For Further Reading

Carruba, Clifford J. 2005. "Courts and Compliance in International Regulatory Regimes." *Journal of Politics* 67(3): 669–689.

Casper, Jonathan. 1972. *Lawyers Before the Warren Court: Civil Liberties and Civil Rights, 1957–66.* Urbana: University of Illinois Press.

Epstein, Lee. 1985. *Conservatives in Court.* Knoxville: University of Tennessee Press.

Epstein, Lee, Jeffrey Segal, Harold Spaeth, and Thomas Walker. 1994. *The Supreme Court Compendium: Data, Decisions, and Developments.* Washington, D.C.: CQ Press.

Hall, Kermit, James Ely, Jr., Joel Grossman, and William Wiecek, eds. 1993. *The Oxford Companion to the Supreme Court.* New York: Oxford University Press.

Irons, Peter. 1988. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court.* New York: Free Press.

Kelley, Judith. 2007. "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements." *American Political Science Review* 101(3): 573–589.

Meernik, James, Kimi Lynn King, and Geoffrey Dancy. 2005. "Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors." *Social Science Quarterly* 86(3): 683–703.

Moghalu, Kingsley Chiedu. 2008. *Global Justice: The Politics of War Crimes Trials.* Stanford, Calif.: Stanford University Press.

Pacelle, Richard. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration.* Boulder, Colo.: Westview.

Perry, H. W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court.* Cambridge, Mass.: Harvard University Press.

Powell, Emilia Justyna, and Sara McLaughlin Mitchell. 2007. "The International Court of Justice and the World's Three Legal Systems." *Journal of Politics* 69(2): 397–415.

Provine, Doris Marie. 1980. *Case Selection in the United States Supreme Court.* Chicago: University of Chicago Press.

Salokar, Rebecca Mae. 1992. *The Solicitor General: The Politics of Law.* Philadelphia: Temple University Press.

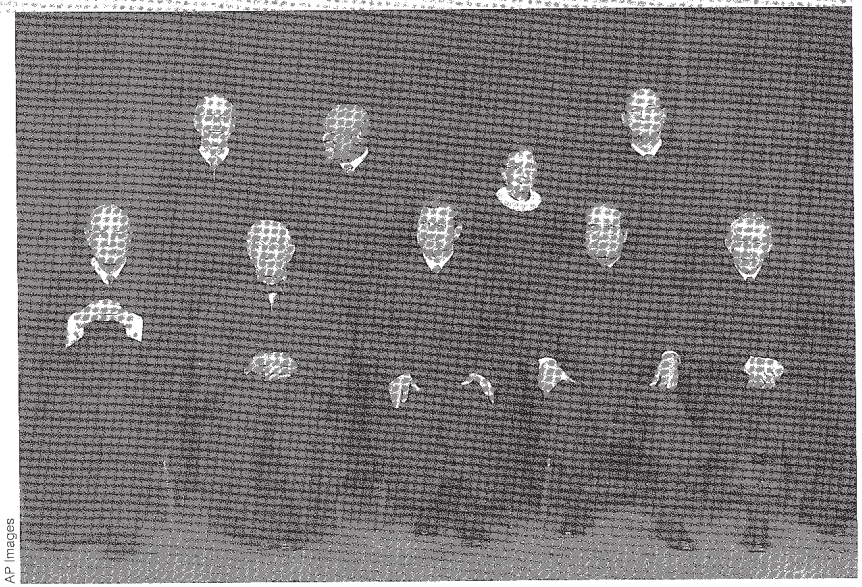
Schwartz, Bernard. 1993. *A History of the Supreme Court.* New York: Oxford.

Walker, Thomas, and Lee Epstein. 1993. *The Supreme Court of the United States: An Introduction.* New York: St. Martin's Press.

Witt, Elder. 1993. *The Supreme Court A to Z: A Ready Reference Encyclopedia.* Washington, D.C.: CQ Press.

CHAPTER

The Supreme Court: The Justices and Their Decisions



AP Images

With the addition of the Supreme Court's newest member, the high court sits for a class photo in 2006. Front row (from left to right): Anthony Kennedy, John Paul Stevens, John Roberts, Antonin Scalia, and David Souter. Back row: Stephen Breyer, Clarence Thomas, Ruth Bader Ginsburg, and Samuel A. Alito Jr.

"I know it when I see it," Justice Potter Stewart once famously said of pornography (*Jacobellis v. Ohio* 1964). And, if you haven't noticed, it's easy to see *it* when you're surfing the Internet. "I was on my way to the White House when I encountered the topless women," is how political columnist Leonard Pitts Jr. (1998) describes how he found pornography on the Internet. Mistyping three letters led not to the official website of the president's house but to a site promising access to "young teens, hot lesbians, and hard-core nymphomaniacs" for only $19.95 a month. (Mistyping the letters today no longer takes the Internet surfer to the porn site.) Congress and the president have sought to end such practices with legislation intended to protect adults and children from online pornography; but it has not been without legal controversy.

