That Lyndon Johnson induced Justice Arthur Goldberg to retire in 1965 may have surprised many. That he named Abe Fortas to replace Goldberg could not have surprised anyone. Back in 1948, when Johnson was running for the Senate, he called upon Fortas’s legal acumen to secure “Landslide Lyndon’s” eighty-seven-vote victory in the face of clear evidence of voter fraud by the Johnson campaign. The two became and remained close friends. But Fortas was more than that. He was a brilliant attorney, perhaps the “best lawyer in America.” Moreover, Fortas was a New Deal liberal who shared Johnson’s views on race, poverty, and governmental actions to remedy them. Fortas was Johnson’s most trusted advisor, and the president was fully intent on placing him on the Court.

LBJ was hardly the first president to use the power of appointment to name a friend to the federal bench. George Washington too conferred judicial positions on personal associates, and 150 years later Harry Truman famously nominated four close pals to the Supreme Court: Harold Burton, Fred Vinson, Tom Clark, and Sherman Minton. Overall, about three-fifths of those seated on the Supreme Court personally knew the president who put them there.

Undoubtedly, however, presidents have other objectives—mainly political objectives—in mind when they make judicial nominations. In some
instances, they use their appointments to shore up electoral support for their party or themselves—what we might call electoral or partisan goals. When Ronald Reagan nominated Sandra Day O'Connor to the Supreme Court in 1981, he was not appointing a crony; he had met her only once, and that was six days before he nominated her. Rather, Reagan was seeking to fulfill a campaign promise to appoint a woman to the Court—a promise he no doubt felt would further his and his party’s chances of attracting female voters. In other instances, policy or ideological goals move to the fore. Abe Fortas may have been a longtime friend of the president, but he also was an ideological soul mate—a liberal who LBJ thought would help advance the administration’s policy goals once on the Court.

That virtually all presidents have sought to advance personal or, more likely, political goals when choosing judges and justices does not mean that they are entirely unfettered. While, to be sure, the framers of the Constitution expected the new nation’s chief executive to play a crucial role in naming federal judges—they did, after all, list the power of appointment in Article II, that is, among the president’s powers—those same framers gave the Senate an equally crucial role: the power to consent to the president’s choices. Because it is the Senate, not the president, that has the final say on nominees, that body can impose an effective restraint on the president’s choices even if it does not completely control the selection of those candidates.

Since presidents desire to see the successful appointment of their nominees, the need for Senate confirmation is hardly a constraint they can afford to ignore—and most have not. In making their selections, presidents have taken into account not only their own personal and political goals but those of senators as well. Because the professional qualifications of the nominee are of nearly threshold importance for the senators whose favorable votes they are trying to court, and perhaps for themselves as well, presidents have generally attempted (though not always successfully) to select people of competence and integrity. A candidate’s ideology and partisanship too are crucial to senators. If they and the candidate are ideologically incompatible, then the odds of nay votes skyrocket. As a result, the political leanings of the Senate must also become a part of the president’s calculus, perhaps compelling him to nominate a second- or third-choice candidate, or one even further down on his list of possibilities. When presidents ignore the Senate altogether the likelihood of rejection increases, meaning that they might find themselves in the uncomfortable position of having to make two or even three nominations for the same seat. Such was the fate of Johnson’s successor, Richard Nixon, who put forth the names of two nominees before he found one, in Harry Blackmun, who would pass muster with the Senate. As for Johnson himself—the “Master of the Senate,” as some call him—a compromise was not necessary: the Senate of 1965 confirmed his dear friend Fortas by a voice vote. The 1965 nomination may be one example where the president’s choice would have been exactly the same even if the Constitution provided him with unilateral appointment power.

Judges and Presidents

Without a doubt, presidents have strong incentives to concern themselves with appointments to the federal bench. For some, the nomination of particular kinds of judges can work to fulfill campaign promises. In 1860, when running for president, Abraham Lincoln implied that he would appoint judges opposed to slavery. During his bid for the presidency in 1980, Reagan pledged to nominate the first woman justice. In an effort to bring the then-solid Democratic South into the Republican fold, Richard Nixon committed to appointing strict constructionists who would (in contrast to the liberal Warren Court) interpret the law, not make it. Nearly four decades later, during the 2004 presidential debates, George W. Bush repeated the Nixon mantra:

The voters will know I’ll put competent judges on the bench, people who will strictly interpret the Constitution and will not use the bench to write social policy. And that’s going to be a big difference between my opponent and me. I believe that . . . the judges ought not to take the place of the legislative branch of government, that they’re appointed for life and that they ought to look at the Constitution as sacred. They shouldn’t misuse their bench.

Appointment is the only mechanism at a president’s disposal that can alter the composition of the federal bench. While the chief executive alone cannot add judges or remove recalcitrant ones, as he may well do with wayward members of the cabinet, he can work to ensure that his nominees share his (and, presumably, the electorate’s) political values. It is this link that explains why a number of legal commentators were disturbed by the
Advice and Consent

Supreme Court’s decisive vote in the election of 2000. As the Yale law scholar Bruce Ackerman famously put it:

In our democracy, there is one basic check on a runaway court: presidential elections. And a majority of the justices [in Bush v. Gore] conspired to eliminate this check. The Supreme Court cannot be permitted to arrange for its own succession. ... When sitting justices retire or die, the Senate should refuse to confirm any nomination offered by President Bush. ... The right-wing bloc on the Court should not be permitted to extend its control for a decade or more simply because it has put George W. Bush into the White House.6

While the opportunity for the Senate to reject Ackerman’s proposal, as it inevitably will, has only recently arisen, that body has hardly been hesitant to confirm George W. Bush’s lower court nominees. In Bush’s first four years the president made thirty-six appointments to federal appellate courts, meaning that as of May 2005 slightly more than one out of every five sitting circuit court judges were his nominees.7 Bush’s appointees already constitute a majority (six of eleven judges) on the Eighth Circuit, which covers the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

These figures demonstrate just how quickly a president can change the composition of the bench, and, assuming he selects carefully, the extent to which he can reap the benefits of such appointments during his tenure. In light of the thousands and thousands of cases to which the federal government is a party or is otherwise interested each year, these benefits, mostly in the form of a packed judiciary likely to support his policies, are no small matter to the president.

Without doubt, then, presidents have strong incentives to pay heed to the men and women they appoint to the nation’s bench. At the same time, it is true that most administrations have been more attentive to some judicial appointments than others. Even though he was a lawyer, Bill Clinton was, with some notable exceptions here and there, relatively disinterested in appointments to the lower courts. When it came to the two vacancies he filled on the Supreme Court, though, Clinton participated in almost every stage in the process, from attending initial meetings with his staff to generating lists of names and interviewing the candidates he eventually selected, Ruth Bader Ginsburg (1993— ) and Stephen Breyer (1994— ).8

That Clinton was personally involved in the selection of Ginsburg and Breyer is not altogether surprising. Nearly without exception, presidents dedicate more time to appointments to higher courts than to the district courts. Several reasons exist for this, not the least of which is sheer numbers. Over the course of one four-year term, a president may make well over a hundred nominations to the district courts. Devoting careful and sustained attention to each and every one would be virtually impossible in light of his other responsibilities. On the other hand, opportunities to make an appointment to the Supreme Court are fairly rare events in contemporary times. During his eight years in office, Bill Clinton made only two. With Justice O’Connor’s retirement, George W. Bush, now into his second term, has only just acquired the opportunity to make one, and he will undoubtedly give careful consideration to the ultimate choice, just as did most of his predecessors.9

The relative number of nominations is not the only factor affecting whether the president personally will devote time to selecting judges. The comparative influence of the courts themselves also is crucial. Because the geographic jurisdictions of the lower courts are limited—to a state or just part of it, in the case of the district courts, or to several states, in the case of circuit courts—their rulings hold only for that geographic area. So if, say, a district court strikes down a federal law, that decision is valid in that district only. In contrast, if the Supreme Court, with its national jurisdiction, renders a law unconstitutional, its ruling binds all other courts and the other two branches of government as well. From the president’s point of view, then, the limited influence of district courts and to a lesser extent the circuits will lead him to delegate some of his appointment power to advisors. Moreover, since appellate courts can reverse the decisions of district courts, and the Supreme Court can reverse the appellate courts, the higher the court, the more influential it is as a legal policy maker. Thus, the higher the court, the more consequential it is to the president. Then there is the matter of the Senate’s role in the process. As we discussed in Chapter 1, the higher the court, the more discretion the president has to make nominations that reflect his preferences. The lower the court, the more influence the Senate expects, at least at the nomination stage.

