PRESIDENTIAL STRATEGIES IN SUPREME COURT JUSTICE SELECTION

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The most important appointments a president makes are those to the Supreme Court of the United States.[1] While cabinet members come and go, serving as they do at the pleasure of the president, federal judges serve for life, and in the case of Supreme Court justices, their decisions are final and unappealable. One scholar calls Supreme Court justiceships, "next to the presidency, the most eminent public office in the United States."[2] Twenty-five years after the death of Franklin D. Roosevelt, two of his justices were still serving on the Supreme Court. In our history, the Senate has shown much less deference to presidents in Supreme Court nominations than it has to either cabinet posts or lower federal judgeships; the 19 percent rejection rate of Supreme Court nominees (through 1991) is the highest for any national office.[3] Senate confirmation fights are costly in terms of political capital, public relations, and time.[4] The goal for the president then, is to start with a nominee for the Court who can be confirmed with as little expense of political capital as necessary. The decision is also a very personal one for the president. "Far more than any other nominations to the federal bench," Abraham writes, "those to the highest tribunal in the land are not only theoretically, but by and large actually, made with a

[1] Richard M. Nixon, quoted in the New York Times, October 22, 1971, announcing the twin appointments of Lewis F. Powell, Jr. and William H. Rehnquist; quoted in Segal, p. 999.
[2] Scigliano, p. 85.
[3] Ruckman, p. 794.
[4] Moraski & Shipan, p. 1072; Nemacheck & Wahlbeck.

considerable degree of *scienter* by the Chief Executive."[5] (emphasis original) Moe emphasizes the increasing consolidation of decision making unto the White House under Reagan,[6] and while this has some relevance to the lower federal courts, it is not relevant to Supreme Court justice selection since the president has always been at the center of those decisions. The role of the president is reminiscent of the Hollywood director who was asked if he has any input into casting. He responded, "your question should be 'does anyone else have any input into casting?'"

What strategies do presidents use in the selection process to maximize the likelihood of getting what they want out of the Supreme Court? What do presidents seek in appointing justices? Dahl writes, "presidents are not famous for appointing justices hostile to their own views on public policy..."[7] While it should not be surprising that presidents want justices who see the world as they do, it may be surprising that only a few presidents in our recent history have consciously attempted to change the ideology of the Court through justice selection. The quintessential example of a president seeking to change the Court is Franklin D. Roosevelt. After he had no opportunity to name a justice in his first term, at a time when the Court was eviscerating his New Deal legislation, Roosevelt proposed a scheme that would let him "pack the Court" in early 1937. While

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[5] Abraham, p. 7.
[6] Moe, 1993, pp. 371 ff.; Moe, 1995, *passim.*
[7] Dahl, 1957, p. 284.

the plan failed, a new pension scheme for federal judges was enacted that made it more lucrative for judges to retire; some Supreme Court justices actually did; and best of all for Roosevelt, there was movement among the justices in the wake of the court-packing plan that let parts of the New Deal pass constitutional muster. (Also noteworthy is the birth of the so-called "conservative coalition" of Republicans and Southern Democrats in order to oppose the plan; the coalition went on to do more harm to Roosevelt and other liberal Democrats than the Court ever did.)

Later that year, Roosevelt had the opportunity to make the first of his nine appointments to the Court. The chief criterion for Roosevelt's appointees was "absolute loyalty to the principles of the New Deal, particularly to governmental regulatory authority."[8] Thus, Roosevelt had a key ideological test for his nominees. When Treasury Secretary Henry Morgenthau suggested Sen. Joseph Robinson of Arkansas as a potential nominee, Roosevelt responded ideologically. "I cannot appoint him ... because he is not sufficiently liberal."[9] By contrast, Dwight D. Eisenhower wanted these things in his justices:

1. Character and ability that could command the respect, pride, and confidence of the populace
2. A basic philosophy of moderate progressivism, common sense, high ideals, and the absence of "extreme views"
3. Prior judicial service, in the belief that such service would provide an inkling of his philosophy
4. Geographic balance
5. Religious balance

[8] Abraham, p. 210.
[9] Rehnquist, p. 246.

