interests" (Senator Jay Rockefeller 1/30/2006, np).
- Lincoln Chafee – Rhode Island (R) – In his statement on the Senate floor, he asserted that he was "greatly concerned about his philosophy on some important constitutional issues," such as executive power, women's reproductive rights, and the Commerce Clause. As

part of his statement, he quoted O'Connor in her opinion on a case involving executive power and contrasted Alito's views with hers (Senator Lincoln Chafee 1/30/2006, np).

These types of statements were not forwarded in the Roberts nomination. Any comparisons that were made between Roberts and Rehnquist were not in reference to any feared differences in representation; to the contrary, they reinforced the fact that the two men were very similar ideologically and frequently agreed in their judicial philosophies. Further, senators' comments regarding the nomination and confirmation of Roberts were not centered on a perceived ideological shift on the Court should Roberts be confirmed, as they clearly were with Alito.

Given these statements, it would be difficult not to conclude that the nature of the Alito appointment, more than any other factor, best explains why these senators voted for Roberts but against Alito. However, an additional question regarding the critical nomination hypothesis is worth mentioning – would John Roberts have faced similar circumstances had he remained the nominee to replace O'Connor? While this question cannot be answered definitively, some observations can be made about the 48 days during which Roberts was nominated for O'Connor's seat.

As has been evidenced, Democratic senators expressed their reservations about the nominee shortly following the announcement of Robert's nomination. However, it seemed to become apparent to Democrats that Roberts would be difficult to attack. According to Edward Lazarus, a columnist for FindLaw.com, the lack of an intense battle would not be because Roberts is a moderate, as Roberts was "conservative enough, in fact, to warrant a real fight on ideological grounds." Instead, Lazarus argued that the battle over Roberts would not be protracted because "it's a fight the Democrats will have a hard time winning."

Lazarus said that Roberts was a "tough target" for several reasons. To begin with, he said that Roberts is "whip-smart and has terrific credentials," having developed a "terrifically successful" private practice and having been "highly regarded" as an advocate before the Court. Further, he said that Roberts was "telegenic, articulate, and well-liked even by ideological adversaries." Given the fact that Roberts garnered extensive support when nominated by Bush to the appellate bench in 2003, Lazarus stated that opposition to his Supreme Court nomination "now may seem manufactured or hypocritical." Finally, Lazarus said that Roberts' grasp of the law is "superb" and that he is "sharp enough to be able to easily separate what the law is, from what he'd like it to be." As a result, he said that Democratic senators "will have a very tough time making Roberts look bad if that's what they set out to do." Moreover, Roberts' lack of a record of his opinions regarding public policy or constitutional matters made him a difficult target, according to Lazarus. While Roberts generated a substantial number of memos and briefs during his time in government service, the two years he spent on the circuit court were "not enough time to create the kind of paper trail that got Robert Bork in trouble" (Lazarus 7/29/2005, np).

A Newsweek article furthered these sentiments, stating that Roberts was "known as an intellectual and reliable conservative" with a "relatively thin" record on the bench. It went on to assert that the "low-key and affable Roberts isn't likely to rub lawmakers the wrong way." The story also quoted several Democratic senators whose statements suggested that they may not have seen Roberts as someone worth waging war against. Lieberman was quoted as stating that Roberts was "in the ballpark," and Reid's office released a statement about Roberts stating that while additional investigation was necessary, he had "suitable legal credentials." Further,

Schumer said that while Roberts was not a nominee that Democrats would automatically endorse, he was not one that they would automatically oppose either (Rosenberg 7/20/2005, np).

In the end, there is no way of knowing whether or not Roberts, had he remained the nominee for O'Connor's seat, would have been subjected to the heightened contentiousness and close vote that Alito was. Given what has been observed about the window of time when Roberts was nominated as O'Connor's replacement, however, it seems that his credentials, personality, and lack of record from the bench would have prevented an enjoined battle over his confirmation. The critical nomination hypothesis is likely strongest in explanatory power, then, when the nominee is not "stealth" or is seen as having vulnerabilities, and as was evident from his narrative, Alito most certainly fits this criteria.