Do not take this to mean, however, that the president lacks strong preferences about whom he would like to see serve on the nation’s lower courts. Quite the opposite. In a perfect, unconstrained world, his appointments at
all levels of the judicial hierarchy would reflect precisely his administration's (largely political) goals. In reality, the president may have objectives he would like to accomplish via appointments to the bench, but he is not an unconstrained actor who can make decisions based entirely on his own preferences. Rather, when it comes to making his selections, the president must be strategic. To achieve his goals he must take into account the preferences and likely actions of the body that must confirm his nominees, the Senate, as well as certain norms senators expect him to follow. If he does not, he runs the risk of seeing his candidates defeated, in which case he cannot accomplish his objectives, whatever they might be. Both parts of this claim—the president's goals and the constraints he confronts in attempting to achieve them—deserve some consideration.

Presidential Goals

In anticipation of one or more retirements from the U.S. Supreme Court, the Bush administration compiled a list of potential replacements. The possible candidates are mostly sitting judges but do include a few politicians and members of the executive branch (see Figure 3.1).

If Bush’s predecessors are any indication, a range of actors contributed to his list. Certainly some, perhaps the vast majority, came from inside the executive branch—perhaps even from the president himself. As previously noted, Bill Clinton was actively engaged in the process of generating candidates for the appointments that eventually went to Ginsburg and Breyer, as were Lyndon Johnson and Richard Nixon before him. We have no reason to suspect that Bush is any different; at the very least, he is surely familiar with many of the oft-mentioned candidates, including two that he appointed to positions in the executive branch: former solicitor general Theodore Olson and attorney general (formerly White House counsel) Alberto Gonzales.

Beyond the president and his advisors, trusted senators, party leaders, and organized interests recommended at least some of the names under consideration. Interest groups, in particular, have figured prominently into Bush’s appointments to the lower courts. No group has been more involved than the Federalist Society, an organization devoted to counterbalancing what it decries as the “orthodox liberal” ideology that “dominates” the legal community. Of the George W. Bush administration’s first seventy

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### Figure 3.1

<table>
<thead>
<tr>
<th>Name</th>
<th>Current Position</th>
<th>Partisanship</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alito, Samuel A.</td>
<td>U.S. Court of Appeals (3rd)</td>
<td>Republican; appointed by G. H. W. Bush</td>
<td>White male; worked in the Reagan Justice Department; nicknamed “Scalio” or “Scalia-lite”</td>
</tr>
<tr>
<td>BeVier, Lillian Riemer</td>
<td>Law professor (U. Virginia)</td>
<td>Declines to give party affiliation but says she is more “conservative than liberal”; contributor to Republican campaigns</td>
<td>White female; nominated to the Board of the Legal Services Corporation by G. W. Bush; serves on national board of the Federalist Society</td>
</tr>
<tr>
<td>Brown, Janice</td>
<td>U.S. Court of Appeals (D.C.)</td>
<td>Republican; appointed by G. W. Bush</td>
<td>Would be first black female justice; appellate court nomination blocked for two years by Democrats; worked on California governor Pete Wilson’s campaign</td>
</tr>
<tr>
<td>Clement, Edith Brown</td>
<td>U.S. Court of Appeals (5th)</td>
<td>Republican; appointed by G. W. Bush</td>
<td>White female; former District Court judge (G. H. W. Bush appointed); was a maritime attorney prior to ascending to the federal bench</td>
</tr>
<tr>
<td>Easterbrook, Frank</td>
<td>U.S. Court of Appeals Judge (7th)</td>
<td>Republican; appointed by Reagan</td>
<td>White male; former law professor; a leading disciple of the law and economics movement</td>
</tr>
<tr>
<td>Estrada, Miguel</td>
<td>Lawyer</td>
<td>Presumed Republican (contributor to Republican campaigns, including Bush’s)</td>
<td>Male; would be first Hispanic justice; clerked for Anthony Kennedy; contributor to Bush campaign; nominated by G. W. Bush to the D.C. circuit but not confirmed</td>
</tr>
<tr>
<td>Garza, Emilio M.</td>
<td>U.S. Court of Appeals (5th)</td>
<td>Republican; appointed by G. H. W. Bush</td>
<td>Male; would be first Hispanic justice; Texan</td>
</tr>
<tr>
<td>Gonzales, Alberto</td>
<td>U.S. attorney general</td>
<td>Republican; appointed by G. W. Bush</td>
<td>Male; would be first Hispanic justice; served as general counsel to Governor G. W. Bush and White House counsel to President G. W. Bush</td>
</tr>
</tbody>
</table>

(continues)
Other possible names that have surfaced since Sandra Day O'Connor announced her retirement from the Court include: Danny Boggs, Jose Cabranes, Raoul Cantero III, Ricardo Hinojosa, Edward Prado, and Sonia Sotomayor. All but Cantero are federal judges. Cantero is a justice on the Florida Supreme Court.

nominees, twenty were “recommended directly” by this organization. Even more to the point, several of the candidates have ties to the society, including Michael McConnell, who served as an advisor to the group; a current justice, Antonin Scalia, speaks at some of its functions; and Edith Clement has sat on its advisory council.10

Perhaps the Bush administration has even consulted (or been lobbied by) sitting justices or judges, which would certainly not be without precedent. In the 1850s, the entire Supreme Court asked President Franklin Pierce to appoint John Campbell to the bench. Over a century later, as John Dean (of Watergate fame) tells it, Chief Justice Warren Burger “constantly supplied [the administration] with names” for “his” court. When Richard Nixon was attempting to fill two vacancies in 1971, Burger suggested Herschel Friday, an Arkansas attorney who had a connection to Justice Harry Blackmun, a childhood friend of Burger’s. At the same time, Burger lobbied against the appointment of a woman—so much so that Nixon’s attorney general, John Mitchell, dreaded telling Burger that Mildred Lillie, a California state judge, was on the president’s list.11

Though Nixon did not appoint Lillie, neither did he nominate Burger’s candidate, Friday. In fact, according to Dean, only the president himself and Mitchell knew that William H. Rehnquist would get the nod. All other advisors were kept out of the loop until the last possible moment.

But why Rehnquist and not Friday, Lillie, or any of the other dozen or more prospective nominees Nixon considered? More generally, why do
certain names and not others make initial lists, why will some candidates advance in the process to an even shorter list, and why will one ultimately rise above the pack? We could ask the same questions about nominations to the lower courts as well, for even though the president must pay more heed to names submitted by U.S. senators, he and his advisors typically must still make a selection from among an array of choices. What criteria do they use?

The answer to this question lies at least in part with the administration’s goals. Undoubtedly, as we hinted above, judicial appointments can work to accomplish many aims, but almost all fall under the rubric of politics. In some instances, politics has centered largely on partisan aims, with the idea being that the president attempts to exploit judicial appointments to advance his or his party’s interests; in other cases, politics has been primarily about policy, or the notion that the president seeks to nominate judges and justices who share his political or ideological preferences. Each merits discussion, though, frankly, they are often difficult to separate.

**Partisan and Electoral Goals**

In some sense it seems odd to think that judicial appointments could help advance the president’s and his party’s ambitions, electoral or otherwise. After all, most Americans lack even a passing familiarity with courts and judges; they cannot, for example, identify the office Chief Justice William H. Rehnquist holds, much less name any of the other justices. Even more to the point, when asked before the 2004 presidential election, “What issue or problem ... is most important for the next president to address?” fewer than 0.5 percent said, “The Supreme Court.” Of the lower courts, the North Carolina senator Jesse Helms said it best: “You go out on the street of Raleigh, N.C., and ask 100 people, ‘Do you give a damn who is on the Fourth Circuit Court of Appeals?’ They’ll say, ‘What’s that?’”