6. An upper age limit of 62, unless other qualifications were unusually impressive
7. A thorough FBI check of the candidate and the approval of the American Bar Association (ABA).[10]

Thus, even as he was facing a Court appointed in its entirety by his two Democratic predecessors, Eisenhower approached his nominees with no specific agenda, in fact demanding that they be moderates in the face of "extreme views." In these two cases, Roosevelt and Eisenhower, we can see two different approaches to the Court at play. One president seeks to change the Court to suit his own policy directions; the other is largely content to appoint moderates to seek their own way.

Scigliano points out that "presidents have been less concerned with the views of their candidates on public questions during periods of relative political calm."[11] A different interpretation of that same evidence, considered here, is that presidents are less likely to seek to change the court during periods of political calm and that the ideology of the nominees naturally follows from a desire to change the Court.

Chief Justice William H. Rehnquist says, "a president who sets out to pack the Court does nothing more than seek to appoint people to the Court who are sympathetic to his political or philosophical principles. *There is no reason in the world why a president should not do this.*"[12] (emphasis added) (That from a survivor of two heated confirmation battles.) Actually, there are many reasons why a president should not do that. Not the

[10] Adapted from Abraham, pp. 250-51.
[11] Scigliano, p. 119.

least of which is that not all of them have wanted to; certainly not the way Rehnquist describes it. For most presidents, packing the Court with highly ideological justices is a pipe dream. Many are fortunate if they can replace a justice with someone even a little bit closer to the president's own ideology, to move the Court a little bit their way.

Abraham outlines four criteria for Supreme Court nominee selection: objective merit, personal friendship, balancing representation, and political and ideological compatibility.[13] Another theory is devised by Scigliano, who posits that "the environment in which presidents have made their appointments has influenced the extent and specificity of their interest in the views of their candidates." He says that in calm periods, presidents have regarded the Court as a legal institution and sent it justices with sterling professional qualifications and judicial experience. In times of stress, presidents have regarded the Court as a political institution and sent it justices with experience in the other two branches dealing with political questions.[14] This theory is plainly inadequate to our modern institutions, if it was even keen when it was put forth (1971). There is clearly a presidential style at play here, one which is shaped more by the political climate in the Senate and the president's desires to shape the Court (and with it, the Constitution) than by any desire to respond to the larger

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[12] Rehnquist, p. 235.
[13] Abraham, p. 5.
[14] Scigliano, p. 119.

political climate. Scigliano's thesis is unprepared to deal with Abraham's contention that "to Franklin D. Roosevelt, judicial experience was of little importance; to Dwight Eisenhower, it was crucial." The prevalence of the appointment of experienced judges in our period is for two perpendicular reasons: One is that an experienced judge can more easily be sold to the Senate; the other is that they have a track record presidents can evaluate in making the appointment. "You know the judicial philosophy of those judges because they've had experience and they've written opinions you can look at," notes former Attorney General Edwin Meese III.[15] If Scigliano were correct, once Roosevelt had a majority of New Dealers on the Court (by which time the Depression was more or less over anyway), he should have started appointing experienced judges to the Court. But he kept up a steady stream of cabinet members and senators. Another competing theory is that of Baum, who outlines five broad categories, similar to Abraham's four. These are "objective" criteria of competence and ethics (quotes original); policy preferences; reward to political and personal associates; the building of political support; and prospects for the nominee's confirmation.[16] While Baum lays out a good series of descriptions of these five types, there is little theoretical in them to explain why a president chooses one category over another. Such an explanation is laid out here.

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[15] Fred Barnes, "Reagan's Full Court Press," *New Republic,* June 10, 1985, p. 18, quoted in Baum, 1995, p. 43.

[16] Baum, 1995, p. 41.

The model presented here operationalizes Supreme Court nominations on two dimensions. The first dimension is the president's desire to change the Court. This is determined by the president's public and private statements at the time of the nominations and in the presidential campaign. In the period covered herein (the presidencies from Franklin D. Roosevelt to Bill Clinton, inclusive), four presidents are determined to have sought to change the Court: Franklin D. Roosevelt in his first two terms, Richard M. Nixon, Ronald Reagan, and George H. Bush. The remaining presidents showed little or no desire to change the Court through their appointments, rather to maintain the status quo or to eschew ideology altogether. These presidents are Franklin D. Roosevelt in his third term, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Gerald R. Ford, and Bill Clinton.[17]

