

# Where have all the politicians gone? Recruiting for the modern SUPREME COURT

by TERRI L. PERETTI

For most of U.S. history, Supreme Court justices have been involved in partisan elective politics prior to their appointments or have served in government, usually in a prominent and political position. Schmidhauser observed in 1959 that “political activism of a rather intense kind emerges as a necessary stage in career ascent to the Supreme Court” and has “been a virtual precondition for such an appointment.”<sup>1</sup>

Of course, this should not be surprising given the importance of partisan and ideological considerations in the judicial selection process. Holding a high government office gives potential nominees credibility and is critical to drawing the attention of the president and Justice Department. Such experience might also be regarded as valuable training for the Court’s function of deciding legal questions that are highly political and that must be implemented in a political environment. It furthermore offers a record of potential nominees’ ideological views, allowing presidents to predict their future decisions more skillfully. These varied aims in recruiting for the High Bench are likely being under-served given that a striking shift has occurred in the occupational background of Supreme Court justices.

A leading study by Epstein, Knight, and Martin offers empirical proof of two recent developments—a norm of prior judicial service and, related to this, striking occupational homogeneity on the Court.<sup>2</sup> Rather than following historical practice and nominating prominent politicians

to the Court, presidents over the last several decades have used the courts, especially the federal circuit courts, as a primary and nearly exclusive recruiting pool.

Presidents now recruit directly and nearly exclusively from the bench, particularly the federal appellate bench.

The loss of distinguished politicians on the Court risks its representational qualities and its effectiveness as a policy maker and co-equal branch of government.

This change can be starkly illustrated by comparing the early Warren Court with the current Court. In 1954, the Court was quite statesmanlike, containing a former governor of California (Warren), three U.S. senators (Black, Burton, Minton), two U.S. Attorneys General (Jackson, Clark), two

high-ranking executive branch officials (Reed, Douglas), and a law professor (Frankfurter) who had also served in the executive branch and as an informal presidential advisor. Only one justice, Sherman Minton, was a U.S. court of appeals judge at the time of his appointment, and he had previously served both in the Senate and White House.

In contrast, every single member of the Court in 2007 came directly from the federal circuit courts. Additionally, no current justice served in a state or national legislature, held elective office, or occupied a Cabinet-level executive branch position. Several held sub-Cabinet posts, but typically as an attorney in the Justice Department. The latter