On the other hand, when judges or their decisions attract media attention Americans not only are aware of the controversy but also may have strong opinions that they occasionally express in their ballots. The storm over George H. W. Bush’s nomination of Clarence Thomas in 1991 provides a case in point. After initial public opinion polls indicated that blacks overwhelmingly believed Thomas when he said he had not sexually harassed Anita Hill, several senators from states with large minority populations voted to confirm Thomas. But some paid a price. Wyche Fowler (D-Ga.), for one, was defeated at least in part because pro-choice white women were unhappy with his support for the anti- Roe Thomas, and Arlen Specter (R.-Penn.) nearly lost his reelection bid, receiving only 49.1 percent of the two-party vote in 1992, compared with 56.4 percent in his previous election, in 1986. Across the United States, voters who disapproved of Thomas were 14 percent more likely to vote for the challenger than the incumbent. On the other hand, voters who disapproved of Thomas were 18.6 percent more likely to vote for their senator if she or he failed to back Thomas.

Clearly, it is not in the president’s or, more precisely, his party’s interest to see his senators lose support or even go down in defeat over judicial nominees. Even so, the Thomas appointment is hardly a prototypical example of how partisan considerations can come to the fore in the selection of federal judges. (Actually, that appointment was probably something of an anomaly. Owing primarily to charges of sexual harassment, it was a highly visible confirmation battle for a seat on the nation’s most visible tribunal, the U.S. Supreme Court.) More typically, the link between judicial nominations and the president’s achievement of partisan goals is less direct and can play out in a multitude of ways. In making his appointments to the lower courts, Franklin D. Roosevelt often contemplated how they might help shore up approval for his policies among Democrats within the Senate. So, for example, knowing that he would need the support of the Senate’s Foreign Relations Committee as World War II approached, FDR nominated a candidate suggested by the committee’s chair over one proposed by the other senator from the state where the vacancy arose. Roosevelt apparently felt he had to accommodate the chair to ensure approval of his war policies. The Eisenhower and Kennedy administrations used their appointment power somewhat differently. They tried to strengthen their respective parties, with both Ike and JFK occasionally supporting candidates proposed by competitors within their party.

Other presidents have placed a great deal of weight on geography at least in part to advance their or their party’s electoral objectives. Richard Nixon was nearly obsessed with making appointments that would help his 1972 reelection bid, and in particular, as we noted earlier, with enhancing the Republican party’s appeal to southerners by appointing a justice from that region. And Nixon was surely not the first.
Prior to 1891, geographical concerns were particularly paramount because the justices “rode circuit.” The Judiciary Act of 1789 divided the nation into six circuits, then corresponding to the number of seats on the Supreme Court. As the number of circuits increased, so did the number of justices. Each justice served in a dual capacity: as a circuit court judge and as a member of the Supreme Court. The assumption from the beginning was that the justice would reside within the circuit he served, thereby initiating a tradition of regional representation. As George Washington wrote in 1799, when it appeared that a vacancy would arise on the Court, “It would be inexpedient to take two of the Associate Judges from the same state. The practice has been to disseminate them through the United States.”15 While presidents no longer feel as constrained as Washington (both Justice O’Connor and Chief Justice Rehnquist have strong ties to Arizona, as do Justices Scalia and Ginsburg to New York), it has been historically true that in any given year the Court has represented a healthy percentage of the population (between 42.5 and 78.2 percent, depending on the calculation)—hardly a surprise if presidents view these seats as political tools.

We might say the same of religion—as when Dwight Eisenhower appointed the Catholic William J. Brennan Jr. to the Court, a result, at least in part, of direct lobbying by Cardinal Spellman. The first Catholic named to the Court was Roger Taney, who was nominated in 1835, defeated when the Senate postponed its vote indefinitely, renominated less than a year later, and finally confirmed in 1836. A second Catholic, Edward White, was not named until 1894. Since then, for all but eight years, at least one Catholic has sat on the Court. A so-called Jewish seat existed from 1916, when Louis Brandeis was confirmed, until 1969, when Abe Fortas resigned. Douglas Ginsburg, who is Jewish, was nominated by Reagan in 1987 but withdrew following allegations that he smoked marijuana with students while on the faculty of Harvard Law School. Both of President Clinton’s nominees, Ruth Bader Ginsburg and Stephen Breyer, are Jewish.

That two Jewish and three Catholic (Kennedy, Scalia, and Thomas) justices now sit on the Court is telling. These days, religion (and region) has taken a back seat to race, sex, and ethnicity as vehicles for furthering partisan goals. Though presidents serving in the 1950s and 1960s contemplated some of these factors, it was Jimmy Carter who emphasized them. When Carter took office, only eight women had ever served on a federal court. Owing almost exclusively to the 144 new judgeships created by the Democratic legislature during his tenure, Carter was able to appoint 40 women to the nation’s trial (29) and appellate (11) courts. He also appointed 37 black judges—nearly double the number of all his predecessors combined. To some, Carter’s commitment to diversifying the federal bench reflected a genuine concern on his part about human rights. That may be true, but surely appointing women and blacks did little to damage his standing with crucial Democratic constituencies.16

Either way, Carter’s emphasis on diversity continues today. Bill Clinton faced pressure from civil rights groups to appoint black judges, and as we shall see, his administration went to great lengths to accommodate those groups. Now in 2005, George W. Bush must be tempted to appoint Hispanics to the bench, but especially to the Supreme Court, on which no Hispanic has ever served (unless we count, as do some, Benjamin Cardozo, a Jewish justice of Spanish descent). Undoubtedly, this is a group of voters to which his party wants to appeal, in much the same way that Nixon sought out southerners and Carter courted blacks and women. What is more, if social science research demonstrating the importance of symbolic appeals, such as Bush’s Spanish-speaking ability, to many constituencies, including Hispanics, is any indication, appointments to the bench may well have the desired effect.17

Bush has hardly missed the point. Of his 202 appointments through 2004 to the lower federal courts, 10.4 percent have gone to Hispanics, a percentage higher than any of his predecessors.18 In addition, the names of several Hispanics appear on his list of possible Supreme Court nominees, most notably his current attorney general, Alberto Gonzales.

Appointing Hispanics to the bench may result in future payoffs to the Republican party, or so the current President Bush and his advisors may hope. In other cases, presidents have used the power of appointment to pay off prior political debts. In 1952 Earl Warren, then the governor of California, saw that his chances for obtaining the Republican presidential nomination were faltering, and so he threw his and his state’s support to General Eisenhower rather than Eisenhower’s rival, Senator Robert Taft of Ohio. One year later, Eisenhower nominated Governor Warren to replace Chief Justice Fred Vinson. Similarly, John F. Kennedy’s friend Byron White, best known as an all-American football player, received a seat on the Supreme Court in 1962, two years after organizing Citizens for Kennedy-Johnson.
Ideological Goals

Attempting to advance electoral or partisan goals through appointments is fairly common, but it is not the only political force at work; candidates’ ideology or policy values may be just as important, if not more so. Some observers assume that this is a relatively new presidential consideration, dating back only to the Reagan administration in the 1980s. This is emphatically not the case. While Reagan’s advisors did care a great deal about packing the federal bench with judges and justices who shared their commitment to a particular (conservative) ideology, so too did many of their predecessors. Thomas Jefferson hoped to rid the judiciary of judges attached to a Federalist philosophy—in other words, virtually every jurist appointed by his predecessors, George Washington and John Adams. Richard Nixon may have talked about appointing strict constructionists to the bench, but according to an internal memo written by none other than William Rehnquist (then an assistant attorney general), this is what the Nixon administration meant:

A judge who is a “strict constructionist” in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs—the latter two groups having been the principal beneficiaries of the Supreme Court’s “broad constructionist” reading of the Constitution.19

The current President Bush is even more transparent, publicly equating ideology with particular approaches to constitutional interpretation: “I don’t believe in liberal, activist judges,” the president has said. “I believe in strict constructionists. And those are the kind of judges I will appoint.”20

The manifestations of this emphasis on ideology are easy enough to spot. As we explained back in Chapter 1, throughout history it is the rare appointment that falls outside the president’s own political party (a rough indicator of ideology), and when cross-party appointments do occur, they may well go to an ideological compatriot, such as when Nixon appointed the conservative Democrat Lewis Powell. The current President Bush is no exception. Of his 202 appointments to the district and appellate courts (through 2004), 85.6 percent have gone to Republicans, and all of those proposed as possible contenders for a seat on the Supreme Court have a noticeable connection to the Republican party.21