Some detailing of these assertions is in order. With regard to the presidents who sought to change the Court, Nixon campaigned in 1968 almost as strenuously against the Court as he did against Vice President Hubert H. Humphrey.[18] Nixon's comments in his secret tape recordings reveal the primacy of ideology in his judicial selection process: "I don't give a God damn if the guy can read or write, just so he votes right."[19] The 1980 Republican platform called for the appointment of judges "who respect[ed] human life," an obvious swipe at the Court's 1973

[17] Franklin D. Roosevelt made no appointments to the Court in his fourth term, and the only other president in the period covered, Jimmy Carter, made no appointments to the Court.
[18] Woodward & Armstrong, p. 10.

abortion decisions, and this was only part of Reagan's broader mission of de-emphasizing the impact of government in American lives. In the words of Meese, a top aide to the president in his first term and Attorney General of the United States in his second, the judicial appointments served "to institutionalize the Reagan revolution so it can't be set aside no matter what happens in future presidential elections."[20] According to Moe, ideology was one of the linchpins in getting a Reagan appointment.[21] Bush made clear in 1988 that he had no plans to back away from the direction Reagan had led, and also came out in favor of criminal penalties for women who had abortions, evincing a clear desire to change the Supreme Court.

Other presidents had little desire to change the court. By the time Roosevelt had appointed a majority to the Court, the New Deal was moot anyway, and he loosened his ideological expectations for his justices and reverted to the time-honored practice of filling the Court with cronies. As Scigliano describes, "Roosevelt was willing to have his sixth justice, James F. Byrnes, be less than pure in his New Deal principles and an opponent of the court-increase plan, too. But Byrnes had been generally loyal to the administration as a senator, and by the time of his appointment in 1941, the Court was safe for the New Deal."[22] Roosevelt was by this time so unconcerned with ideology that some of his appointments constituted a conservative wing of

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[19] Dean, p. 96.
[20] O'Brien, p. 107.
[21] Moe, 1985, p. 260.

the Court, headed by Harlan Fiske Stone, a Coolidge appointee and Roosevelt friend whom he elevated to Chief Justice. (Felix Frankfurter, another Roosevelt appointee, also became part of the conservative wing, along with Owen Roberts, the lone holdover on the Court from before Roosevelt.) Wiley B. Rutledge was the only Roosevelt appointee the president did not know personally.[23] Truman appointed only friends, including a Republican, and he later blistered at how little attention he had paid to their ideology and judicial philosophy. This underscores his lack of concern for their ideology at the time. (Tribe calls the Truman appointees "perhaps the least distinguished group of appointments made by any president in this century."[24]) After making Earl Warren Chief Justice as a reward for his role in the California delegation's vote for Eisenhower at the 1952 Republican National Convention, Eisenhower seemed to approach Court appointments much the way as a general in the Army he decided who got to be colonel. They were not his friends; except for a brief acquaintance with John M. Harlan, Eisenhower was unfamiliar with the four justices he appointed after Warren.[25] Kennedy appointed two men of divergent ideologies, caring most that they were "his kind of people."[26] The question of the relation of Supreme Court nominees to the president was apparently so obvious to Attorney General Robert F. Kennedy that he bluntly asked why someone

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[22] Scigliano, p. 118.
[23] Ibid.
[24] Tribe, p. 69.
[25] Scigliano, p. 94.
[26] Abraham, p. 272.

should be appointed "that neither my brother nor I knew."[27] Johnson's preference for cronies in high office was the stuff of legends. It seemed not to matter to the man who had served as a conservative Democratic senator from Texas that both of his successful nominees subscribed to the most liberal ideologies the Court has ever seen. Ford chose John Paul Stevens specifically for his moderate views[28] -- a definite break from Nixon. In fact, Stevens's political party identification -- and also his religion -- were unknown to Ford when he decided to name him.[29] According to O'Brien, "Ford made a pragmatic, rather than ideologically controversial, nomination based on Stevens's professional qualifications."[30] Clinton's attitude toward the Court is discussed below.