Congress and the president first entered the arena of pornography on the Internet with the 1996 Communications Decency Act and later the Child Online Protection Act (1998), each passed by Congress and signed into law by President Bill Clinton. The Supreme Court got involved on June 26, 1997, ruling (7–2) that portions of the Communications Decency Act of 1996 (see Case Close-Up: *Reno v. American Civil Liberties Union* 1997) were unconstitutional on First Amendment grounds. Advocates of the legislation were outraged. Senator Dan Coats (R-Ind.) said about the Court's decision, "A judicial elite is undermining democratic attempts to address pressing social problems" (CNN 1997). The next year, Congress revised the previous law and attempted once again to limit, in particular, children's access to pornography on the Internet by passing the Child Online Protection Act (COPA). The Supreme Court again declared the law unconstitutional, this time in *Ashcroft v. American Civil Liberties Union* (2004), finding that the law in its effort to protect children prohibited otherwise constitutionally protected speech. Meanwhile, the Congress had crafted the PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act of 2003, which was aimed at a broad array of protections for children, including a prohibition on pornography aimed at children and virtual or computer-generated child pornography. The legislation was signed into law by President George W. Bush.

In May 2008, after twenty years of trying to place restrictions on child pornography on the Web, the Supreme Court finally sided with Congress and the president. In *United States v. Williams* (2008), the justices considered whether the PROTECT Act was unconstitutionally overbroad, limiting more free speech than was necessary to accomplish the goal of protecting children. Justice Scalia, writing for a seven-person majority and upholding the law, noted that the First Amendment does not protect individual efforts to traffic or purport to traffic in child pornography (whether the children are real, virtual, or purely fictional). Two justices, Souter and Ginsburg, issued a dissenting opinion, arguing that the statute remained overbroad and that they did not believe the restriction on the First Amendment was warranted.

Efforts to curtail, limit, or otherwise control pornography on the Internet are not going away. Pornography opponents, free-speech advocates, legislators, and interest groups are all involved in fighting the battle over how the First Amendment will be applied to the Internet. The Supreme Court's role in this controversy is to figure out how to balance all those perspectives.

The U.S. Supreme Court has been called the most mysterious, most remote, and least understood branch of U.S. government. The justices are among the most anonymous leaders in American life, rarely speaking to reporters and never allowing cameras

in the courtroom. In other ways, however, the Court is less secretive about what it does than any other governmental institution. Through written opinions, which average more than 4,000 pages each year, the justices explain the reasons for their actions. This written product is closely scrutinized by judges, lawyers, law professors, political scientists, and, at times, even lay citizens. Through those decisions, the justices affect more people than any other nine individuals in the nation.

This chapter focuses on the Court as a legal and political institution—first by examining the political nature of the process of selecting the justices. After dissecting the decision-making process step by step, it considers the critical importance of the justices' policy preferences. The last part of the chapter examines the contemporary debate over the Supreme Court by surveying recent controversial decisions and the varying voting alignments (from the Warren Court through the Roberts Court) and investigating why Supreme Court decisions are not necessarily the final word.

Selecting the Justices

In declaring "[t]he most important appointments a President makes are those to the Supreme Court of the United States," President Richard Nixon (1971, 24) echoed the sentiments of every modern-day chief executive. Appointing a Supreme Court justice provides the president with the opportunity to leave an enduring mark on the U.S. legal system and most probably to extend his influence well beyond his own term of office.

Even though nominations to the Court are important to the president, the nation's highest elected official has no control over the frequency or the timing of that valuable political opportunity. A vacancy occurs when a sitting justice dies or steps down from the Court, meaning that a president's opportunity to nominate a justice is essentially a random and irregular event (Atkinson 1999; King 1987; Squire 1988). Franklin Roosevelt had no vacancies to fill during his first term, but had five in his second. However, four justices left the Court in Richard Nixon's first three years in office, providing him the opportunity to fulfill his campaign promise of appointing strict constructionists to the Court. Jimmy Carter never had the chance to make a single nomination during his four-year tenure. Thus, Bill Clinton was the first Democrat in twenty-six years to fill a vacancy on the Court, nominating two justices to the nation's highest court. For the first five years of his presidency, George W. Bush had no vacancies to fill, but in rapid succession he saw his nominee John Roberts confirmed as the seventeenth chief justice and then Samuel Alito confirmed for the seat being vacated by retiring justice Sandra Day O'Connor. Given the age and health problems of some of the current justices, the next president will likely have vacancies to fill. Table 15.1 shows the current composition of the Supreme Court.