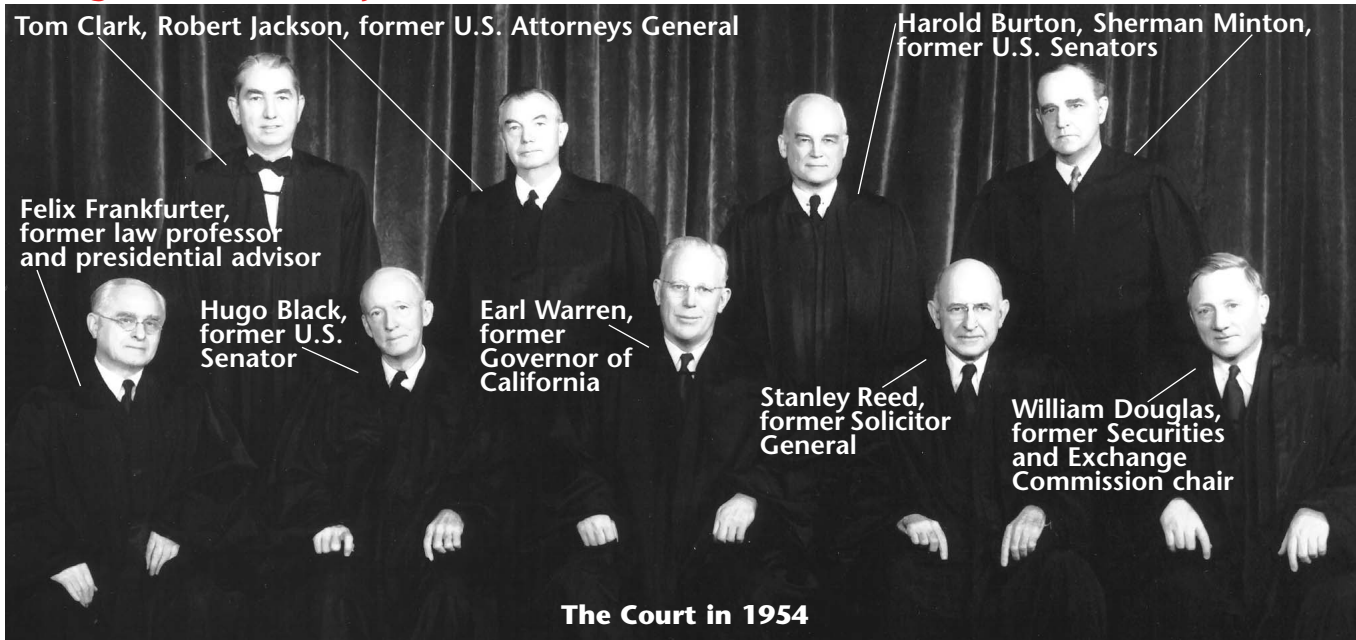
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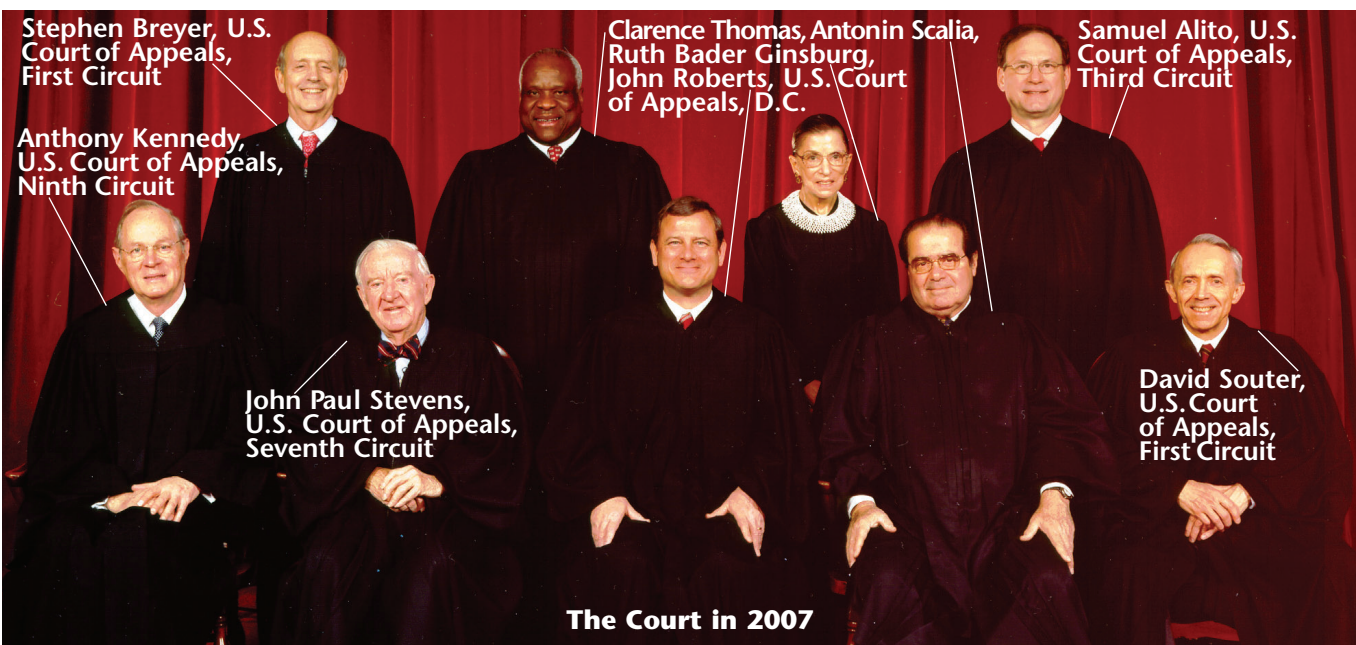
1. John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 *MIDWEST J. POL. SCI.* 1, 56-57 (1959).