There are a few other more peripheral factors that may account for the differences in confirmation votes. One is presidential popularity ratings, which have been suggested by some as exerting an influence on how senators cast their votes for confirmation. The authors claim that as the president's approval ratings decrease, there are increased odds of his Supreme Court nominees receiving fewer votes and potentially not winning confirmation. Table 4 shows President Bush's approval ratings from when Roberts' nomination was announced to when he was confirmed, and Table 5 shows President Bush's approval ratings from the time he announced Alito's nomination to when the confirmation vote occurred.

When Roberts was nominated on July 20, Bush's approval ratings were at 46 percent. However, his ratings faltered in the weeks and months following the nomination, hitting a low of 39 percent and averaging 43 percent (CNN/USA Today/Gallup 7/2005-9/2005, np). When Alito was nominated on October 31, Bush's approval ratings were at 41 percent, 5 percentage points lower than they were when Roberts' nomination was announced. As was the case with Roberts,

Bush's popularity ratings wavered in the weeks and months following the nomination. His ratings hit low of 37 percent and averaged 41 percent from the time Alito was nominated until the day he was sworn in (CNN/USA Today/Gallup 10/2005-1/2006, np). As is evidenced by the table, the differences in presidential approval ratings between the two cases are not striking. The approval ratings at the time of nomination, the approval ratings at the time of the confirmation vote, the lowest point that the president's approval ratings hit, and the average of presidential approval ratings over the entire nomination and confirmation period are in both cases just a few different. While the president's approval ratings were ever so slightly higher during Roberts' nomination and confirmation, it is certainly not enough to conclude that approval ratings can in any appreciable way account for the difference in senators' confirmation votes.

Another factor worth mentioning is qualifications. It is possible that senators saw Roberts as being more qualified than Alito, thus resulting in greater bipartisan support for Roberts. The words of those senators who supported Roberts but opposed Alito do not support this possibility. Most of these senators in their statements on the Senate floor lauded Alito's qualifications. Bingaman asserted, "I do not doubt Judge Alito's qualifications or his integrity. He has served on the federal bench for over fifteen years and has demonstrated that he is indeed a bright and capable jurist" (The New Mexican 1/26/2006, np). Carper said, "I will not be voting against his confirmation because I don't believe he has the legal qualifications and experience necessary to sit on the Supreme Court. I do. He is clearly very bright and demonstrates an excellent grasp of the law" (Senator Tom Carper 1/26/2006, np). Additionally, Levin said, "Judge Alito has an impressive background and command of the law. He easily meets the educational and professional requirements of the position...He is respected by his peers as a very decent person and is a person of high caliber and integrity" (Senator Carl Levin 1/26/2006, np).

Murray asserted that she was "comfortable that Judge Alito is qualified, honest and ethical," and Pryor stated, "There is no doubt in my mind that Judge Alito is a credentialed jurist for this position, and carries with him the proper judicial temperament to sit on our nation's highest court" (Senator Patty Murray 1/25/2006, np; Senator Mark Pryor 1/27/2006, np). Other senators described Alito as being "very amiable and of the highest intellect" and "clearly qualified and capable of serving on the high court," as well as having "a very capable legal mind" and "substantial credentials."

Further, Segal-Cover qualification scores for the nominees are quite close – on a scale of 0-1, with 0 being least qualified and 1 being most qualified, Roberts is rated at .970, and Alito received a rating of .810 – a difference of just .160. Had Miers not withdrawn her nomination and had gone on to be confirmed by a close vote margin, an argument citing qualifications as being able to explain the vote difference could be strong, as Miers' qualifications score, .360, was considerably lower than Roberts' (Segal and Cover 2005, np). The closeness in qualification scores between Roberts and Alito, however, likely means that senators did not perceive the two to be different enough to lead to a difference of 20 yea votes between them.