The Nomination Process

The formal process of appointing a justice to serve on the Supreme Court is guided by the same constitutional provisions that govern the selection of other Article III judges: The president nominates, the Senate confirms, and the justice serves during

TABLE 15.1 Supreme Court Justices in Order of Seniority

Name	Year of Birth	Home State	Religion	Year of Appointment	Appointed By	Senate Vote
John Paul Stevens	1920	Illinois	Protestant	1975	Ford	78–0
Antonin Scalia	1936	New York	Catholic	1986	Reagan	98–0
Anthony Kennedy	1936	California	Catholic	1988	Reagan	97–0
David Souter	1940	New Hampshire	Episcopalian	1990	George H. W. Bush	90–9
Clarence Thomas	1948	Georgia	Catholic	1991	George H. W. Bush	52–48
Ruth Bader Ginsburg	1933	New York	Jewish	1993	Clinton	96–3
Stephen Breyer	1938	Massachusetts	Jewish	1994	Clinton	87–9
John Roberts	1955	Indiana	Catholic	2005	George W. Bush	78–22
Samuel A. Alito Jr.	1950	New Jersey	Catholic	2006	George W. Bush	58–42

good behavior (Chapter 6). Thus, for all practical purposes, Supreme Court justices enjoy lifetime positions; none has ever been removed from office.

The informal process of appointing a justice to the Court, however, is strikingly different from that used to select lower-court judges. Presidents give Supreme Court nominations a degree of personal attention that is matched only by the scrutiny devoted to cabinet appointments and the president's closest advisers. At the same time, however, presidents increasingly find that their choices are scrutinized by a greater array of official and unofficial participants in the selection process. But not all presidents use the same process. David Yalof (1999) points out that presidents vary in their development of criteria to be used in selecting a nominee and the level of responsibility for the process they delegate. Complicating the president's selection is the fact that a wide range of liberal and conservative interest groups now actively lobby for the confirmation or the defeat of presidential nominees. The contentious nomination and withdrawal of the Harriet Miers nomination, the appointment of Clarence Thomas, and the failed nomination of Robert Bork are examples of that conflict (Bronner 1989; Comiskey 2004; Overby et al. 1992). Such competition sets the stage for the intersection of law, courts, and politics in determining who will sit on the nation's highest legal institution.

The Criteria for Nomination

What types of people do presidents choose to fill a Supreme Court vacancy? The most influential selection criteria include objective merit, personal and political friendship, policy preferences, and symbolic representation. Obviously, more than one of those factors is present in most of the nominations, and, as will be shown, these considerations vary from president to president and from vacancy to vacancy as well (Abraham 1999).

Merit In selecting judges for the lower federal courts, presidents seek nominees who are qualified, but other criteria, such as political support and senatorial courtesy, are also important. Nominations to the Supreme Court reverse that equation. For the Court, merit plays a critical role. Presidents first seek nominees who have strong legal credentials and whose ethical behavior is unquestioned. Indeed, "the great majority of justices had already achieved eminence by the time they were selected for the Court"—in judicial, legal, or public careers (Scigliano 1971, 107). Although not all nominees have been topflight lawyers, in only a few instances have the ethics or the credentials of a nominee been seriously questioned (Baum 2001).

Nominees whose qualifications to serve on the Supreme Court are not immediately obvious run the distinct risk of not being confirmed at all. That was most certainly the case with President Bush's 2005 nomination of his longtime friend and lawyer Harriet Miers. Even though she had a distinguished career as a corporate lawyer in Dallas and later as chief White House counsel, her qualifications were questioned by a wide variety of groups and people. In the end, President Bush withdrew her nomination.

An indicator of the importance of judicial qualifications is the fact that, on the Court today, all the nine justices have previously served on the U.S. courts of appeals. It is safe to say that the path to the Court now leads through lower-court chambers.

Personal and Political Friendship A nomination to the Supreme Court is one of the most important rewards that presidents can bestow on their political supporters. It should come as no surprise, therefore, to learn that presidents have frequently awarded those prizes on the basis of personal and political friendship. Indeed, half of the justices have been personal friends of the appointing president (Scigliano 1971). Not only do such persons appear to be deserving but also the president can have considerable confidence in the nominee's ideological "correctness." More broadly, 90 percent of all nominees have come from the president's party and most have been active in party politics (Baum 2001). Deviations from this norm are rare: William Brennan, for example, was a registered (but inactive) Democrat before being picked by Republican Dwight Eisenhower.