2. Lee Epstein, Jack Knight, and Andrew Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 *CALIF. L. REV.* 903 (2003).

## Backgrounds of the justices



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positions certainly qualify as public service and are governmental in nature. However, they are not directly political and do not belong in the same category as legislators, governors, and Cabinet secretaries.

While hybrids and exceptions certainly exist, the Epstein et al. study offers a defensible categorization. The

authors viewed justices as holding a “political” position when appointed if they were in an elective office in the legislative or executive branch or in a non-legal executive branch position, i.e., one not requiring legal training. Justices were regarded as holding a “legal” position upon appointment if they were serving as judges, government lawyers, in private practice, or in legal academia.

However defined, it is true, as

Baum simply states the matter, that “there is less politics and more law in the backgrounds of justices than there used to be.”<sup>3</sup> According to Epstein et al., “[b]etween 1789 and 1952, the mean percentage of justices with some political background, either in legislative or executive politics, hovered around 65%” but has declined to 34 percent since 1952 (with a small drop with Roberts and Alito); while a slight majority of the

3. Lawrence Baum, *The Supreme Court*, 8th ed, 61. (Congressional Quarterly Press, 2004).

Court's members have possessed elective political experience, a disproportionate number of these

served early in the Court's history, when it was not rare for as many as two-thirds of the Court to have previously faced the electorate. Between 1826 and 1836, the proportion was even higher, with all twelve justices who served during this time having experience as elected officials. After that high-water mark, a rather steady decline occurred until the percentage...leveled off at 44% until 1957, when it dropped again to 33%.<sup>4</sup>

From 1957 to 2006, only 2 justices (10 percent of new appointees) had previously won an elective office, neither at the national level, with O'Connor having served in the Arizona legislature and Stewart on the Cincinnati city council. The last time a sitting member of Congress was appointed to the Court was 1945, when Truman nominated and the Senate approved Harold Burton. It has been nearly 45 years since a Cabinet secretary has been appointed, with Kennedy's selection of Arthur Goldberg.

While Supreme Court justices are far less likely to have previous political experience, they are far more likely to have served as a judge, particularly on a U.S. court of appeals. About one-third of nominees prior to Eisenhower's presidency were sitting judges at the time of their appointment, compared to three-quarters in the five decades that followed. Nemachek has found that 39 percent of candidates on the short lists of presidents from Hoover through Nixon had federal court experience prior to 1975, but over 75 percent did from 1975 to 2005.<sup>5</sup>

William Rehnquist and Lewis Powell, both nominated by Richard Nixon in 1971, are the last two justices in the modern era to bring no judicial experience to their seat on the Supreme Court. In fact, every justice appointed since that time has had state or federal judicial experience and, of those, about 90 percent (all but O'Connor) possessed federal appellate experience. Sixteen percent of all justices prior to 1953 were federal circuit judges at the time of their

appointment, rising to 43 percent in the 50 years that followed.<sup>6</sup> Even more striking, since 1954, 62 percent of Supreme Court nominees were drawn from the U.S. courts of appeals including since 1975 10 of 13 nominees—an astounding 77 percent. Clearly, “federal circuit court judges have become the ‘darlings’ of the selection process in modern times”<sup>7</sup> and federal appellate court experience “nearly a de facto qualification.”<sup>8</sup>

### Origins of the shift

What accounts for this dramatic shift in the career path of Supreme Court justices—from a primarily political path to an exclusively judicial one? When and why did the norm of prior judicial service develop, and is it likely to persist?