The second dimension in the model is the climate in the Senate at the time of the nomination. The president's standing in the Senate is key, since 90 percent of nominees submitted when the president's party controls the Senate have been confirmed while only 61 percent submitted when the opposition party controls the Senate have been confirmed.[31] Cameron et al state the basic rule this way: "Senators routinely vote to confirm nominees who are perceived as well qualified and ideologically

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[27] O'Brien, p. 69. Justice Felix Frankfurter commented that Kennedy "did not adequately appreciate the Supreme Court's role in the country's life and the functions that are entrusted to the Supreme Court and the qualities both intellectual and moral that are necessary to the discharge of its functions," noting that Kennedy passed over distinguished men in favor of the inexperienced Goldberg and White, who lacked "familiarity with the jurisdiction or the jurisprudence of the Court either as practitioners or scholars or judges." Letter to Alexander Bickel, 1963, Frankfurter papers, Harvard Law School, quoted in O'Brien, p. 66.
[28] Abraham, p. 322.
[29] Abraham, p. 324.
[30] O'Brien, p. 77.

proximate to Senators' constituents."[32] It only makes sense that presidents take this into account -- or ought to -- in making their nominations. The president exercises much greater dominance over Supreme Court nominations than lower judicial offices. "Basically, [in terms of federal district court judges], it's senatorial appointment with the advice and consent of the president," Robert F. Kennedy stated.[33] Baum declares, "in the 20th century, senators from a nominee's home state have held no special power."[34] Attorney General William Mitchell, on Supreme Court nominations, wrote, "With the whole country to choose from, the senators from one state or another are in no position, even if they were so inclined, to attempt a controlling influence."[35] So the prerogative to break a Supreme Court nomination rests not with individual senators but with the Senate as a whole. For purposes of this model, the climate is rated as favorable when the president's party controls the Senate, except in the fourth year of his term, and unfavorable when the other party controls the Senate, and the fourth year of the president's term. These presidents dealt with favorable Senates: Roosevelt, Truman,[36] Eisenhower (1953-55), Kennedy, Johnson, Reagan (1981-

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[31] Baum, 1995, p. 53.
[32] Cameron, Cover & Segal, p. 525.
[33] O'Brien, p. 74.
[34] Baum, 1995, p. 50.
[35] William Mitchell, "Appointment of Federal Judges," *American Bar Association Journal* 17: 569 (1931), quoted in O'Brien, p. 74.
[36] Although Truman faced a Republican Senate from 1947-49, no vacancies on the Court occurred in this time.

87), and Clinton.[37] Presidents who dealt with unfavorable Senates were Eisenhower (1955-61), Nixon, Ford, Reagan (1987-89), and Bush.

The notion that presidents have less latitude in Supreme Court nominations in the fourth year of their terms (i.e., election years) has long been noted.[38] Four of the six nominations in election years have been rejected and seven of the nine nominations by lame-duck presidents (after the election and before the successor takes over) have been rejected.[39] In the period covered here, only the nominations of William Brennan in 1956 and the failed nominations of Abe Fortas and Homer Thornberry in 1968 were fourth-year nominations, and since the Senate was unfavorable to the president in 1956 to begin with, only the 1968 nominations are reclassified as Senate-unfavorable. (It's worth noting that the two most recent successful election year nominations, those of Brennan and Benjamin N. Cardozo, were accomplished when Republican presidents named Democrats to the court.[40])

Scigliano notes that before 1970, presidents faced a Senate of their party in 108 nominations and an opposition Senate in only 26. The experience of the recent era is much different. In fact, since 1970, there have been 11 nominations in divided government (and only five in united government), almost half as

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[37] Clinton's only appointments to the Court came in the 1993-95 period when Democrats controlled the Senate.
[38] Scigliano, p. 97; Massaro, p. 136; Segal, p. 1001. Scigliano also adds Senatorial courtesy as a factor in upending Supreme Court nominations, but that has not been a factor since the start of the 20th century.
[39] Scigliano, p. 99.

many as in the 180 years prior to that. So, the Senate is seemingly more powerful in our era (by being more ready to reject a nomination) than it has been over American history as a whole. Indeed, from 1895 to 1969, only Harry S. Truman and Dwight D. Eisenhower faced opposition Senates, and only Eisenhower had to appoint justices in this period against an opposition Senate. The emergence of divided government in the late 20th century has invigorated the role of the Senate, and made the input of constituencies and interest groups more potent. Silverstein notes, "From 1900 to 1967, not one senator's career was enhanced or cut short by constituent response to a confirmation vote."[41]

The role of public opinion as an alternative to Senate composition is to be considered. Segal et al reveal, "There is no one-to-one relationship between presidential popularity and confirmation approvals." They note that Nixon was at a peak in popularity when Clement Haynsworth and G. Harrold Carswell were rejected in 1970 and that Johnson was only at 39 percent when Thurgood Marshall was confirmed.[42] Thus, it is more useful for our model to utilize Senate party control rather than presidential popularity as a dimension of justice selection.