Finally, it is well known that senators consider American Bar Association (ABA) ratings when examining nominee qualifications; according to Davis, individual senators use the ABA "because it offers an independent review of nominees designed to recognize merit (or its absence) in the appointment process and, ostensibly, is separate from the politics of presidential selection and Senate consideration" (Davis 2005, 44). Further, Bill Mears of CNN stated that the ratings "traditionally have carried significant political weight with senators, since the ABA is the country's largest group of lawyers" (CNN.com 8/18/2005, np). In the case of Roberts and Alito, the ABA unanimously rated both nominees as being "well qualified." Therefore, senators who

considered these scores discovered that there was no difference between the ratings of Roberts and Alito.

When the ABA ratings are coupled with Segal-Cover scores, it is apparent that in terms of qualifications, the nominees are not overly dissimilar. More importantly, when one examines the statements of the senators who voted for Roberts but against Alito, it is evident that many did not consider Alito to possess a lack of qualifications. Accordingly, we can assert that qualifications cannot sufficiently explain the vote difference between the nominees.

The strong versus weak presidency factor, which has been evidenced to influence confirmation votes considerably, can also be examined. As has previously been explained, a president is considered to be in a strong nominating position when his party controls Congress and when he is not making a nomination in the fourth year of his term. Therefore, this factor can be examined in two parts – same party status and year of the president's term in which the nomination is made.

The assessment of this factor is straightforward; the president made the nominations within months of one another – his party controlled the Senate in both nominations, and neither nomination was made in the president's fourth year. Therefore, the differences between the votes in these cases cannot be attributed to the president's strength in nominating.

It should be noted that presidential strength can be assessed in other terms. For example, the failure of a prior nomination by the president could serve to weaken his nominating position when he makes his next choice. It is possible that the withdrawal of the Miers nomination could have weakened Bush's position when selecting his next nominee. Miers was panned by both Democrats and Republicans for her lack of qualifications and the appearance that she was nominated simply because she was a friend of Bush's. Thus, Bush's selection of a weak

nominee could have made things more difficult on Alito by increasing the scrutiny and contentiousness placed upon Alito's nomination, potentially resulting in a closer confirmation vote. Given past history, however, this is likely not the case. Nixon nominee Harry Blackmun was confirmed 94-0 following the failed nominations of Haynsworth and Carswell, and Reagan had two failures in Bork and Ginsburg before his third nominee, Kennedy, was easily confirmed 97-0. While it is possible that failures in prior nominations could play a small role in affecting the strength of the president's position when making nominations to the Court, it is not a factor that should be given considerable weight.

Additionally, as proposed by Epstein, Lindstadt, Segal, and Westerland (2006), the ideological distance between Bush and the median member of the Senate can be a factor in presidential strength (Epstein et al 2006, 305). Again, Bush was operating under the same Senate with both nominations, so the ideological distance between himself and the median member of the Senate did not change. Had Alito been nominated in 2007 or 2008, this factor may have warranted further examination. However, it is evident that in the Roberts and Alito cases, this measure of presidential strength does not explain differences in confirmation votes.

Having eliminated the influence of party, ideology, presidential popularity, qualifications, and the strong versus weak presidency factor, and given the words of the pertinent senators themselves when explaining their opposition to Alito, it seems safe to conclude that the critical nomination factor explains a great deal when one attempts to understand the confirmation vote difference between Roberts and Alito.

Table 1 – Segal-Cover Scores of Current Justices on the Supreme Court

Justice	**Segal-Cover Score**
Ruth Bader Ginsburg	.680
Stephen Breyer	.475
Anthony Kennedy	.365
David Souter	.325
John Paul Stevens	.250
Clarence Thomas	.160
John Roberts	.120
Samuel Alito	.100
Antonin Scalia	.000

Ideological scores range from 0 (most conservative) to 1 (most liberal).
Information obtained from http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf

Table 2 – Senate Confirmation Votes for John Roberts

Republicans	**Vote**	**Democrats**	**Vote**
Alexander (TN)	Y	Akaka (HI)	N
Allard (CO)	Y	Baucus (MT)	Y
Allen (VA)	Y	Bayh (IN)	N
Bennett (UT)	Y	Biden (DE)	N
Bond (MO)	Y	Bingaman (NM)	Y
Brownback (KS)	Y	Boxer (CA)	N
Bunning (KY)	Y	Byrd (WV)	Y
Burns (MT)	Y	Cantwell (WA)	N
Burr (NC)	Y	Carper (DE)	Y
Chafee (RI)	Y	Clinton (NY)	N
Chambliss (GA)	Y	Conrad (ND)	Y
Coburn (OK)	Y	Corzine (NJ)	N
Cochran (MS)	Y	Dayton (MN)	N
Coleman (MN)	Y	Dodd (CT)	Y
Collins (ME)	Y	Dorgan (ND)	Y
Cornyn (TX)	Y	Durbin (IL)	N
Craig (ID)	Y	Feingold (WI)	Y
Crapo (ID)	Y	Feinstein (CA)	N
DeMint (SC)	Y	Harkin (IA)	N
DeWine (OH)	Y	Inouye (HI)	N
Dole (NC)	Y	Johnson (SD)	Y
Domenici (NM)	Y	Kennedy (MA)	N
Ensign (NV)	Y	Kerry (MA)	N
Enzi (WY)	Y	Kohl (WI)	Y
Frist (TN)	Y	Landrieu (LA)	Y
Graham (SC)	Y	Lautenberg (NJ)	N
Grassley (IA)	Y	Leahy (VT)	Y

Gregg (NH)	Y	Levin (MI)	Y
Hagel (NE)	Y	Lieberman (CT)	Y
Hatch (UT)	Y	Lincoln (AR)	Y
Hutchison (TX)	Y	Mikulski (MD)	N
Inhofe (OK)	Y	Murray (WA)	Y
Isakson (GA)	Y	Nelson, Ben (NE)	Y
Kyl (AZ)	Y	Nelson, Bill (FL)	Y
Lott (MS)	Y	Obama (IL)	N
Lugar (IN)	Y	Pryor (AR)	Y
Martinez (FL)	Y	Reed, J. (RI)	N
McCain (AZ)	Y	Reid, H. (NV)	N
McConnell (KY)	Y	Rockefeller (WV)	Y
Murkowski (AK)	Y	Salazar (CO)	Y
Roberts (KS)	Y	Sarbanes (MD)	N
Santorum (PA)	Y	Schumer (NY)	N
Sessions (AL)	Y	Stabenow (MI)	N
Shelby (AL)	Y	Wyden (OR)	Y
Smith (OR)	Y		
Snowe (ME)	Y	**Independent**	
Specter (PA)	Y	Jeffords (VT)	Y
Stevens (AK)	Y		
Sununu (NH)	Y		
Talent (MO)	Y		
Thomas (WY)	Y		
Thune (SD)	Y		
Vitter (LA)	Y		
Voinovich (OH)	Y		
Warner (VA)	Y		

Information obtained from http://www.c-span.org/congress/roberts_senate.asp

Table 3 – Senate Confirmation Votes for Samuel Alito

Republicans	**Vote**	**Democrats**	**Vote**
Alexander (TN)	Y	Akaka (HI)	N
Allard (CO)	Y	Baucus (MT)	N
Allen (VA)	Y	Bayh (IN)	N
Bennett (UT)	Y	Biden (DE)	N
Bond (MO)	Y	Bingaman (NM)	N
Brownback (KS)	Y	Boxer (CA)	N
Bunning (KY)	Y	Byrd (WV)	Y
Burns (MT)	Y	Cantwell (WA)	N
Burr (NC)	Y	Carper (DE)	N
Chafee (RI)	N	Clinton (NY)	N
Chambliss (GA)	Y	Conrad (ND)	Y
Coburn (OK)	Y	Dayton (MN)	N