Most commentators point to the 1950s as the origin of this new norm. Congressional critics of the Warren Court claimed that a lack of judicial experience was a prime culprit in that Court's runaway activism and proposed, without success, a requirement of prior judicial service. Others give credit to President Eisenhower, who sought to distance himself from the cronyism that had characterized Truman's appointments and his own first appointment of Earl Warren. He subsequently insisted on judicial experience, and his next four nominees were indeed judges—one state court judge (Brennan) and three U.S. courts of appeals judges (Harlan, Whittaker, and Stewart).

It appears that Eisenhower's initial and informal step of requiring judicial experience has taken hold, as the percentage of nominees serving as a judge at the time of nomination has greatly increased, from 37 percent from 1900-1953 to 77 percent from 1954 to the present. Additionally, 13 of 14 nominees from 1975 to the present (all but Harriet Miers) were judges at the time of nomination, and all but 3 came directly from the U.S. courts of appeals.

### Not universal

We should, however, resist embracing a simplistic account of a uniform trend and a universal rule of prior

judicial service from the 1950s to the present, as the Epstein et al. study at times suggests. After all, only one of the four Supreme Court appointments by Presidents Kennedy and Johnson in the 1960s (Thurgood Marshall) had judicial experience. Although the “trend” reappears with Nixon, whose first four nominees (Burger, Haynsworth, Carswell, and Blackmun) were recruited directly from the federal appellate bench, his last two appointees (Powell and Rehnquist) had no judicial experience.

That the norm of prior judicial service has not been universally followed is also evident in the nomination decision making of Richard Nixon, Bill Clinton, and George W. Bush. For example, for his final two vacancies created by the retirements of Justices Black and Harlan, Nixon did consider four judges, but broadened his net to include a municipal-bond lawyer (Herschel Friday), two members of Congress (Senator Robert Byrd and Congressman Richard Poff), a distinguished private attorney (Lewis Powell), and a U.S. assistant attorney general (Rehnquist). In fact, Nixon first offered a seat to Congressman Poff, who declined in anticipation of a rough Senate fight due to some “civil rights skeletons,”<sup>9</sup> and ultimately selected Powell and Rehnquist, neither of whom possessed judicial experience.

President Clinton sought explicitly to avoid his Republican predecessors' practice of drawing exclusively from the bench. For his first Court vacancy, Clinton turned to three prominent politicians—New York governor Mario Cuomo, Secretary of Educa-

4. Epstein, et al., *supra* n. 2, at 932-3.

5. Christine Nemachek, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH. (Charlottesville: University of Virginia Press, 2007).

6. Epstein at al., *supra* n. 2, at 917.

7. David Alistair Yalof, PURSUIT OF JUSTICES 170. (University of Chicago Press, 1999).

8. Joel B. Grossman, *Paths to the Bench: Selecting Supreme Court Justices in a "Juristocratic" World*, in Kermit L. Hall and Kevin T. McGuire, eds., INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 162. (Oxford University Press, 2005).

9. Henry J. Abraham, JUSTICES, PRESIDENTS, AND SENATORS 14. (Rowman & Littlefield, 1999).

tion and former South Carolina governor Richard Riley, and Secretary of the Interior and former Arizona governor Bruce Babbitt—each of whom declined his invitation. For his second appointment opportunity, Clinton again sought to select a candidate with political experience, offering the position to Senate Majority Leader George Mitchell who also declined. (Perhaps the proper research question is why contemporary politicians refuse to serve rather than why they aren't asked.) Clinton next considered several judges as well as executive branch officials, such as Bruce

service with his subsequent Supreme Court nominations. After all, Bush claimed to have “come to agree with the late Chief Justice William Rehnquist, who wrote about the importance of having judges who are drawn from a wide variety of professional backgrounds.”<sup>10</sup> Additionally, several Senate leaders from both parties—Arlen Specter, Bill Frist, Patrick Leahy, and Harry Reid—urged Bush to break from recent tradition and look beyond the judiciary in searching for Supreme Court nominees, again suggesting that judicial experience is not an inviolable

ice, the Miers experience suggests that perhaps they do so at some peril, risking a sanction for their unconventional, i.e., non-judicial, choice (although Miers had other factors working against her as well).