By the same token, the majority of appointments to the federal courts have engaged in what Professor Sheldon Goldman calls “past party activism”—in other words, activities designed to advance their party’s interest, such as campaigning, organizing, or fund-raising.22 Goldman’s data run back to the Roosevelt years, but equally high—or even higher—levels may have existed in earlier years as well. Ulysses S. Grant (1869–1877) may himself have been “bored” by politics, but his advisors made clear to the president that he “needed to pack the [Supreme] Court with Republican loyalists.” As a result, Grant “resolved at the outset that a safe Republican record would be a basic requirement for nomination, to which he added geographic suitability.” “Other qualifications,” Henry Abraham reports, “appeared not to matter.”23

That a high fraction of judicial seats go to activists is not altogether surprising. Service to prominent party members may be precisely why the candidate came to the administration’s attention. Service also may reveal something about the candidate’s ideological commitments. Either way, the practice of rewarding loyal partisans continues today: about two out of every three Bush appointments to the circuits have been involved in party politics, as have many of those on his list of possible Supreme Court nominees (see Figure 3.1).24 Some have even contributed to Bush’s campaigns or worked on his behalf, including Michael McConnell and John G. Roberts—two names that appear on virtually all inventories of leading contenders for a spot on the high court.

Of course, we can name plenty of active Republicans who would likely not appear on any list compiled by the Bush administration. Senators Lincoln Chafee (Rhode Island), Susan Collins (Maine), Olympia Snowe (Maine), and Arlen Specter (Pennsylvania) are all Republicans, but they are all relatively liberal, what some call RINOs (Republicans in name only)—in much the same way that Lewis Powell was a conservative Democrat, a DINO of sorts.

Partisanship, it turns out, does not always neatly translate into ideological compatibility, and so presidents and their advisors must resort to other methods to ensure that candidates will meet their policy objectives. The “litmus tests” employed during the Reagan years are legendary. The president and his advisors repeatedly rejected candidates, even if they were supported by Republican senators or governors, who did not hold the administration’s conservative values. Conservative appeals court judge
Anthony Kennedy, appointed to the Supreme Court in 1988, did not originally pass muster, as a close reading of his record by the Justice Department revealed a "distressing" acceptance of privacy rights. Only after the failure of two more-conservative candidates, Robert Bork and Douglas Ginsburg, did Reagan appoint Kennedy to the Supreme Court.25

But ideological screening predates that administration and, of course, has hardly been limited to conservatives. Skirmishes with anti-New Deal judges and justices prompted FDR to seek out nominees who shared his policy visions. Knowing that, those proposing names for FDR's consideration were unhesitant to stress their candidate's commitment to "liberalism" and "progressive" causes. "Active opponents of the New Deal," Sheldon Goldman writes, "were not seriously considered." And if a doubt existed, the Roosevelt administration scrutinized a candidate's background, in much the same way as successor administrations now do. In the case of a New Hampshire Supreme Court justice who was under consideration for a position on the First Circuit, lawyers in FDR's Justice Department read thirty-one of the justice's economic and labor decisions. When the lawyers found that the justice had ruled for the employer against an employee in more than half, a question arose as to whether the justice was a "true liberal." Upon further investigation, not to mention an endorsement by the State Federation of Labor, the administration decided that the candidate was "fit" and nominated him.26 Clearly, the goal here was precisely the same as it was during the Reagan years. FDR wanted to avoid "mistakes"—judges and justices who do not share the president's political vision.

Given the screening process, we would not expect many mistakes of this sort, and in fact they are rare, as we report in Chapter 5. But they do occur. Kennedy's support for abortion and gay rights, not to mention his use of foreign law in his opinions, has led Republican majority leader Tom DeLay to label Kennedy's behavior "outrageous." The prime contemporary example of a "mistake," though, is surely David H. Souter. Prior to his 1990 appointment to the Supreme Court, several of President George H. W. Bush's advisors vouched for Souter's allegiance to conservative values. But Souter's behavior on the Court has belied that promise. Souter consistently votes with members of the Court's left wing, including John Paul Stevens (1975--) and Clinton's two appointees, Ginsburg and Breyer.

As a result, "no more Souters" (and, more recently, "no more Kennedys") is now a popular refrain among many conservatives, including members of the current Bush administration.27 And it is one that the president and his advisors have attempted to translate into action, also via extensive screening. So, for example, like his predecessors, Bush has sought to gain insight into judicial candidates by analyzing their written record. This may explain why over half of his (and his immediate predecessors') appointments have gone to individuals who had served or were serving as judges, an occupation that requires its members to write.

Of course, judicial opinions may reveal little about a candidate's ideology: the New Hampshire justice FDR considered for the First Circuit was apparently more employee-oriented than his judicial opinions let on. But in other instances the written record can be highly illuminating. Such was the case with Robert H. Bork. Undoubtedly the Reagan administration viewed Bork as the ideal justice, at least in part because as a law professor and later as a circuit court judge, he had taken conservative stances on virtually all the major social issues of the day.28 Michael Luttig, whom George W. Bush may very well nominate to the Supreme Court, supplies another example. As a federal appellate court judge, Luttig has supported the death penalty, allowed states to require parental notification before a minor can obtain an abortion, struck down the Violence Against Women Act, and upheld a ban on partial-birth abortions. Surely in the case of Luttig (not to mention Bork) the president need not engage in idle speculation about how he would behave as a justice. It would be odd if Luttig allied himself with the Court's liberal wing. (Then again, when the Nixon appointee Harry Blackmun joined the Court in 1970, he was a regular member of its conservative camp; by the time he retired in 1994, he was an out-and-out liberal. So extreme swings are possible, if rare.)

Gaining insight into candidates' political values by scrutinizing their writings is effective, of course, only when a contemporaneous and relatively large record exists. That does not always hold, not even for sitting federal judges. A search of texts produced by John G. Roberts, another oft-mentioned contender for a seat on the Supreme Court, turns up a couple of "notes" he wrote in 1978, as a student at Harvard Law School, and several rather unilluminating pieces he penned in the 1990s, mainly for newspapers. By the same token, since ascending to the federal bench in 2003 Roberts has authored only about forty opinions. None seems particularly revealing of his views on controversial social issues of the day.
What the Roberts case suggests is that analyses of the written record do not always or even often supply presidents with the information they need to avoid "a Souter." Fully aware of this, the president's advisors subject all candidates to a vetting process, occasionally extensive. As Janice Brown, a California Supreme Court justice whom George W. Bush (unsuccessfully) sought to appoint to the federal bench in 2003 and (successfully) renominated in 2005, described it, she was interviewed by White House and Justice Department officials on three separate occasions. Brown also completed two applications for background checks, as well as questionnaires for the Justice Department and, later, the Senate.29

Certainly some of this screening involves matters other than ideology, but it would be surprising if the topic did not come up. At the very least, the pursuit for like-minded candidates finds some expression in the various surveys candidates complete, as the following question reveals.

Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem solution rather than grievance-resolution;
b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.30

Given President Bush's (not to mention House majority leader Tom DeLay's [R-Tex.] and Senate majority leader Bill Frist's [R-Tenn.] use of the term "judicial activism," it would be easy enough to add "liberal" to this list of no-nos.

These types of screening mechanisms—interviews, questionnaires, and analyses of the written record—are rather obvious manifestations of the president's interest in appointing judges and justices with the "right" values. But there are also the markers of age, race, and gender. Beginning with age, note that the majority of current candidates for the Supreme Court are under sixty; George W. Bush's appointees to the circuit courts are even younger, on average about fifty-one.31 And Bush is hardly alone. Presidents dating back to the earliest days of the Republic have valued relative youth. John Jay was only forty-three when George Washington nominated him to serve as the first chief justice of the United States. President John Adams's initial appointee, Bushrod Washington, was just thirty-six. One hundred and fifty years later, Eisenhower named the forty-three-year-old Potter Stewart to the Supreme Court, and in 1962, Kennedy appointed Byron White, who at forty-four was just a month younger than the president himself.