Earlier presidents all selected primarily personal acquaintances for vacancies on the high court, but recent presidents have exhibited a different pattern. Neither Nixon, Ford, Reagan, nor Bush appointed close associates. Clinton is reported to have seriously considered several political allies but, in the end, demurred to two experienced jurists—Stephen Breyer and Ruth Bader Ginsburg. The lone recent exception appears to be George W. Bush's troubled choice of Harriet Miers. Bush was not friendly with either John Roberts or Samuel Alito before nominating them to the high court. This pattern suggests a shift away from personal and political factors and toward other nomination criteria, such as the policy preferences of the nominee.

Policy Preferences Modern presidents have sought nominees who share their policy preferences regarding the role of the Supreme Court in U.S. political life and the interpretation of the Constitution (Watson and Stookey 1995). Most certainly, President Reagan's nominees to the high court reflected his conservative principles. His four nominees—Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and William Rehnquist (elevating him from associate justice to chief justice)—were chosen because they were known conservatives. President Clinton's selections to the Court reflected his middle-of-the-road stance. His two nominees—Ruth Bader Ginsburg and Stephen Breyer—were known as moderate, middle-of-the-road jurists (Goldman et al. 2003).

More so than any previous president, George W. Bush made conservatism the defining and dominant criterion for selection to the Court. For example, in announcing the nomination of John Roberts to fill a vacancy on the Court, the president stressed code phrases that his conservative supporters clearly wanted to hear: "He will strictly apply the Constitution and laws, and not legislate from the bench" (quoted in Neubauer and Meinhold 2006). The nomination and confirmation of the conservative Samuel Alito to replace the more moderate Sandra Day O'Connor has resulted in an increased awareness of the policy preferences of the nominees.

Although presidents seek to nominate judges who reflect their policy preferences, they have not always been successful. Historical accounts abound with tales of presidents who were disappointed by their appointees' voting records. For instance, President Dwight Eisenhower (1965) considered his Supreme Court nomination of Earl Warren to be the biggest mistake he made as president (Warren 1977; compare Kahn 1992). Conversely, Democrat John Kennedy was responsible for nominating the conservative Byron White to the bench. To avoid such ideological surprises, chief executives increasingly prefer to appoint individuals with prior judicial experience, arguing that former judges provide a decision-making record that can serve as a guide to their subsequent behavior (Gates and Cohen 1988).

Anecdotal evidence aside, how successful are presidents in appointing like-minded justices to the Court? The evidence suggests they mostly are successful. Justices do reflect the political preferences of their appointing presidents, at least in some issue areas and for a short time after their appointment (Gates and Cohen 1988; Heck and Shull 1982). In a study of the voting behavior of Supreme Court justices from 1937 to 1994, Segal, Timpone, and Howard (2000) conclude, "Presidents appear to be reasonably successful in their appointments in the short run, but justices on average appear to deviate over time away from the presidents who appointed them." Such deviation is probably due, in part, to the fact that the issues confronting the Court change and often differ from those most salient to the president at the time the nominee was selected a decade or more ago. It also matters how many justices the president gets to appoint, as found by Lindquist, Yalof, and Clark (2000), who conclude that a president's influence is greatest when he gets more than one appointment and when those appointees vote cohesively. There is then a powerful opportunity for this judicial bloc to advance the president's interest, as happened with the Reagan and Nixon appointees. It should be interesting to see whether Clinton's or Bush's nominees fit this model.

Symbolic Representation Symbolic representation also often plays a major role in influencing a president's choice to fill a vacancy on the Supreme Court. A candidate's geographic background, religious preference, race, ethnicity, or gender may make a potential nominee especially attractive. Indeed, when a president nominates a member of the opposing political party to the Supreme Court, it is often a symbolic gesture (Marshall 1993). In turn, by nominating a person with the "correct" symbolic background, presidents hope to gain voter support while rewarding loyal political followers.

Throughout the nineteenth century, geography was a prime consideration in efforts to engage in symbolic representation. Presidents sought to win political support through the appointment of justices from each of the expanding nation's rival sections. Geography

was a less important factor in the twentieth century, but, occasionally, it played a role. During the 1968 campaign, Nixon promised to appoint a southerner to the Court, and, after two unsuccessful attempts (Clement Haynsworth and G. Harold Carswell), he succeeded with the confirmation of Lewis Powell.

Religious preference has also been a factor in some appointments. Through the years, the high court has been overwhelmingly Protestant in its makeup, but the period from 1894 until 1949 exhibited a tradition of a so-called Catholic seat. That tradition was revived in 1957 amid some controversy when Eisenhower appointed William Brennan. Today, however, the controversy over a Catholic seat seems a reflection of an earlier era; the nomination of five Roman Catholic jurists—Scalia, Kennedy, Thomas, Roberts, and Alito—by Republican presidents has hardly attracted attention.