A table represents these two dimensions in a two-by-two model. The model predicts that when presidential desire for changing the Court is low and the Senate is favorable to the president politically, the president will appoint friends and

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[40] Scigliano, p. 104.
[41] Silverstein, p. 141.
[42] Segal, Cameron & Cover, p. 112.

allies to the Court. When desire for change is high and the Senate is favorable, the president will make appointments on the basis of ideology. When desire for change is low and the Senate is unfavorable, the president will send over judges -- always judges -- who have neither an ideological axe to grind nor a friendship with the president. Essentially the president says to the Senate in this situation, "Here is my candidate. You come up with a reason to reject him or her." When desire for change is high and the Senate is unfavorable -- and the likelihood of rejection is high -- the president will compromise, sending over a nominee not as ideological as he or she would like, but having some ideological leanings at least and a meritorious record which make the nominee less likely to be rejected. Scigliano points out "when the Senate has been strong enough, and willing, to defeat the nominations of presidents to the Supreme Court, it has also, we may assume, been in a position to compel chief executives to accommodate their choices of candidates to its dominant temper."[43] Massaro alleges that ideology is the main reason why nominations are rejected.[44] Tribe buttresses this view by pointing out that presidents don't appoint candidates who are patently unqualified because (1) they understand that the Senate is bound to reject them; and (2) they want to leave a judicial legacy.[45] This view is also consistent with the idea that most rejections would be based on ideology rather than qualifications.

[43] Scigliano, p. 97.
[44] Massaro, p. 135.
[45] Tribe, p. 85.

Baum notes that the process "weighs against the selection of nominees whose perceived preferences on judicial policy issues are likely to arouse widespread opposition in the Senate."[46] Such a goal is apt to lead to more of what Silverstein calls "stealth" candidates -- people like Sandra D. O'Connor, Anthony Kennedy, and David Souter, whose views are as unknown as the candidates are themselves.[47] After the Bork imbroglio, it was helpful to Bush that there was scant evidence Democrats could use against Souter.[48]

Nominees to the categories in the upper pair of boxes frequently have no judicial experience. This is truer historically than currently, as all nominees to the Court since 1975 have been judges, in sharp contrast to the first 180 years of the Court's history when only 40 percent had any judicial experience at all.[49] (Indeed, only since the retirement of Stanley Reed in 1957 have all members of the court even been graduates of law schools.[50]) Nominees to the categories in the lower pair of boxes are apt to have judicial experience. (Truly, of the nominees assigned to the lower boxes in the period considered in this model, only Lewis F. Powell, Jr., began his judicial career on the Supreme Court.) This paradigm dovetails neatly with the concept of a justice being "meritorious." A president can scarcely present his friend, who happens to be a

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[46] Baum, 1995, p. 48.
[47] Silverstein, p. 164.
[48] Baum, 1995, p. 49.
[49] Scigliano, p. 108.
[50] O'Brien, p. 67.

lawyer and a cabinet secretary, to the Senate and say, "This is the most qualified person in the country to serve on the Supreme Court." So presidents seeking to put their friends on the bench will little care if they have experience as judges, and presidents hoping to shape policy will also not be interested in judicial experience, and in this day and age, might even want to avoid someone with a judicial track record. Abraham notes that legislation is frequently proposed in Congress to institute judicial experience as a statutory requirement for service on the Court, but these are not given serious consideration because the members of Congress -- many of whom are lawyers themselves -- agree that judicial experience is not essential.[51]

In applying the model, one asks two questions. First, "Has the president, through the record, indicated a desire to change the direction of the Supreme Court?" If the answer is yes, the question becomes "Does this nominee represent a strong ideological position concordant with the president's?" If the answer is yes, the nomination is treated as ideological. If the answer is no, the nomination is treated as a compromise. If the answer to the first question is no, the question then becomes "Does the nominee have a personal relationship with the president?" If the answer is yes, the nomination is treated as a crony or ally. If the answer is no, the nomination is treated as "meritorious." Applying the 41 Supreme Court nominations in the period from 1937 to 1994 (the presidencies of Franklin D.