Some commentators say the emphasis on youth reflects the president's interest in creating a legacy. That begs the question of what kind of legacy, however. In many instances the answer is an ideological one. When Franklin Roosevelt appointed his securities and exchange commissioner, the forty-year-old William O. Douglas, to the Supreme Court, the president knew precisely what he was doing: attempting to establish allegiance to his economic policies for decades to come.

Race and gender too may be political markers. Was it merely electoral concerns that drove both Bill Clinton and Jimmy Carter to place emphasis on appointing blacks and women to the bench? Or did they assume that blacks and women would be liberal jurists as well? We might say the same of Bush's inclination to nominate Hispanics. While it is hard to generalize about how they might vote as judges—Americans of Cuban descent, for example, are more conservative than those hailing from South America—we do know that Hispanics, as a group, are more likely to vote for Republican candidates and sometimes take more conservative stances than other minority groups. According to exit polls conducted by CNN, only 11 percent of blacks but fully 44 percent of Hispanics voted for George Bush in 2004 (representing a 9 percent increase over 2000). Likewise, Hispanics tend to support prayer in school and oppose abortion on demand and same-sex marriages.32 How these general patterns will translate into judicial decisions remains unclear. At the very least, however, they suggest that
Advice and Consent

Constraints on the President

The current President Bush has expressed his desire to nominate very conservative individuals like Antonin Scalia and Clarence Thomas. So surely Scalia and Thomas themselves should be quite high on the administration's list of candidates to replace William H. Rehnquist as chief justice when he retires.

The fact that some men and women meet a president's goals better than others, however, does not necessarily mean that these first choices will get the nod. That is because the president is hardly an unconstrained actor; rather, when he makes nominations, he must pay heed to the Senate, and in particular the norms that senators expect him to follow. Failure to do so, as we have said, can lead to defeats for the administration in both the short and long terms.

The constraints confronting the president are several in number, though none is more important than the convention of qualifications and the norm of senatorial courtesy. The first speaks to the professional merit of the president's choices, which may affect the Senate's willingness to confirm his nominees. The second also implicates senators, specifically those from the state in which the vacancy arises.

Qualifications

Without doubt presidents have nominated unqualified, even unsavory people to serve as federal judges. We think here of the drunkard and infirm John Pickering. Then there is the case of G. Harrold Carswell, a little-known federal judge from Florida whom Richard Nixon (unsuccessfully) sought to place on the U.S. Supreme Court. Carswell's record on the bench was so deficient—he was reversed far more frequently than any other judge in his circuit—that even his supporters had a hard time justifying confirmation. About the best they could muster was the infamous defense uttered by Senator Roman Hruska (R-Neb.): "Even if [Carswell] is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they..."33 That Carswell had years earlier declared his belief in the principles of “white supremacy” hardly added to his reputation. (Nor did the fact that later, in 1976, he was arrested for soliciting sex outside a public men's room.)

That these judges should not have been nominated is not altogether controversial. But many cases are far murkier. Should deficiencies in, say, professional experience, temperament, or even "people skills" render a person unsuitable for service on the federal bench? Consider Judge Roger Benitez, a sitting federal magistrate, whom George W. Bush nominated to a federal district court in California. According to the American Bar Association, "a substantial number of the judges and lawyers" reported that Judge Benitez "displays inappropriate judicial temperament with lawyers, litigants, and judicial colleagues; that all too frequently, while on the bench, Judge Benitez is arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills." Based in part on these reports, the ABA deemed Benitez "not qualified" for a federal judgeship. Then there is the case of Alexander Williams, a Clinton nominee for a district court seat, whom the ABA also judged as unqualified, "primarily on concerns about his professional competence. This includes concerns over his lack of substantial trial experience, the quality of his legal writings, his lack of candor ... and by his misstating and overstating his experience."34

It is just these sorts of nominees, not the easier cases of Carswell and Pickering, that prompt debate over the larger question of what actually constitutes a "qualified" candidate. But a resolution is not in the offing, at least in part because the U.S. Constitution itself does not speak to the matter. Unlike many other societies, which specify qualifications for their (constitutional) court judges (see Figure 3.2), U.S. laws are silent. One need not even be a lawyer to attain appointment to the Supreme Court, though no justice has lacked at least some training in the law.

THE IMPORTANCE OF QUALIFICATIONS

Which takes us to the chief point. Despite the lack of formal criteria, most presidents have sought to appoint persons of professional merit to the bench. This is not to say that they have necessarily and uniformly viewed a lack of qualifications as a barrier to nomination. Surely they do not, and the Carswell example illustrates as much. Even Nixon administration insiders considered him a "boob" and a "dummy." And we could say much the same of President Franklin D. Roosevelt's nomination of Richard M.
Duncan, a U.S. representative from Missouri. When then-Senator Harry Truman (D-Mo.) wanted FDR to name Duncan to a federal trial court, FDR’s attorney general, Francis Biddle, opposed the nomination: “Almost all the lawyers who know Duncan,” Biddle wrote, “consider him an inexperienced and mediocre lawyer.” The president ignored his attorney general’s advice and nominated Duncan, who, with Truman’s backing, was easily confirmed.35

In this case, FDR seemed more interested in appeasing a senator than in appointing a person of merit, but for many of the president’s other nominations “judicial temperament” carried the day. More generally, qualifications are of at least some concern to presidents, and have been since the George Washington administration. While the nation’s first president may have been chiefly motivated to appoint loyal Federalists to the bench—men who shared his commitment to a strong central government—from among this group he sought out candidates with judicial experience as well. Eight of Washington’s ten appointees to the Supreme Court had served as state judges, and the remaining two had impressive legal credentials. William Paterson (1793–1806) had coauthored the Judiciary Act of 1789, the cornerstone of the federal legal system, and James Wilson (1789–1798) was “one of the country’s most acclaimed legal scholars.”36

Why do presidents seek out meritorious candidates, especially since the Constitution does not require them to do so? They themselves may well prefer highly qualified candidates, but another answer revolves around the Senate. As we have noted throughout, the president cannot achieve any of his goals—whether focused on advancing his partisan or policy interests—unless the Senate confirms his candidates. And senators are more likely to support the candidates they perceive as qualified for office. Again, this was true during the nation’s earliest days and it remains so even today, an era in which many commentators claim that professional merit is immaterial to the Senate’s deliberations and that only the candidate’s ideology (relative to senators’) matters.

As we shall see in the next chapter, there is some truth to this claim. But even we, who argue that the appointments process is replete with ideological and partisan considerations from beginning to end—from the creation of a vacancy on the federal bench and the president’s choice of a nominee to fill it to the Senate’s decision over whether to consent to the nomination—cannot belie the role of professional merit in the confirmation process. The evidence, as we lay it out in Chapter 4, is just too overwhelming.

It is thus no wonder presidents seem to take seriously a candidate’s qualifications for office. Qualifications figure prominently into the Senate’s calculations. But the need for approval from the Senate may not be the only reason. If the president is concerned with leaving a lasting legacy to the nation in the form of jurists who will continue to exert influence on the law well after he leaves office, then professional merit too may come into play. To be sure, some twentieth-century appointees who were thought to lack the requisite qualifications went on to be great judges; Hugo L. Black (1937–1971), a senator at the time of his appointment, provides an example. But Black may be the exception. As it turns out, many judges universally acclaimed as great by contemporary legal scholars were also universally perceived as exceedingly well qualified at the time of their
nomination. We think here of the Supreme Court justices Oliver Wendell Holmes (1902–1932), Benjamin Cardozo (1932–1938), William J. Brennan, and more recently Antonin Scalia (1986– ), and the circuit court judges Richard Posner (1981– ) and Frank Easterbrook (1985– ). In some instances, as we explain in Chapter 5, the appointing presidents would have been pleased with the legacy they left (for example, Ronald Reagan and Scalia). In others, their displeasure is a matter of public record (Dwight Eisenhower thought Brennan a “mistake”). Either way, though, it is hard to deny the effect that outstanding jurists have had on the course of American legal history, an effect that transcends their appointing president.