The existence of an alternative partisan explanation presents another challenge to the thesis of a universal and uniform norm of prior judicial experience since the 1950s. The shift toward recruiting nearly exclusively from the bench could be due to Republicans winning nearly 2/3 of presidential elections since 1952 and a strong Republican preference for judicial experience. Such a preference could have very well developed out of Republican anger over Warren's liberal activism, anger that was subsequently reinforced by periodic disappointment with other Republican appointees lacking judicial experience, such as Powell and federal judicial experience such as O'Connor. The conservative revolution in constitutional policy that the GOP had hoped to achieve through its Supreme Court appointments did not occur as fully and quickly as expected, and frustrated Republican presidents may have turned to the federal courts for a more reliable source of judicial conservatism.

There is indeed strong statistical support for the existence of a modern Republican preference for judicial experience for Supreme Court candidates. Since 1930, 81 percent of Republican presidents' nominees but only 33 percent of Democratic presidents' nominees were judges at the time of their appointment. Additionally, 63 percent of the individuals nominated by Republican presidents during this time came directly from the U.S. courts of appeals, compared to only 24 percent by Democratic presidents.

This huge partisan gap diminishes but remains significant when comparing nominees since 1950: 83 percent of Republican presidents' nominees and 50 percent of those of Democratic presidents served as judges at the time of nomination, with 70 percent of Republican presidents' nominees but only 38 percent of Democratic

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Babbitt, Attorney General Janet Reno, Assistant Attorney General Walter Dellinger, and Solicitor General Drew Days III. His ultimate selection of two federal circuit court judges should not obscure Clinton's strong desire to abandon the not-so-ironclad rule of selecting only individuals with judicial experience.

Finally, George W. Bush surprised many with his selection of the judicially-inexperienced Harriet Miers to fill Justice O'Connor's empty seat. The president's long-time attorney and personal aide ultimately withdrew her nomination after criticism mounted, including charges of cronyism and, from the president's own conservative allies, complaints about Miers' slender credentials and undistinguished record.

There was at least some expectation that President Bush would again disregard the norm of prior judicial

rule. Nonetheless, Bush turned to the federal appellate bench for his next two nominations, selecting John Roberts and Samuel Alito.

### **An uneven pattern**

Overall, this examination of recent nomination decision making reveals a more uneven pattern of presidential adherence to the norm of previous judicial service than most studies suggest. Of course, it is important to acknowledge the difficulties that presidents deviating from the norm have experienced. Politicians recently tapped for a possible seat on the Court have frequently resisted in part due to anticipated confirmation trouble, itself a possible consequence of the judicial experience norm. Similarly, Bush was forced to withdraw his nomination of Harriet Miers at least partially because of her limited knowledge of and facility with constitutional law issues. While recent history shows that presidents sometimes ignore the norm of prior judicial serv-

10. Michael Doyle, *How to Judge a Nominee?* Modesto Bee, October 4, 2005.

presidents' nominees coming directly from the U.S. courts of appeals. The disparity then disappears entirely for Supreme Court nominations since 1968; in fact, all of the nominees of Democratic presidents since 1968 came directly from the bench compared to 83 percent for Republican presidents. The problem is that the latter comparison is based on only four Democratic nominations during this time (Fortas for chief justice, Thornberry, Ginsburg, and Breyer), undermining empirical testing and certainty. While it is clear that President Clinton made a deliberate attempt to break with the Republican practice of recruiting from the bench, we cannot state with confidence that future Democrats will embrace his approach. Only future Democratic victories in presidential elections will allow us to judge how partisan or universal is the new norm of prior judicial service.