[51] Abraham, p. 58.

Roosevelt to Bill Clinton, inclusive), shows 30 of the nominees in the box where the model predicts they belong. Of the other 11, six were rejected by the Senate, suggesting their being "in the wrong box" (i.e., the president overplaying his hand vis-à-vis his standing in the Senate) led to the defeat of the nominations. For example, the ill-fated nominations of Abe Fortas to be Chief Justice and Homer Thornberry to replace him came in the election year of 1968, a time when history suggests the president doesn't have the political capital to bring down two highly controversial Supreme Court nominations. The model, then, shows why they were rejected. Had Johnson nominated a judge with whom he had no close ties, rather than one of his best Washington friends (to say nothing of the most liberal member of the Court, with one of his best Texas friends waiting in the wings), the nomination would have likely succeeded. Similarly, Nixon was overestimating what the Senate would allow when he put forward not one but two archconservatives to replace the Court's most liberal member at a time when Democrats controlled the Senate. Reagan, too, failed to consider Republican loss of the Senate in the interim between his elevation of William H. Rehnquist to Chief Justice and accompanying appointment of Antonin Scalia to Rehnquist's seat in 1986 and his next appointments a year later. This model could have predicted the failure of the nomination of Robert H. Bork in 1987 (in fact, it was a party line vote that defeated the nomination[52]), and to some

[52] D 2-52 R 40-6. Massaro, p. 168.

extent the failure of Douglas Ginsburg's nomination.[53] Nixon and Reagan succeeded in filling those seats when they moderated their ideological desires and appointed Harry Blackmun and Anthony Kennedy, respectively. Massaro writes, "In selecting Kennedy, the president also conveyed a willingness to compromise with regard to ideology. This became even more apparent when the nominee appeared before the Judiciary Committee and his views, while conservative, were perceived to contrast starkly with those expressed by Bork."[54] The New York Times said, "Reagan has finally yielded to the imperative of winning in the Senate."[55]

Three of the other cases that do not correspond to what the model predicts have explanations. Nixon succeeded in installing Warren E. Burger as Chief Justice, when the model called for someone less ideological, in part because Nixon was high in political capital being a new president,[56] and in part because the Senate was not eager to reject another Chief Justice nominee having recently filibustered the Fortas nomination to death. (It also helped that Southern Democrats whose opposition to the nomination would have been key in killing it were themselves glad to see change at the Court.) The original Rehnquist nomination in 1971 also should have failed, and undoubtedly would have failed had it stood alone, but Nixon was successful in persuading the Senate Judiciary Committee to bind the nomination to the

[53] Although the Ginsburg nomination was withdrawn rather than rejected by the Senate, it was clear that it would have been rejected by a wide margin, due in part to the nominee's "hard-right" ideology and in part to his marijuana use.
[54] Massaro, p. 195.
[55] New York Times, November 12, 1987, p. A31, quoted in Massaro, p. 196.

concurrent nomination of Lewis F. Powell, Jr., a moderate Southern Democrat. Although Powell's supporters tried to have the nominations considered separately, fearing that an uprising against Rehnquist would sink their candidate, Sen. James Eastland of Mississippi, chairman of the Judiciary Committee, was adamant. He decided the confirmations would be "double or nothing."[57] Thus, Nixon used what he knew would be broad, bipartisan support for the moderate, superannuated Southerner (Powell was 64) as a "Trojan horse" to install an extremely conservative, hard-nosed justice and most significantly, one of the youngest in history. (Rehnquist was 47 and has celebrated his 32nd anniversary on the Court. He could conceivably go on to serve the longest tenure in history, surpassing William O. Douglas's 36 years.)

The third contrarian case is that of Clarence Thomas. Bush would not have attempted to nominate a white person as conservative as Thomas to the Court, but he knew that Democrats would not oppose the nomination of a black man to the Court going into an election year. He was right. Thomas, arguably as conservative as Bork, was treated quite gingerly by the Democratic Senators in his initial confirmation hearings. Broder commented that the nomination had "almost exactly the effect Bush's political advisers hoped. It mobilized the conservatives and split the Democrats."[58] Thus, Bush enhanced his power those two ways in the short term and one major way in the long-term: A

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[56] Sullivan proposes that high political capital isn't only for new presidents.
[57] Woodward & Armstrong, p. 162.