THE ROLE OF THE AMERICAN BAR ASSOCIATION

Whatever the reason for the emphasis on qualifications, we are still left with the question of how presidents evaluate candidates’ professional merit. In earlier periods in American history, presidents often relied on their own advisors and eventually the FBI to conduct background checks on possible nominees, as well as to assess their qualifications. Attorney General Biddle’s information about the “mediocre” Missouri representative Richard Duncan, for example, came in part from an FBI investigation.

FBI checks continue today but are focused more on candidates’ personal background and fitness than on their professional merit. As one Justice Department official explained it:

In this process, [FBI] agents interview Federal and state judges, attorneys, associates, government officials, business and civic leaders, religious and civil rights leaders, neighbors and [the] personal physician. National agency, police and credit checks are made. An Internal Revenue Service report is obtained.37

Without doubt these investigations have served to root out ethically or otherwise problematic candidates prior to nomination, but major gaffes have occurred. Nixon’s counsel, John Dean, tells us that the FBI’s report on the “mediocre” Carswell failed to mention either Carswell’s racism or his affairs with men while he was married. This was disconcerting, as Dean explains, for while “Richard Nixon was always looking for historic firsts, nominating a homosexual to the high Court would not have been on his list.”38 Likewise, the FBI failed to unearth the fact that Douglas Ginsburg had smoked marijuana with his students. It was the press that first reported the story.

In addition to the FBI, every president since Dwight Eisenhower (with the exception of the current president, George W. Bush) has relied on the American Bar Association (ABA), through its Standing Committee on Federal Judiciary, to prescreen possible candidates. After inspecting a questionnaire completed by candidates and interviewing them and their professional colleagues, the committee produces an evaluation for each would-be nominee—“well qualified,” “qualified,” or “not qualified”—which it supplies to the White House. (See Figure 3.3.)39

Because these ratings are supposed to reflect “professional qualifications and . . . not a nominee’s philosophy or ideology,” at least some presidents (and senators) seem to have regarded them as something of a gold standard for evaluating a candidate’s merit and have been especially loath to nominate those receiving the troublesome “not qualified.”40 Only a very small fraction—less than 1.5 percent—of all candidates nominated since Eisenhower’s administration received a “not qualified” rating.41

Nonetheless, these data, however informative, cannot convey the occasionally manipulative and sometimes controversial relationship between the ABA and various administrations. Richard Nixon, for one, said he would not make a nomination to the Supreme Court unless the ABA cleared it, but at the same time he attempted to exploit the organization for his own purposes. When some of Nixon’s advisors suggested that naming a woman to the Supreme Court would help the president with his quest for reelection, he sent Mildred Lillie’s name (among others) to the ABA. Nixon apparently had no intention of nominating Lillie; he asked the ABA to evaluate her only because he believed the organization would find her, a woman and a mere state court judge, “not qualified” for service. That way he could get credit for attempting to seat a woman but, ultimately, could blame the ABA for failing to do so. And that is precisely what happened.42

“Steering” of sorts continues in the contemporary era. As an insider during the Clinton years tells it, when the ABA gave the administration advance notice of a “not qualified” ranking, sometimes Clinton would withdraw the name from consideration. But in other instances Clinton’s advisors attempted to work with the ABA to ratchet up the ranking.43 At the end of the day, only three of the president’s 305 appointees to the district courts and none of his circuit court judges received a rating of “not qualified.” But a total of thirty-five of his lower court nominees received a
Membership

The Standing Committee on Federal Judiciary of the American Bar Association consists of fifteen members—two members from the Ninth Circuit, one member from each of the other twelve federal judicial circuits and one member-at-large. Appointments to the Committee are based on a reputation for the highest professional stature and integrity. The members have varied backgrounds and professional experience and are appointed for staggered three-year terms by the President of the ABA. No member serves more than two terms.

Function

The Committee evaluates the professional qualifications of persons nominated for appointment to the Supreme Court of the United States, U.S. circuit courts of appeals, U.S. district courts, the Court of Appeals for the Federal Circuit, the Court of International Trade and the territorial district courts for the Virgin Islands, Guam and the North Mariana Islands.

The Committee never proposes candidates for the federal judiciary, believing that to do so might compromise its evaluative function. Rather, its sole function is to evaluate nominees.

Evaluation Criteria

The Committee's evaluation of nominees to the federal bench is directed solely to their professional qualifications: integrity, professional competence and judicial temperament.

Integrity is self-defining. The nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence.

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience.

In investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.

The Committee believes that ordinarily a nominee to the federal bench should have been admitted to the bar and engaged in the practice of law for at least twelve years. In evaluating the experience of a nominee, the Committee recognizes that opportunities for advancement in the profession for women and members of minority groups may have been limited. Substantial courtroom and trial experience (as a lawyer or a trial judge) is important for nominees to both the appellate and the trial courts. Additional experience that is similar to in-court trial work—such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses—is considered by the Committee in evaluating a nominee's trial experience.

Significant evidence of distinguished accomplishment in the field of law may compensate for a nominee's lack of substantial courtroom experience.

Because an appellate judge deals primarily with records, briefs, appellate advocates and judicial colleagues (in contrast to witnesses, parties, jurors, and live testimony), the Committee may place somewhat less emphasis on the importance of trial experience as a qualification for the appellate courts. On the other hand, although scholarly qualities also are necessary for the trial courts, the Committee believes that appellate court nominees should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence. The ability to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases are considered in the evaluation of nominees for the appellate courts.

While the Committee recognizes that civic activities and public service are valuable experiences for a nominee, they are not a substitute for significant experience in the practice of law in either the private or public sector.


mixed rating, with a majority of the committee rating the nominee “qualified” but a minority assigning an “unqualified” rating.

Nixon’s and Clinton’s attempts at working with the ABA to change candidates’ ratings were not public at the time. But during presidencies in between the two, the ABA was embroiled in several highly public controversies. Jimmy Carter promised to appoint women to the federal bench. At the same time, he stated that he would not send any “not qualified” nominees to Senate. These twin commitments, it turned out, were difficult to fulfill, owing at least in part to the ABA. “We had some problems,” Carter’s attorney general, Griffin Bell, later explained, “because we are trying to follow the ABA standard of [requiring] fifteen years’ practice experience
[for a rating of “qualified” or above], and many of the women didn’t have fifteen years. . . . Women didn’t get into law schools until the sixties." Other observers, especially leaders of civil rights groups, were less charitable, claiming that the ABA was a sexist organization that stymied Carter’s efforts. After a showdown of sorts over the prospective nomination of Professor Joan Krauskopf—whom the ABA rated as unqualified because she had no trial court experience and studied the “narrow” area of family law—women’s organizations lobbied Carter to bypass the ABA. An all-out war was averted when the administration pressured the organization to rethink its criteria. It also probably did not hurt that for the first time in the association’s history, it appointed a woman to chair its Standing Committee on Federal Judiciary.44

That truce of sorts turned out to be temporary. Twenty years after Carter, in March 2001, the George W. Bush administration announced its decision to terminate the ABA committee’s role in prescreening candidates. “Although the President welcomes the ABA’s suggestions concerning judicial nominees,” then–White House counsel Alberto Gonzales wrote to the ABA’s president, “the Administration will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public.”45

Why the administration took this step, as we noted back in Chapter 1, is a matter of speculation. The White House claims that it is unfair to allow one particular organization to play such a prominent role in recruiting judges when many other groups desire to participate in the process. Some commentators, though, say the move can be traced back to the Reagan years, when ABA committee members split over Judge Robert H. Bork’s fitness for service on the Supreme Court. At that time, ten members viewed him as “well qualified,” one voted “not opposed,” and four rated him “not qualified.” This vote angered some Republicans then and continued to remain a sticking point, especially in light of more recent charges that the ABA is generally biased against conservatives.46

To some observers these claims are the height of irony, for historically the ABA was a bedrock of reaction, founded to oppose Supreme Court decisions that legitimized governmental regulation of big business. The association was, as the great legal scholar Edward S. Corwin said, “a juristic sewing circle for mutual education in the gospel of laissez faire.”47 As late as World War II, it largely excluded African Americans, Jews, and women from membership. But apparently, according to its critics, times have changed, and now conservatives do not get a fair hearing from the ABA.