### Alternate explanations

Professor Yalof offers several reasons why Democratic and Republican presidents alike have been more likely to recruit from the federal appellate bench in recent decades, with the implication that we have a universal rather than a partisan norm.<sup>11</sup> First, Yalof argues, presidents have turned to federal circuit judges since their opinions offer an excellent source of evidence for predicting their future decisions on the Court. This is a plausible explanation, particularly in light of the fact that we have witnessed presidents grooming Supreme Court prospects by placing them on high-profile circuit courts. However, the position that service on a federal appellate court improves the president's predictive abilities receives only limited support, with counter-examples, such as Blackmun, Stevens, and Souter, and mixed results from empirical studies.<sup>12</sup> Most significantly, Segal and Spaeth offer contrary evidence, with a much lower correlation between nominee ideology and subsequent Court votes for those with judicial experience (.67) than those without (.92), leading

them to suggest that lower court experience might even provide "disinformation."<sup>13</sup> Another problem with Yalof's explanation is that presidents have always cared about the positions their nominees will likely take on the Court. Without more, Yalof has failed to provide a convincing explanation for the dramatic *increase* in recruitment from the U.S. courts of appeals in recent years.

Yalof also speculates that the current political climate has made the federal judiciary an appealing recruitment pool, with federal circuit court judges more easily winning Senate confirmation because they are less controversial. After all, they are less visible compared to politicians, have already survived FBI and ABA scrutiny, enjoy political support from home-state senators and party leaders, and typically chart a moderate policy course. Additionally, and unlike elected officials, federal appellate judges have not staked out positions on contentious political issues; instead, they are merely applying Supreme Court precedent. While we can make educated guesses about circuit judges' ideological leanings, we cannot state with a high degree of certainty that they will or will not reverse key precedents like *Roe v. Wade*.

Problems exist with this alternate explanation as well. First, it is not universally true that federal circuit judges are uncontroversial and easily confirmed in the Senate. Robert Bork was rejected by the Senate, Thomas won confirmation by the narrowest of margins, and there was considerable opposition to some of the judges floated by the Bush Administration as possible Supreme Court nominees, such as Michael Luttig. Additionally, there is again the question of timing: why have presidents *recently* become either more concerned with candidate confirmability or more convinced that federal judges score highly on that scale?

It is here that Yalof may be on to something. For example, a recent study by Epstein, Lindstadt, and Segal found that the Senate's heavy

reliance on ideology in evaluating Supreme Court nominees did not, as the conventional wisdom claims, begin with the Bork nomination in 1987.<sup>14</sup> Instead, the authors point to the 1950s for the origin of vigorous ideological review by the Senate. Is it mere coincidence that this is also when we see presidents turning more frequently to the bench as a primary recruitment pool?

Additionally there are the recent developments of divided government and ideological polarity. Partisan gerrymandering, the Republican realignment in the South, and an influx of former House members into the Senate have produced substantial party polarization in Congress. A clear sign is the recent surge in party-line voting, increasing from about 40 percent of all roll-call votes in the early 1970s to 60 percent in the late 1990s and approaching 70 percent in both 1995 and 2003.<sup>15</sup> Reinforcing this polarization and intensifying partisan rivalries further are several additional developments—divided government, the result of a record-high 80 percent of elections from 1982 to 2000; a rough partisan balance on the federal bench (at least at the start of George W. Bush's presidency); and electoral parity between the parties, producing narrow majorities and fluctuating partisan control of Congress and slim and/or plurality victories in presidential races.

11. Yalof, *supra* n. 7, at 170-1.

12. John B. Gates and Jeffrey E. Cohen, *Presidents, Supreme Court Justices and Racial Equality Cases: 1954-1985*, 10 POL. BEHAV. 22 (1988); David W. Rohde and Harold J. Spaeth, *SUPREME COURT DECISION MAKING* 107-110, 114-115. (H. W. Freeman, 1976); John Szmer and Donald R. Songer, "The Role of Information in the Selection of Supreme Court Justices," Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, April 25-28, 2002.

13. Jeffrey A. Segal and Harold J. Spaeth, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 323-4. (Cambridge University Press, 2002).