43-year-old justice for life. No one -- except perhaps Thomas, if he was guilty -- could have foreseen the bombshell that almost derailed the nomination, and entailed another round of hearings where Democrats were indeed less delicate toward the nominee than previously. Had it not been for Anita Hill's allegations of sexual impropriety, there might have been only a handful of nay votes and certainly far fewer than the 48 against Thomas. Thus, despite the turmoil, Bush succeeded in using the race of his nominee to slip past the Senate an ideologue they almost certainly would have rejected. (Reagan's framing of the Scalia nomination in terms of his being the first Italian-American justice -- something reflected in the first comments from the Senate -- similarly helped that nominee win unanimous confirmation.[59] The Democrats were also hamstrung by their simultaneous effort to sink Rehnquist's elevation to chief justice. Democrats alleged they opposed Rehnquist because of his supposed racial biases and ethical lapses during his first confirmation hearings and not because of ideology. As a result, they could not plausibly oppose the Scalia nomination on ideological grounds alone.[60])

The other two cases have less to explain them and are more troublesome for the model than the others. These are Clinton's nominations of Ruth Bader Ginsburg and Stephen Breyer. As Baum wrote, "both of them were widely viewed as moderates -- more

[58] David Broder, "Bush Was Spoiling for a Fight from the Start," Washington Post, October 20, 1991, quoted in Baum, 1995, p. 47.
[59] Brisbin, p. 59.

liberal than Republican senators would prefer, but considerably less liberal than many other candidates that a Democratic president might nominate. As a result, each could be expected to win easy confirmation."[61] Why did Clinton appoint only moderates? He had not been particularly antagonistic toward the Court in his 1992 campaign except in terms of being forthrightly pro-choice on abortion. Making not one but two appointments of moderates confirms the thesis that Clinton did not have a strong desire to change the Court. These Court appointments are perhaps the best evidence that Clinton really was a "New Democrat" and not merely a liberal posing as one. Clinton therefore falls into much the same mindset as Eisenhower: Inheriting a Court, eight of whose members had been appointed by Republicans (and the ninth justice, Byron White, was by that time almost as conservative as a Republican justice), Clinton did not even attempt to put liberals on the Court and instead generally followed Eisenhower's criteria for Supreme Court nominations. The question of why Clinton strove for a "meritorious" appointment rather than appointing a crony or ally, which is what the model calls for in that situation, is less clear. Since no one has attempted to put a friend on the Court since 1968, it might be that the practice is outmoded, beyond what the public would stand for in the 21st century. Tribe notes that not one of the most esteemed justices in the 20th century was purely a crony or a political ally.[62]

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[60] Brisbin, p. 62.
[61] Baum, 1995, p. 48.
[62] Tribe, p. 85.

Indeed, even personal connections between presidents and justices, now non-existent, were once commonplace; Scigliano estimates that pre-1970, presidents personally knew 3/5 of their nominees.[63] Baum suggests that the decline in the appointment of cronies might be reversed at some point because "the impulse to reward close associates can be strong."[64] Moe notes, "Presidents have traditionally used many appointments as political payoffs and have been expected to do so by other politicians."[65] The implication is that the Senate is not apt to resist a return to cronyism (even though the public might).

It's also true that presidents have had a zealous interest in the business of the Court since the time civil rights became so prominent on the agenda, and Clinton's low interest in changing the Court is itself anomalous in our era. It might be that a test of the model needs to wait for a time when the ideology of the Supreme Court is not at the forefront. It's not inconceivable that such a time will come. The other possibility is that Clinton perceived the Senate as being less hospitable to his nominations than this binary model (president's party/not president's party) accounts for. Indeed, Clinton and the Democrats in the Senate might not have been able to overcome a filibuster by the likes of Jesse Helms at a time when the Senate Republicans were so eager to be confrontational with the president. Perhaps then, Clinton nominated moderates not of his

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[63] Scigliano, p. 95.
[64] Baum, 1995, p. 46.
[65] Moe, 1985, p. 245.

personal circle simply to avoid a costly confirmation battle. Still, it seems likely that a president would have to be rejected at least once (along the lines of Hoover, Nixon, and Reagan) before resorting to such a strategy.