The ABA claims otherwise, and several scholars have come to the association’s aid. But it is too late for it to regain its prescreener role with the Bush administration. Whether future presidents will follow suit or revisit the Bush decision to forgo the ABA’s input remains unclear.

What is true, though, is that while the ABA no longer receives advance information on judicial nominees, it continues to rate them—and, interestingly enough, by the ABA’s lights George W. Bush’s nominees are relatively meritorious, with 62 percent of his nominees receiving a “well qualified” rating (compared to 57 percent for Clinton’s nominees).48 Indeed, the ratings of some of his candidates have been so favorable that the (liberal) New York Times accused the ABA of acting as a “rubber stamp for the administration’s nominees.”49 We should not take this to mean, however, that Bush, any more than his predecessors, is unwilling to name the occasional “not qualified” judge. He has, in fact, nominated four (through 2004), at least in part because they may have worked to advance other goals. We think here of state court judge Dora Irizarry, who helped New York governor George E. Pataki court Hispanic voters and whom the governor wanted to reward with an appointment to a district court in that state. While Irizarry received a “not qualified” rating from the ABA—amid allegations that she yelled at lawyers in her courtroom—Bush went ahead and nominated her anyway. She was confirmed in June 2003.50

What is also true is that President Bush, while removing the ABA from the prescreening process, has not hesitated to cite its ratings when they work to his advantage. In defending nominees against Senate charges of “extremism,” he occasionally points to their “unanimous [ABA] rating of well qualified,” as he did in the case of the (unsuccessful) nomination of Miguel Estrada to serve on a federal circuit court. Estrada, the president said, “earned the American Bar Association’s highest mark . . . but [the Senate] still won’t confirm him.”51

Senatorial Courtesy

The Senate never did confirm Estrada, who ended up withdrawing from consideration. This is a fate that befalls relatively few lower federal court nominees, however. The vast majority (about four out of every five) are
rather handily confirmed, at least in part because presidents have adhered
to various norms within the Senate—most of which are intended to ensure
that senators who are from the state where the nominee will serve (home-
state senators) and who belong to the president’s party have some role in
filling vacancies on the lower federal bench (especially to the district courts,
which do not cross state lines).

Senatorial courtesy is chief among these norms. Operative since the
days of the Washington administration, courtesy holds that home-state
senators of the president’s party can block a nomination without supply­
ing a reason. Should a home-state senator invoke courtesy, the nomination
is usually doomed. Such was the fate of Franklin D. Roosevelt’s nominee
Floyd Roberts. When in 1939 Roosevelt attempted to appoint Roberts to a
district court in Virginia, above the objections of the two home-state Demo­
cratic senators, one invoked courtesy. “It is my sincere and honest convic­
tion that this nomination was made for the purpose of being personally
offensive to the Virginia Senators, and it is personally obnoxious to me, as
well as to my colleague.” The Senate, in the face of this home-state objec­
tion, rejected Roberts by a 9–72 vote. (FDR later retaliated by refusing to
nominate a senator’s candidate for a position on the Third Circuit, choos­
ing instead his friend Francis Biddle.)\(^5\)

In this case, the Virginia senator verbalized his “courtesy” objection.
More typically, senators invoke courtesy through “blue slips,” which are
sheets of light blue paper that the Senate’s Committee on the Judiciary
sends to the home-state senators, regardless of their party affiliation. The
home-state senators, in turn, decide whether to support the nomination. If
one or both of the home-state senators withhold their blue slips or other­
wise object to the nomination, it is up to the Judiciary Committee’s chair
to decide whether to go forward with the nomination. When he served as
chair of the Judiciary Committee during the Clinton years, Orrin Hatch’s
(R-Utah) practice was to allow “aggressive” use of blue slips by his fellow
Republicans to block nominations made by the Democratic White House.
Some say Hatch took a different approach after George W. Bush became
president, declaring that “negative blue slips will be given substantial con­
sideration . . . but they will not be dispositive unless there wasn’t consul­
tation” between the White House and the senator. In other words, while
the Bush administration would “consult” with Democratic home-state sena-
tors, Hatch suggested that his committee might well ignore any objections
those senators raise, and schedule hearings over the nominee.

How a chair decides to interpret senatorial courtesy can have conse­
quences for nominations to the lower federal courts. By his own count,
Hatch blocked seventeen Clinton nominees on the ground that “they lacked
home state support, often because of a lack of presidential consultation
with the nominee’s home state senators.”\(^5\) But his interpretation had little
influence on Supreme Court nominations. While in earlier eras, when re­
gion exerted a greater influence on the selection of justices, home-state
senators did occasionally attempt to block nominations, these days cour­
tesy and blue-slipping are not in much evidence over candidates to the
Supreme Court. As a result, senators, though free to submit names to the
administration, have little expectation of seeing their favored candidate
get the nod.

On the other hand, presidents cannot ignore the Senate altogether when
contemplating Supreme Court nominations. In fact, out-and-out failure to
include at least some key players in the vetting process can result in trouble
down the road. The 1987 Reagan administration, for example, apparently
took at face value Senate Judiciary Committee chairman Joe Biden’s 1986
comment that if a well-qualified conservative such as Robert Bork was
nominated for the Supreme Court, he would have to support him; the
president’s advisors seemed to forget that Biden is, well, a politician. Hence
when Reagan nominated Bork, Biden quickly lined up against him.\(^5\)

By the same token, because the Senate has shown its willingness to
reject candidates for the high court, failure to take into account its overall
preferences and possible actions at the nomination stage can place a can­
didate at risk for rejection. Consider the political situation that President
George W. Bush would likely confront if the Democrats took control of
the Senate after the 2006 elections. In this case, Bush would be dealing
with a Senate far more liberal than he.

Surely Bush’s goals in 2006 would be the same as in 2005. He would
want to move the moderately conservative Court to a more right-of-center
posture, especially on key issues such as abortion, affirmative action, regu­
lation, and gay rights. But what would happen if he attempted to appoint
an ultraconservative to the bench in 2006 should his party no longer con­
trol the Senate? The Democrats might well reject that person; knowing
that, Bush would probably consider nominating a candidate closer to the existing Court. That candidate would not be the president's first choice (nor, for that matter, the Senate's), but by compromising, the president and his party could avoid paying whatever political costs an unsuccessful confirmation battle might entail.

At the very least, this is the way many of his predecessors approached their task. When confronted with a hostile Senate, they have modulated their appointments, moving to the right or left as necessary. Ford's nomination of the moderate John Paul Stevens rather than the conservative Robert Bork in light of an overwhelmingly Democratic Senate is a prime example of this kind of presidential pragmatism. The Senate responded in kind, voting 98–0 to confirm Stevens. Of course, not all compromise candidates receive unanimous votes, but the inclination of most (though certainly not all) presidents to move toward the Senate may well explain why the rejection rate of Supreme Court nominees is not than it is.

Overcoming the Constraints

Short of appeasing senators, whether by taking into account their recommendation or their political preferences, what might a president do to work around the constraints he confronts? What strategies does he have at his disposal to see his nominees confirmed?

One is to “go public,” that is, to convince Americans that his candidate is well suited for the position and that only the partisan, ideological Senate can stand in the way. Following in the footsteps of many of his predecessors, George W. Bush has attempted a form of this strategy. Throughout 2004 and into 2005, he accused Senate Democrats of “using unprecedented obstructionists tactics” to block his nominees, while simultaneously attempting to appear above politics himself: “Every judicial nominee should receive an up-or-down vote in the full Senate, no matter who is President or which party controls the Senate.” “It is time,” Bush said, “to move past the partisan politics of the past, and do what is right for the American legal system and the American people.” At the same time, he continued to tout even seemingly doomed candidates, such as Janice Brown and Priscilla Owen, as “superb” and an “absolutely right pick for their respective positions.”