Cochran (MS)	Y	Dodd (CT)	N
Coleman (MN)	Y	Dorgan (ND)	N
Collins (ME)	Y	Durbin (IL)	N
Cornyn (TX)	Y	Feingold (WI)	N
Craig (ID)	Y	Feinstein (CA)	N
Crapo (ID)	Y	Harkin (IA)	N
DeMint (SC)	Y	Inouye (HI)	N
DeWine (OH)	Y	Johnson (SD)	Y
Dole (NC)	Y	Kennedy (MA)	N
Domenici (NM)	Y	Kerry (MA)	N
Ensign (NV)	Y	Kohl (WI)	N
Enzi (WY)	Y	Landrieu (LA)	N
Frist (TN)	Y	Lautenberg (NJ)	N
Graham (SC)	Y	Leahy (VT)	N
Grassley (IA)	Y	Levin (MI)	N
Gregg (NH)	Y	Lieberman (CT)	N
Hagel (NE)	Y	Lincoln (AR)	N
Hatch (UT)	Y	Menendez (NJ)	N
Hutchison (TX)	Y	Mikulski (MD)	N
Inhofe (OK)	Y	Murray (WA)	N
Isakson (GA)	Y	Nelson, Ben (NE)	Y
Kyl (AZ)	Y	Nelson, Bill (FL)	N
Lott (MS)	Y	Obama (IL)	N
Lugar (IN)	Y	Pryor (AR)	N
Martinez (FL)	Y	Reed, J. (RI)	N
McCain (AZ)	Y	Reid, H. (NV)	N
McConnell (KY)	Y	Rockefeller (WV)	N
Murkowski (AK)	Y	Salazar (CO)	N
Roberts (KS)	Y	Sarbanes (MD)	N
Santorum (PA)	Y	Schumer (NY)	N
Sessions (AL)	Y	Stabenow (MI)	N
Shelby (AL)	Y	Wyden (OR)	N
Smith (OR)	Y		
Snowe (ME)	Y	**Independent**	
Specter (PA)	Y	Jeffords (VT)	N
Stevens (AK)	Y		
Sununu (NH)	Y		
Talent (MO)	Y		
Thomas (WY)	Y		
Thune (SD)	Y		
Vitter (LA)	Y		
Voinovich (OH)	Y		
Warner (VA)	Y		

Information obtained from http://www.c-span.org/congress/alito_senate.asp

Table 4 – Senators Who Voted for John Roberts and Against Samuel Alito

Senator	**State**	**Party**
Max Baucus	Montana	Democrat
Jeff Bingaman	New Mexico	Democrat
Tom Carper	Delaware	Democrat
Christopher Dodd	Connecticut	Democrat
Byron Dorgan	North Dakota	Democrat
Russ Feingold	Wisconsin	Democrat
Herb Kohl	Wisconsin	Democrat
Mary Landrieu	Louisiana	Democrat
Patrick Leahy	Vermont	Democrat
Carl Levin	Michigan	Democrat
Joseph Lieberman	Connecticut	Democrat
Blanche Lincoln	Arkansas	Democrat
Patty Murray	Washington	Democrat
Bill Nelson	Florida	Democrat
Mark Pryor	Arkansas	Democrat
Jay Rockefeller	West Virginia	Democrat
Ken Salazar	Colorado	Democrat
Ron Wyden	Oregon	Democrat
Jim Jeffords	Vermont	Independent
Lincoln Chaffee	Rhode Island	Republican

Table 5 – President George W. Bush's Approval Ratings During the Nomination and Confirmation Period of John Roberts

Date	**Approve**	**Disapprove**	**Unsure**	**N**
7/22-24/05	49	48	3	1,006
7/25-28/05	44	51	5	1,010
8/5-7/05	45	51	4	1,004
8/8-11/05	45	51	4	1,001
8/22-25/05	40	56	4	1,007
8/28-30/05	45	52	3	1,007
9/8-11/05	46	51	3	1,005
9/12-15/05	45	52	3	921
9/16-18/05	40	58	2	818
9/26-28/05	45	50	5	1,007

Gallup Poll and CNN/USA Today/Gallup Poll in response to the question, "Do you approve or disapprove of the way George W. Bush is handling his job as president?"