Much more controversial than any of the Catholic appointees to the Court was the nomination of Louis Brandeis, the first Jewish justice, by President Woodrow Wilson in 1916. Conservatives bitterly fought his nomination because of his social and economic views (often accompanied by an underlying element of anti-Semitism). Indeed, when Brandeis took his seat on the Court, Justice James McReynolds did not speak to him for three years and once refused to sit next to him for a Court picture-taking session. Herbert Hoover's nomination of Benjamin Cardozo in 1932 thus established a so-called Jewish seat on the Supreme Court, which continued until 1969. When Abe Fortas resigned, President Nixon broke the tradition of a Jewish seat by choosing Harry Blackmun, a Protestant. Thus, no Jewish justice sat on the nation's highest court for a quarter of a century until Ruth Bader Ginsburg became the 107th justice of the Court. President Clinton's second nominee—Stephen Breyer—is also Jewish.

In the modern era, geography and religion have been reduced to minor factors in selecting Supreme Court nominees. Today, race and gender have become more important factors in presidents' use of Supreme Court nominations to pursue political support (Perry 1991). In 1967, Thurgood Marshall became the first African American to serve on the Court. When he retired, President George H. W. Bush nominated another African American, Clarence Thomas, to continue the tradition.

The selection of Sandra Day O'Connor in 1981 brought the first woman to the Court. For his first nomination to the high court, President Clinton also chose a woman—Ruth Bader Ginsburg. The two women reflect different backgrounds, however. Although gender shaped O'Connor's choice of a public, as opposed to a private, career, her voting and opinion-writing behavior provides scant evidence of a distinctly feminine perspective (Davis 1993). Ginsburg, on the other hand, was in the forefront of the women's movement, serving as director of the American Civil Liberties Union's Women's Rights Project and arguing six important gender-based discrimination cases before the Supreme Court.

Future presidents will face considerable political pressure to maintain African-American and female representation on the Court and perhaps even to consider seriously the appointment of the first Latino justice. Indeed, George W. Bush was criticized by some, including his wife, for choosing a male to replace Justice Sandra Day O'Connor when she stepped down. After Roberts had been nominated for O'Connor's seat, Chief Justice Rehnquist passed away. President Bush switched Roberts's nomination to the position of chief justice and tapped a woman for the vacancy, only to be forced to withdraw

her nomination. The travail of Harriet Miers illustrates how tricky selections motivated by symbolic representation can be.

Interest Groups

Interest groups now take an active part in the Supreme Court nomination process (Bell 2002). In the past, interest groups were concerned primarily with the cases the Supreme Court heard and trying to influence those outcomes. Today, however, interest groups see nominations to the Court as a way to influence the outcome of future cases and to raise money and energize their supporters. Their role has become so public that some senators object to the pressure they are trying to exert on the process. During the confirmation hearings for Chief Justice Roberts, Patrick Leahy (D-Vt.) said, "These outside lobbying groups, whether on the right or the left, have become, for me anyway, basically irrelevant." Others would argue that his statement could not be further from the truth. During the John Roberts confirmation hearings, interest groups from both the left and the right mobilized to either support or oppose his nomination (Neubauer and Meinhold 2006). So far, though, the evidence suggests that interest groups have been more effective in blocking a nomination than they have been in influencing who is chosen by the president.

One group in particular has historically had more influence than others—the American Bar Association (ABA). Before the Bush administration, the president would send the ABA Standing Committee on the Federal Judiciary the name of the nominee in advance of the public announcement, and the committee would rank the nominee as "well qualified, qualified, or not qualified." Some presidents have paid greater attention to those rankings than have others, but the ABA was presumed to have some influence on the process. But, in 2001, President Bush announced that he would no longer send the names to the ABA committee in advance of the public announcement—effectively treating the ABA the same as any other interest groups. The role of the ABA has now been eclipsed by more partisan groups (Caldeira and Wright 1998), offering further evidence that nominations are as political as they are legal.

Senate Confirmation

The president is also constrained by the requirement that the Senate confirm the choice. Moraski and Shipan (1999) contend that "presidents act strategically to choose the best nominee they can, given the constraints they face." Such constraints include a potentially hostile Judiciary Committee and Senate. Whatever the calculus used by a particular president, important external influences and competing institutional agendas must be considered: all the more reason to study whom presidents choose and whom they almost choose.

After the president has made a selection, the name is sent to the Senate Judiciary Committee, who question the nominee on a wide range of issues, including constitutional philosophy (Guliuzza, Reagan, and Barrett 1994). That questioning, however, typically reveals little of the nominees' legal or political philosophies (Comiskey 1993). During controversial nominations, the hearings rate as high drama in the media and are considered a significant part of the confirmation process. Conversely, the hearings in noncontroversial nominations are often theatrics, a mere formality. Nonetheless, even in noncontroversial nominations where approval seems certain, senators can use the hearings to influence the next nomination even before it is made (Watson and Stookey 1995). For example, in questioning Supreme Court nominee John Roberts, senators appeared to focus not on Roberts but instead on the nominee whom Bush would eventually select to fill the O'Connor vacancy (namely, Samuel Alito).