Sticking by his nominees turned out to be a good strategy for Bush. Owing to an eleventh-hour compromise, the Senate has now approved Owen and Brown. But it is an indirect strategy at best. By playing to the public, Bush was lobbying citizens to contact their senators. Other presidents (and Bush as well) have attacked the problem more directly, by seeking to cut deals with legislators or, more dramatically, by maneuvering around the Senate altogether. Bill Clinton took the former route in his quest to appoint his (and Hillary Rodham Clinton’s) former classmate at Yale Law School and co-chair of his California election committee, William Fletcher, to the Ninth Circuit. Hoping to change the ideological composition of the left-of-center Ninth, Senate Republicans balked at the appointment of the liberal Fletcher. They agreed to proceed only if Fletcher’s mother, the also-liberal Judge Betty Fletcher, vacated her seat on the Ninth and if the president appointed a candidate suggested by Republican Senator Slade Gorton to replace her. The “throw Momma from the bench” strategy eventually worked. Clinton was able to appoint his friend William Fletcher, but only by appointing a Republican to fill the other seat.

This sort of bargaining is a regular feature of the appointments game. More unusual, but hardly unknown, are attempts to work around the Senate entirely. Ulysses Grant’s attorney general, Ebenezer Hoar, in an effort to create a more professional judiciary, tried to evade senatorial courtesy by refusing to give home-state senators a say in nominations. Jimmy Carter, in an attempt to diversify the bench, also tried to eliminate senatorial courtesy, this time by establishing merit commissions for the selection of appellate court judges. A decade or so later, George H. W. Bush, in retaliation for the Senate Judiciary Committee’s leak to the press of Anita Hill’s affidavit to the Justice Department accusing Clarence Thomas of sexual harassment, said he would restrict senators’ access to FBI reports.

These efforts were not terribly successful. Senators retaliated against Grant and refused to confirm Ebenezer Hoar for a position on the Supreme Court. Carter too generated his own share of problems. He may have succeeded in diversifying the bench, but his approach led to “embarrassment and splintering in his own party,” and the merit commissions he established were eventually abolished. As for Bush, when the Judiciary Committee, no longer privy to the FBI reports, decided to delay Bush’s appointments until it could conduct its own investigations, the administration changed its policy. But it was too late. As the legal scholar Michael Gerhardt explains, “The delay was fatal to over two dozen subsequent
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judicial nominees, because the nominees’ earliest opportunities for hear­
ings would not have been until 1992 at which point the Senate slowed the process to a complete standstill pending the outcome of the presidential election.”

And yet presidents continue to attempt end runs around senatorial norms. Bill Clinton and the Senate were able to cut a deal over Fletcher, yet the president faced a far less hospitable legislature when it came to nominations to the Fourth Circuit. Whether for policy reasons or to appease civil rights groups, Clinton came into office quite intent on diversifying the Fourth. Covering the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia, the Fourth has the highest black population in the country, but no black judge had ever served on it. It also has a (deserved) reputation as among the most conservative circuits in the nation.

During his first term in office, Clinton tried to ameliorate the situation by nominating a black district court judge to the Fourth’s “North Carolina seat.”

But Jesse Helms, a conservative Republican from the state, refused to return a favorable blue slip. Around the same time, the Fourth’s chief justice, J. Harvie Wilkinson III, an oft-named candidate for a George W. Bush appointment to the Supreme Court, reported to Congress that the Fourth’s caseload was insufficiently large to justify filling vacant positions.

Facing continuing pressure from civil rights groups, Clinton attempted to break the logjam, but with no success. So in late 1999 the administration took some rather drastic steps. First, for every vacancy on the Fourth it nominated a black candidate; second, to maneuver around Helms, it moved the “North Carolina seat” to Virginia. The Republican senator there, John Warner, agreed to cooperate with the Clinton team. Virginia’s other senator, the Democrat Charles Robb, “strongly supported the goal [of diversifying the Fourth], had already recommended candidates to the White House and, in an election year, was likely to exert considerable effort to secure the nominee’s confirmation.”

After considering Robb’s suggestions, the president settled on Roger Gregory, a lawyer from Richmond, Virginia. Clinton planned to announce the nomination in June 2000. But John Edwards—then a Democratic senator from North Carolina—almost foiled the plan when he expressed anger about losing the North Carolina seat. To appease Edwards, the administration agreed to return the seat to North Carolina when the next vacancy arose. And with that Clinton nominated Gregory.

Nonetheless, and despite Robb’s and Warner’s support, the Judiciary Committee, with its Republican majority, failed to schedule a hearing over Gregory’s nomination. In the meantime, the administration continued to nominate more black judges, whose hearings too went unscheduled. The presidential election of 2000 was on the horizon, and so with its options and time running out, the White House decided to give Gregory a recess appointment (though it waited until after the election to do so). This meant that Gregory would become a judge on the Fourth Circuit, but only temporarily. His appointment would expire at the end of the next session of Congress unless he was renominated and confirmed by the Senate.

This was a risky strategy on the Clinton administration’s part. In the first place, it was clear by December 28, 2000, the date on which the president appointed Gregory, that George W. Bush would be the next president. Thus, only if the Republican Bush as well as Robb’s Republican replacement, George Allen, supported Gregory would Gregory remain on the Fourth—a big if. Second, while recess appointments are certainly not unknown—in 1789 George Washington made three to the federal district courts, and since then more than three hundred judges received their jobs in this way—they have been controversial. More to the point, they have been relatively rare in the contemporary era. No president had made one of a federal judge since Carter in 1980. Clinton had to know his opponents would roundly condemn him, and they did. Senator James Inhofe (R-Okla.) not only said he would block a life-tenured appointment for Gregory but also deemed it “outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate.” Senator Trent Lott (R-Miss.) apparently told Clinton much the same, stating that he would not support any recess appointments.

Even so, Clinton succeeded. Again, amid pressure from civil rights groups and threats from Democratic senators, Senator Allen agreed to support Gregory, though not Clinton’s “political manipulation.” Gregory was renominated by Bush and ultimately confirmed by the then Democratic-controlled Senate by a vote of 93-1. (True to his promise, Lott cast the sole nay vote; Inhofe abstained.)

The longer term may have been less successful from the Democrats’ perspective. Clinton’s recess appointment of Gregory opened the door for George W. Bush to make two himself: to William H. Pryor, a supporter of
greater intermingling between church and state, and to Charles S. Pickering, a controversial nominee surprisingly (and perhaps disingenuously) accused of holding racist beliefs, after the Democratic-controlled Judiciary Committee rejected them. The Senate has now confirmed Pryor and Pickering has retired, but surely the entire episode only serves to shore up the adage that in politics what goes around comes around.

Or maybe not. Just as Republicans widely rebuked Clinton for trying to evade constitutional norms and processes, the Democrats have said even worse of George W. Bush. Former Senate majority leader Tom Daschle claimed, "No president had ever used a recess appointment to install a rejected nominee on to the federal bench." "These actions," Daschle continued, "not only poison the nomination process, but they strike at the heart of the principle of checks and balances that is one of the pillars of American society." When Democrats counterattacked by refusing to consider any other nominees, the president agreed to refrain from making any more recess appointments in exchange for the confirmation of some his candidates.

Presidents are, of course, free to nominate whomever they like to the federal courts in pursuit of whatever goals move them. But as the examples of William Fletcher, Roger Gregory, William H. Pryor, and Charles S. Pickering show, the Senate can attempt to curtail that freedom, whether through senatorial courtesy, forced bargains, or nay votes.

No president is immune, not even that Master of the Senate himself, Lyndon Johnson. When in June 1968 Chief Justice Earl Warren informed Johnson of his intent to retire from the Supreme Court, the president could have selected a replacement from among any number of confirmable candidates. But the president again decided to do exactly as he pleased. He promoted his pal Abe Fortas to chief justice and then nominated another friend, appeals court judge and former member of Congress Homer Thornberry, to the seat Fortas would vacate. But 1968 was not 1965. In the face of a mediocre showing in the New Hampshire primary, Johnson chose not to run for reelection. Both Republicans and conservative southern Democrats sensed a Republican victory in November. The liberal Warren Court, which now included Abe Fortas as part of its dominant coalition, continued to exasperate conservatives with its path-breaking decisions on civil rights and criminal procedure. Finally, details of questionable financial dealings by Fortas began to emerge. Perhaps Johnson could not have imagined that the Senate, which had bent to his will on civil rights, voting rights, and Vietnam, would deny him his choice, but deny him it did. Not only was Johnson forced to withdraw the Fortas nomination amid clear signs of defeat, but Fortas himself, the president's most trusted advisor, was later forced to resign from the Court amid talk of impeachment and even criminal prosecution.