Table 6 – President George W. Bush's Approval Ratings During the Nomination and Confirmation Period of Samuel Alito

Date	**Approve**	**Disapprove**	**Unsure**	**N**
10/28-30/05	41	56	3	800
11/7-10/05	40	55	5	1,011
11/11-13/05	37	60	3	1,006
11/17-20/05	38	57	5	1,002
12/5-8/05	43	52	5	1,013
12/9-11/05	42	55	3	1,003
12/16-18/05	41	56	3	1,003
12/19-22/05	43	53	4	1,004
1/6-8/06	43	54	3	1,003
1/9-12/06	43	53	4	1,003
1/20-22/06	43	54	4	1,006

Gallup Poll and CNN/USA Today/Gallup Poll in response to the question, "Do you approve or disapprove of the way George W. Bush is handling his job as president?"

Chapter Six: Conclusion

Now that the description and analysis of the Roberts and Alito appointments are complete, several conclusions can be posited. First, if anything is clear from this examination, it is that critical nominations matter. Given the similarities of not only the nominees but the conditions under which they were nominated, it is hard to escape the conclusion that the traditional predictors of ideology and party could not account for the confirmation vote differences between Roberts and Alito in the way that the critical nomination factor could.

In terms of ideology, the nominees' Segal-Cover scores indicated that there was a very small ideological difference between Roberts and Alito. This difference – .020 – is so slight that it is unlikely that senators considered Roberts and Alito to be ideologically different enough to result in such differences in votes. Had the nominees been more ideologically divergent, the ideology hypothesis might have provided a stronger explanation of why senators voted the way they did in the two confirmations. In these cases, however, ideology seems to offer little in the way of explaining why the Roberts and Alito confirmation votes differed so considerably.

With respect to party, it also proved to be a weak explanatory factor in why Roberts received fewer nay votes and was able to garner greater support from Democratic senators than Alito. When the votes are looked at separately, party could have been a determining factor in the Alito vote; all but one Republican voted for him, and all but four Democrats voted against him. However, when examining Roberts' vote, it is clear that party provides little explanatory power, as Democrats split evenly in their yea and nay votes. Moreover, Roberts and Alito were nominated under very similar circumstances – they were nominated just three months apart by

the same Republican president and were scrutinized the same Senate. Additionally, they are presumably both Republicans. Given the fact that the nominees did not differ in their party or in the party of their nominating president, and since the confirmation votes, when taken separately, only followed party lines in the Alito case, the hypothesis regarding party does not explain the disparity in the two votes.

Other more peripheral factors were evidenced to be insufficient as well in explaining the vote difference. Presidential popularity ratings were similar during the nomination and confirmation processes of both Roberts and Alito. Though the president had slightly lower popularity ratings overall during Alito's nomination and confirmation, the difference is minor (within the margin of error of the polls) and is highly unlikely to explain the 20 vote difference between Roberts and Alito. Additionally, the president when nominating both Roberts and Alito was in a "strong" position – that is, his party controlled Congress and he was not in the fourth year of his term. Further, little evidence exists to indicate that the withdrawal of the Miers nomination affected the president's standing. The lack of difference between the two nominees in terms of his nominating position disproves the strong versus weak position of power factor.

Qualifications also proved to be an inadequate explanation of the difference in confirmation votes. The nominees' Segal-Cover qualifications scores, as with their ideological scores, were not considerably dissimilar, with a .160 difference between the two, whereas the difference between Roberts and Miers, for example, was considerable and would have pointed more towards the qualifications factor than the difference between Roberts and Alito. Much like the ideological scores, it is unlikely that such a small difference caused senators to consider the two nominees to be considerably different in terms of qualifications. Additionally, both nominees received "well qualified" ratings by the American Bar Association, further evidencing

their similarities in qualifications. Finally, many of the senators who voted for Roberts but against Alito themselves stated that they found Alito to be highly qualified and of strong intellect. As with the other factors, qualifications falls short of providing an explanation to the Roberts-Alito confirmation vote puzzle.

We are left, then, with the critical nominations factor. It is evident, given Ruckman's definition, that Alito's nomination was a critical nomination and that Roberts' was not. What remained to be seen was whether the fact that Alito's nomination was critical influenced his confirmation vote – more specifically, whether or not it could explain why Roberts was confirmed in a 78-22 vote and Alito received a 58-42 vote. Though his nomination was not defeated, as was the case in several of the critical nominations Ruckman studied, the vote margin was very close – one of the closest confirmations in recent history – and differed considerably from Roberts' just a few months prior. Why did those 20 senators vote to confirm Roberts but not Alito?