After holding hearings, the Judiciary Committee makes a recommendation to the full Senate, and a date for the confirmation vote is set. Most nominations sail smoothly through the confirmation process, usually in less than two months from submission to the final vote (Wasby 1993). Indeed, recent confirmation votes tend to be lopsided, with only three successful nominees receiving less than a two-thirds margin. Controversial nominations, however, may take longer, with the fate of some genuinely in doubt (Segal 1987). Shipan and Shannon (2003) find that the confirmation happens faster when nominees have judicial experience or are sitting senators and when there is less ideological disagreement between the president and the Senate. When the executive and the legislative branches of government are controlled by the same political party, it makes sense that the president will have a greater chance of getting his nominees confirmed.

The confirmation process was overtly political throughout the nineteenth century. The Senate rejected or tabled Supreme Court nominations for virtually every conceivable reason, including the nominee's political views, opposition to the incumbent president, a desire to hold the vacancy for the incoming president, interest group pressures, and "on occasion even the nominee's failure to meet minimum professional standards" (Monaghan 1988, 1202). Before 1900, one-quarter of the nominees to the Supreme Court failed to win confirmation. From 1900 to 1967, though, presidents fared considerably better, with only one nomination failing to win confirmation. Since 1968, the pendulum has swung back. To be sure, thirteen nominees won Senate confirmation during this period, but several proved controversial. William Rehnquist's nomination to be associate justice in 1972 and his subsequent elevation to the post of chief justice in 1986 both generated significant opposition, as did President George H. W. Bush's choice of Clarence Thomas and George W. Bush's nomination of Samuel Alito.

Most pointedly, the seven unsuccessful nominations since 1968 (Table 15.2) reflect two primary factors: First, a nominee's policy preferences are a major source of Senate opposition, although, typically, mere disagreement with the views of the nominee is not enough to cause rejection. The second key factor is the competence or the ethical standards of the nominee. The nominations of Abe Fortas, Clement Haynsworth, G. Harold Carswell, Douglas Ginsburg, and Harriet Miers floundered amid charges of lack of ethics and/or lack of competence. Johnson and Roberts (2004) demonstrate that presidents can enhance the chances of success for their nominees or at least reduce the likelihood of a hostile Senate by using their political capital and going public to offer their support. Of the seven unsuccessful presidential efforts in recent years, the defeat of Robert Bork has attracted the most widespread interest. (See Debating Law, Courts, and Politics: The Rejection of Robert Bork.)

TABLE 15.2 Unsuccessful Twentieth-Century Supreme Court Nominations

Nominee	President	Year	Outcome	Discussion
John Parker	Hoover	1930	Rejected 39–41	Parker, a prominent North Carolina Republican and a judge on the Fourth Circuit Court of Appeals, was opposed by the American Federation of Labor, who read his opinions as indicating a hostility to labor. The NAACP also opposed the nomination. Parker might still have won, except for several progressive Republicans who would have voted against anyone Hoover nominated.
Abe Fortas	Lyndon Johnson	1968	Withdrawn after vote to end cloture rejected 47–48	After Fortas had served for three years as associate justice, Johnson tried to elevate his longtime friend to the post of chief justice. Johnson's unpopularity over the Vietnam War, coupled with charges of ethical impropriety against Fortas, led the Senate to refuse to confirm. In 1969, Fortas resigned amid threat of impeachment for his financial dealings with a convicted felon.
Homer Thornberry	Lyndon Johnson	1968	Moot after rejection of Fortas	A longtime Texas friend, Thornberry was caught up in the backlash against an unpopular president who would soon leave office.
Clement Haynsworth	Nixon	1970	Rejected 45–55	Haynsworth, of the Fourth Circuit, was Nixon's initial choice to fulfill his election promise of appointing a southerner to the Supreme Court. Opposed by labor and civil rights groups, he was rejected because of questions about professional ethics involving the ownership of stock in companies connected to cases before his court.
G. Harold Carswell	Nixon	1970	Rejected 47–52	Carswell was Nixon's second attempt to complete his southern strategy. Also opposed by labor and civil rights groups, he was defeated after publicity surrounding a 1948 campaign speech that supported white supremacists and segregation.
Robert Bork	Reagan	1987	Rejected 42–58	Moderate southern Democrats voted against Bork for being too ideologically extreme.
Douglas Ginsburg	Reagan	1987	Withdrawn before official nomination	After the rejection of Bork, the White House announced the pending nomination of Ginsburg, but nine days later withdrew it amid reports he smoked marijuana while a Harvard Law School professor.
Harriet Miers	George W. Bush	2005	Withdrawn after nomination	Withdrawn amid skepticism about her legal credentials and complaints from conservatives that she might not be conservative enough.