Looking prospectively, the model can anticipate the future choices of presidents. In his first biennium, George W. Bush faced an extremely unfavorable Senate (and the suggestion was even made to deny him any appointments to the Court until after the 2004 election). No vacancies happened in that biennium, and the Republican capture of the Senate in the 2002 election deflated some of the acrimony toward Bush's unorthodox manner of election. He probably doesn't have a strong desire to change the Court that appointed him president, in which case the model calls for a non-ideological appointment. But his key Republican supporters would like the Court to continue its move to the right, and with a Republican Senate, such appointments are within the realm of possibility. The narrowness of Republican control, however, suggests that appointment of a compromise candidate is more viable. A liberal Democrat who wants to be president and change the Court would find himself or herself in much the same position as Richard Nixon in 1968. (And it took eleven appointments and six elections -- and the good fortune for conservatives of no Democratic appointments in the meantime -- before the Court consistently ruled the way Nixon wanted.)

The model is consistent with competing theoretical expectations. All of Abraham's four criteria are accounted for in

the model, as are Baum's five criteria, with representation (in our age, demographic rather than geographic) encompassing the other categories rather than existing as a separate one. The decline of the expectation of geographic representation actually enhances a president's power in making appointments since presidents are no longer expected to fill a "New England" seat or a "New York" seat. At the same time, the president gains leverage when filling a "black" seat, or a "female" seat, since Senators will be reluctant to oppose nominees from those cohorts for fear of being painted anti-black or anti-woman.

In short, the model presented here correctly evaluates 30 of 35 successful nominations, or 85 percent. It also could have been used prospectively to predict the six nominations that would fail. A key part of the theory in this model, neglected in some others, is that it assumes that not all presidents will seek to change the Court for ideological reasons. In its operation, the model relies only on simple concepts opertionalized using readily-available information. This is a road map to explain who gets appointed to the Supreme Court, and why. Presidents and lesser mortals can use it to chart the best path to optimizing a president's most important appointments.

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MODEL FOR PRESIDENTIAL STRATEGIES IN SUPREME COURT JUSTICE SELECTION

Examples	Partisan Composition of Senate	Low — President's Desire to Change Court	High
F.D. Roosevelt Truman Eisenhower 53-55 Kennedy Johnson Reagan 81-87 Clinton	FAVORABLE (United govt. during non-election years)	**CRONIES/ALLIES** Byrnes, Stone, Jackson, Rutledge, Burton, Vinson, Clark, Minton, Warren, White, Goldberg, Fortas, Marshall, **[Fortas]**, **[Thornberry]**	**IDEOLOGICAL** Black, Reed, Frankfurter, Douglas, Murphy, **Burger**, **[Haynsworth]**, **[Carswell]**, **Rehnquist 71**, O'Connor, Rehnquist 86, Scalia, **[Bork]**, **[Ginsburg]**, **Thomas**
Nixon Ford Reagan 87-89 Bush	UNFAVORABLE (Divided govt. & election years)	**MERITORIOUS** Harlan, Brennan, Whittaker, Stewart, Stevens, **Bader Ginsburg**, **Breyer**	**COMPROMISE** Blackmun, Powell, Kennedy, Souter

Upper row: NOMINEES SOMETIMES HAVE NO JUDICIAL EXPERIENCE

Lower row: NOMINEES APT TO HAVE JUDICIAL EXPERIENCE

Low — President's Desire to Change Court — High

Examples:

Low	High
F.D. Roosevelt (from 1941 on)	F.D. Roosevelt (pre-1941)
Truman	Nixon
Eisenhower	Reagan
Kennedy	G.H. Bush
L.B. Johnson	
Ford	
Clinton	

Names in brackets are rejected nominees
Names in bold are contrary to the model

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Fall 2002

START

Has the President, through the record, indicated a desire to change the direction of the Supreme Court?

YES

NO

Does this nominee represent a strong ideological position concordant with the President's?

Does this nominee have a personal relationship with the President?

YES

NO

YES

NO

IDEOLOGICAL

COMPROMISE

CRONY OR ALLY

"MERITORIOUS"