The Alito narrative shed considerable light on the difference in atmosphere and outlook between his nomination and Roberts'. It was clear that not only senators but the media and interest groups as well felt that O'Connor's seat was critical not only because she was the first woman appointed to the Court, but also because of her moderate, swing vote position on the Court. Further, statements by some senators, analysts, and members of interest groups evidenced that their opposition to Alito stemmed not only from the fact that another woman was not chosen to replace O'Connor, but also due to the perception that Alito would shift the Court's ideological balance to the right and would not be anything like the moderate swing voter that O'Connor was. Differences in the statements of senators during the entire nomination and confirmation processes, the remarks of media and legal analysts, the advertising dollars spent by interest

groups, the contentiousness surrounding the confirmation hearings, the questions presented to the nominees, and the chances of a filibuster being proposed emphasized the differences between Alito's and Roberts' nominations and buttress the fact that Alito's nomination was critical.

One need not rely on Alito's narrative alone to evidence that the critical nomination factor was influential in the vote difference between Alito and Roberts. An evaluation of the statements of the 20 senators who differed in their votes for the two nominees – perhaps one of the best ways of ascertaining why these senators voted the way that they did – provided strong support for the critical nomination hypothesis. Nearly all of those senators stated their opposition to Alito by either explicitly asserting that he was not a suitable or acceptable replacement for O'Connor (given her unique position on the Court and the ideological difference between her and Alito) or by citing their concerns about how Alito would vote on particular issues such as executive power, abortion rights, and the Commerce Clause – issues on which O'Connor and Alito ruled in opposition to one another. Given the content of these statements, and considering the fact that alternative hypotheses have proven to be lacking, it seems safe to conclude that the critical nominations factor best explains why the Roberts and Alito confirmation votes differed the way they did.

With the Court having begun its new term on October 2, debate has now shifted to how the Court will change with Roberts and Alito serving their first full terms on the bench. One issue, according to a recent story in The San Francisco Gate, is "just how far the Court's center of gravity has shifted rightward because of Alito's replacement of retired Justice Sandra Day O'Connor," while another is "how Roberts' embrace of judicial modesty and humility at his confirmation hearings will affect his approach to cases in which the Bush administration seeks to overturn court precedents" (The San Francisco Chronicle 10/2/2006, np). Walter Dellinger,

former acting solicitor general and Duke Law School Professor, stated, "The absence of Justice O'Connor will be one of the most fundamental changes the Court has seen." Former solicitor general and Pepperdine Law School Dean Kenneth Star added, "It is difficult to overstate the significance of that shift" (The Christian Science Monitor 10/2/2006, np).

Also garnering considerable discussion are questions of how Roberts and Alito will rule on several controversial issues that will be tackled by the Court during this term, including abortion, affirmative action in public schools, global warming, punitive damages, immigration, and fair trial rights of criminal defendants. "In the term that's about to start, the Supreme Court has really stepped into the biggest social issues of the day," said Thomas Goldstein, an attorney who has argued numerous cases before the Court (CNN.com 9/29/2006, np). Edward Lazarus, a former Supreme Court clerk, stated, "This will be much more of a litmus-test term than the last term was. There are several cases on the docket in the most contentious areas of the law in which the new justices will have to declare themselves" (The San Francisco Chronicle 10/2/2006, np).

Douglas Kmiec of Pepperdine University School of Law asserted, "There are some stand-out cases and each of them will test whether this is a 'restrained' Court." Further, Mark Rahdert of Temple University James E. Beasley School of Law contended, "I think the handwriting is pretty clear in both areas that the law is going to change significantly. If you just line up the votes – replacing O'Connor with [Justice Samuel A.] Alito [Jr.] on both issues [abortion and affirmative action]. The committed minority in the past that was opposed to affirmative action and any kind of permission for partial-birth abortion is set to become a majority." The true question, he adds, is how drastically the law may change. "Will the Court announce some sort of

bold, new set of principles or apply the existing framework in a different fashion and weigh the values in a different way?" (The National Law Journal 9/18/2006, np).