DEBATING LAW, COURTS, AND POLITICS

The Rejection of Robert Bork

The controversy over President Reagan's nomination of Robert Bork for a seat on the Supreme Court stemmed partially from several political situations. First, the 1986 election had produced a Democratic majority in the Senate (54–46). Second, Reagan's power had waned. He was a lame duck who had suffered prestige and credibility gaps because of the Iran-Contra hearings and other political setbacks. Third, the ideological balance of the Court seemed to be at stake (Ruckman 1993). Retiring Justice Powell had been on the winning side of more 5–4 decisions than any other justice. Replacing him with a conservative would provide a fifth conservative justice, thus altering the balance of voting power on the Court—something liberals preferred to avoid. Those factors in combination suggested the potential for defeating the nomination (Stookey and Watson 1988).

The political situation interplayed with the controversy over the nominee himself. Unlike Fortas, Carswell, or Haynsworth, Bork was an academician with nearly impeccable ethical and intellectual credentials that normally would have provoked little excitement. Instead, the hearings were stirred by emotions about legal concepts. Robert Bork was noted for his intellectual passion, as represented in a career of provocative conservative writings. Opponents portrayed Bork's ideology as an ardent, almost reactionary, conservatism.

Civil rights groups found Bork insensitive to the rights of racial minorities, and women's groups feared that Bork's confirmation would result in undoing past gains for women's rights (Stookey and Watson 1988). For those reasons, the Bork nomination produced an unprecedented level of interest group activity. Numerous liberal groups held press conferences, sent mailings, organized rallies, and took out newspaper advertisements in a successful effort to defeat the nomination. Simultaneously, many conservative organizations engaged in similar activities, sponsoring television ads, starting letter-writing campaigns, and urging telephone calls in an attempt to win on the Senate floor.

In the end, Bork and the Reagan administration were unable to persuade moderate southern Democrats, who saw him as an extremist with opinions that were out of step with the times. Thus, unlike the defeats of Haynsworth and Carswell, the vote rejecting Bork was largely along party lines.

After a brief misstep (the abortive choice of Douglas Ginsburg), the White House nominated another conservative, Anthony Kennedy, who had strong backing among Republican senators, and he was quickly approved amid minimal controversy.

The defeat of Robert Bork for a seat on the Supreme Court continues to divide scholars and commentators. Social activists on both the left and the right portray the fight over Bork as the defining moment in the ongoing controversy over the political and ideological balance of power on the federal bench. The conservative version is set forth in *Ninth Justice: The Fight for Bork* (McGuigan and Weyrich 1990) and *The Judges War* (McGuigan and O'Connell 1987), written by major lobbyists for Bork. Conservatives see the origins of the judges' war in the presidency of Jimmy Carter, whom they accuse of using political litmus tests in selecting nominees. Thus, opposing President Reagan's well-qualified nominees on philosophical grounds unfairly changed the rules of the game and served as yet another example of how the U.S. establishment is out to sabotage their conservative revolution. A strikingly different version of the Bork defeat is set forth in *People Rising* (Pertschuk and Schaetzel 1989), written by leaders of the anti-Bork coalition. They detail how difficult it was to mobilize opposition to Bork, stressing internal debates and disagreements among a wide array of groups that expressed misgivings over Bork's philosophy. The authors stress that they learned how to mount a campaign against a justice from the successful efforts of conservatives in California to unseat Chief Justice Rose Bird of the California Supreme Court.

Debate over whether Bork received fair treatment continues. The two sides disagree over past practices of the Senate Judiciary Committee and proper standards for the opposition party to defeat a presidential nominee. In *The Selling of Supreme Court Nominees*, John Maltese (1995) argues that politics has always been at the heart of the Supreme Court selection process. According to his theory, the first "Borking" of a presidential appointee

(*continued*)

came in 1795 with the defeat of John Rutledge's nomination as chief justice. What is different about today's appointment process, he argues, is not its politicization but the range of players involved and the political techniques they use.

Defeat elevated Robert Bork to national prominence. His views, once expressed only in law reviews, gained a national audience with the publication in 1989 of his book *The Tempting of America*, which set forth his conservative views of law.

Senate confirmation votes reflect many of the same political considerations that influence presidents in their initial selection. Policy preferences of presidents and senators are of primary importance. When a strong president nominates a highly qualified, ideologically moderate candidate, the nominee passes the Senate in a lopsided, consensual vote. Because presidents have often chosen to nominate that type of candidate, consensual Senate votes have been fairly common. When presidents nominate a less well qualified, ideologically extreme candidate (especially when the president is in a weak political position), then a conflictual vote is likely. Appointments that are ideologically distant from the president also take more time to confirm (Shipan and Shannon 2003). Surprisingly, presidents have nominated quite a few candidates of that description through the years, and, therefore, conflictual votes occur periodically (Cameron, Cover, and Segal 1990; Segal, Cameron, and Cover 1992).

The bruising battle over Bork left political scars that have been slow to heal. Subsequent presidents appeared to avoid controversial nominations. Perhaps typical is the quick confirmation of David Souter. When Justice William Brennan, 84, resigned from the Supreme Court citing "advancing age and medical condition," President George H. W. Bush hoped to place a conservative on the Court without a bloody confirmation fight. Acting quickly, the president nominated David Souter, 50, a lifelong bachelor and Rhodes scholar. The selection was viewed as a surprise because, despite more than twenty years in public life, Souter's judicial philosophy was largely a blank slate. Liberals were fearful and conservatives apprehensive. In particular, pro-choice groups feared that he might be the fifth vote needed to overturn *Roe v. Wade* (1973). Conservatives, on the other hand, were concerned that Souter might not be conservative enough and, therefore, might *not* provide the needed fifth vote to anchor a conservative Court. During three days of nationally televised confirmation hearings, Souter discussed his general judicial philosophy but refused to state his views on specific cases and issues. During the confirmation hearings, Souter appeared neither highly political nor threatening. By an overwhelming margin (90–9), the U.S. Senate confirmed David Souter to be the 105th justice of the Supreme Court.

President Clinton likewise avoided controversy, choosing to tap those who would not be controversial over those who were likely to provoke a fight with conservative Senate Republicans. Stephen Breyer, for example, was noted for being a moderate pragmatist and a legal technician during his thirteen years on the federal appellate bench (O'Brien 2003).

Nominations can be particularly contentious if the nominee holds ideological views different from those held by the retiring justice. The nomination of John Roberts is a case in point. Originally, he was nominated to fill the seat being vacated by Sandra Day O'Connor—widely regarded as the most centrist justice on the Court. His

selection became much less contentious when it was shifted to replace the recently deceased William Rehnquist. Now one conservative was replacing another conservative, which did not affect the balance of power on the Court. The nomination of Samuel Alito involved a deeper political struggle because he was viewed as much more conservative than O'Connor and, therefore, more likely to shift the Court in a more conservative direction.

The Decision-Making Process

Whenever a new justice is appointed to the Supreme Court, observers speculate about the impact the newcomer may have on the Court. At the same time, analysts recognize that new justices, like anyone assuming a new position, must undergo an adjustment period before becoming completely assimilated into the Court. This adjustment period has been called the "freshman effect." A majority of the justices undergo a period of transition, but some experience this effect more than others (Hagle 1993; Hurwitz and Stefko 2004; compare Bowen and Scheb 1993). During his first term on the Court, for example, Justice Souter wrote few opinions, wrote none of the Court's important decisions, and merely supplied an additional vote for the Court's already-solid conservative majority (Johnson and Smith 1992). By contrast, Justice Anthony Kennedy appeared to settle into his new job within a short period (Melone 1990).

One aspect of the freshman effect is adapting to the ebb and flow of the Court's docket. As Justice Brennan once noted, "Such factors as workload, unfamiliarity with . . . procedures and the unique nature of constitutional decision-making tend to create difficulties for any neophyte justice" (quoted in Heck 1979, 710). The rules and procedures by which the Court conducts its business are easily mastered. What takes longer is assimilating the informal norms that give life and substance to the formal structure. Newly appointed justices find that the Court operates much like nine separate law firms, each with its own support staff. In essence, the justices lead separate, even isolated lives; they deal with one another only in quite formalized settings and then retreat to their own chambers.

Briefing

After the Court accepts a case for review, the lawyers for both parties prepare written **briefs** setting forth the arguments and precedents for their side of the case. Each side also has the opportunity to file reply briefs. Interest groups and the government often file amicus curiae briefs as well, each offering a position on how the controversy should be settled. In the briefs, the lawyers muster evidence to support their interpretations of constitutional provisions and statutory language, particularly discussing relevant Supreme Court decisions. Although Supreme Court rules limit briefs to a maximum of fifty pages (and thirty pages for amici), the justices and their law clerks are nonetheless inundated with reading material. Examples of highly regarded Supreme Court briefs can be found in a series called *Landmark Cases and Briefs*, available in many libraries and more recently on the Web at sites such as http://www.findlaw.com.