Perhaps the most contentious issue the Court will address is abortion – specifically, a pair of cases involving the Partial-Birth Abortion Ban Act of 2003 that the Court will hear in November. Speculation about the case began as early as February, when the Court announced its decision to hear it. Religious conservatives stated that they hoped Roberts and Alito's appointments would lead to considerable legal changes. "We look forward to the new Court's consideration of the case and fully expect a victory for the cause of the unborn," said Brian Fahling, senior trial attorney for the American Family Association Center for Law & Policy. Jay Sekulow, chief counsel of the American Center for Law and Justice, stated, "With the new make-up of the high court, we are encouraged that the justices will determine that the government does have a vital and compelling interest in preventing the spread of the practice of abortion into infanticide" (The Pew Forum 2/23/2006, np).

Others looked at the case in terms of the effect of O'Connor's absence. "This will be a case where the switch from Justice O'Connor to Justice Alito makes all the difference in the world," says Andrew Cohen, a legal analyst for CBS News. "She ruled against the effort to ban this procedure a few years ago, but he has given the clear sense that he would be much more receptive to the restrictions in play here." Jan Crawford Greenburg, another CBS News legal analyst, predicted that the new court would rule to allow states to decide what types of procedures would be acceptable and that such an increase in the power of the states is "something the Supreme Court has not previously allowed with Justice O'Connor on the Court" (CBS News 2/21/2006, np).

Speculation about the case increased as the Court began its term. While religious organizations had previously stated their hopes of a considerable change on how the Court handles abortion cases, some conservatives do not foresee such a shift. "I don't think the Court will reverse *Roe v. Wade*," said Theodore Olson, an appellate attorney and former solicitor general under President George W. Bush. "I think the two newest justices…have said they respect the doctrine of precedent. And that decision is firmly embedded in our constitutional law…They are conservatives in the sense that they will respect precedent" (CNN.com 9/29/2006, np). Many have posited that Alito will take over O'Connor's position as casting the deciding vote in the case. This is a critical point, since O'Connor was part of a 5-4 majority that struck down a similar Nebraska law in 2000 and has for a quarter of a century been the swing vote upholding the basic right to an abortion, while Alito is in this case expected to side with abortion opponents. Some also predict that the decision on this case could be indicative on how the Roberts Court rules on abortion rights in the future. "We'll be able to take the temperature of the justices based on their questions, the opinions they write, whether they've moved one more vote toward overruling Roe v. Wade," Goldstein stated (CNN.com 9/29/2006, np).

The cases involving race in public schools is also forecasted to be highly litigious. The case, to be heard by the Court in December, involve public schools in Seattle, Washington and Louisville, Kentucky, both of which use affirmative action to select children for highly sought-after positions in well- regarded elementary and secondary schools. The case comes to the Court three years after a strongly divided court allowed universities to continue using race in their admissions process, with O'Connor casting the deciding vote. According to a story in The New York Times, the decisions in these cases "will provide the first clear indication of where the center now lies on questions of race and public policy after the retirement of Justice Sandra Day

O'Connor," since O'Connor had been the pivotal voter on affirmative action questions for some time (The New York Times 10/2/2006, np). Starr stated that when it comes to how Roberts and Alito would tackle the cases, the two "may not be sufficiently wedded to the idea that there should be counting by the numbers on the basis of race" (CNN.com 9/29/2006, np). However, both Roberts and Alito were attorneys with the Justice Department during the Reagan administration, which desired limitations on affirmative action, and when the Court ruled in June on congressional districts in Texas, Roberts stated that reapportioning voters to different districts is "a sordid business," indicating that predictions about Roberts' and Alito's judgment on the cases are fragile at best (Associated Press 9/30/2006, np).

Only time will tell if Democrats' assertions regarding Alito's confirmation shifting the Court's ideological balance to the right and altering the protection of civil rights and liberties comes to pass. One thing is clear – Alito's replacement of O'Connor on the Court and the critical nature of his appointment will be a topic of discussion for years to come as the Roberts Court begins to make its mark on American judicial history.

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