14. Lee Epstein, Rene Lindstadt, and Jeffrey A. Segal, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296-307 (2006).

15. Michael Comiskey, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 17 (University Press of Kansas, 2004); Jon Bond, Kevin B Smith, and Richard A. Watson, *THE PROMISE AND PERFORMANCE OF AMERICAN DEMOCRACY*, 7th ed., 202. (Thomson Learning, 2006). Party-line voting is when a majority of one party opposes a majority of the other party.

## A partisan environment

It is in this high-stakes and intensely partisan environment that presidents filling a Supreme Court seat must operate. They must struggle to find a nominee who is both ideologically suitable and likely to be confirmed in the Senate. Recent service on a U.S. court of appeals is certainly no guarantee of confirmation or an easy confirmation process, but recent presidents apparently believe that it contributes to confirmation success. Nemachek and Wahlbeck found that presidents are more likely to choose candidates with political experience

that end with his narrow election victory in 2004 and a popular vote loss in 2000. He has clearly succeeded in executing a conservative shift in the lower federal courts,<sup>18</sup> though it has not always been easy with periodic hostility and delay from Senate Democrats. A Supreme Court nomination raises the stakes even further and, thus, intensifies the confirmation challenge. Nominating a well-respected U.S. court of appeals judge (Roberts and Alito) or an aide without a paper trail (Miers) has been Bush's adaptive strategy. The former approach succeeded, while

Supreme Court nominees.) The next important question is whether it matters if the norm of prior judicial service does persist.

## Does background matter?

In 2005, President Bush nominated Harriet Miers to replace Justice O'Connor. Because of her lack of judicial experience and, to many, her slight credentials, the nomination prompted a vigorous debate about the proper qualifications of Supreme Court justices. Included were questions about the importance of judicial experience and the value of diversity on the Court. Most scholars agree that judicial experience is no guarantee of success or greatness, nor does it reduce or eliminate the influence of ideology on a justice's decisions. On the other hand, a number of studies confirm that career background and diversity both matter significantly, with many commentators extolling the virtues of occupational heterogeneity on the Court.

Congress regularly considers requiring Supreme Court justices to have five or ten years of previous judicial experience. All of these bills have wisely been rejected. After all, some justices uniformly ranked as great—Marshall, Story, Taney, Hughes, Brandeis, Stone, Frankfurter, and Warren—came to the bench with no judicial background, while justices viewed as failures include the judicially experienced Van DeVanter, Vinson, Minton, and Whittaker. As Frankfurter persuasively argued,

without qualification...the correlation between prior judicial experience and fitness for the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo.<sup>19</sup>

Professor Silverstein's concern on the issue of qualifications is that, in the current selection climate of confrontational politics, prominent figures with qualities that make for judicial greatness will likely be ruled out. Empirical support for this claim

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during unified government and judicially experienced candidates during divided government.<sup>16</sup> Also directly on point are Nemachek's findings that partisan activism significantly reduces a candidate's chances for presidential selection and that presidents are more likely to select candidates with political experience when their party controls the Senate and those without political experience when the opposition party is in control of the Senate.<sup>17</sup>

Choosing judges rather than politicians would thus represent a logical response to contemporary political pressures. George W. Bush sought to shift the federal judiciary in a conservative direction, but did not receive an electoral mandate for

the latter did not. With Democrats regaining control of the Senate in 2006, Bush now faces an even greater challenge and a further narrowing of the road.

This preliminary analysis suggests that the norm of prior judicial service is very strong, but not inviolable or universal. Additionally, there are several plausible explanations for its development that are typically overlooked: fierce ideological review by the Senate, Republican dominance in national elections, ideological polarization, and rough electoral parity between the parties frequently producing divided government. Whether the norm will persist or how long it will persist will depend on the continuance of the pressures giving rise to it. An excellent test of the continued existence and vitality of the norm of prior judicial experience will be an extended period of the counter-conditions of Democratic control, unified government, and party moderation. (I find highly doubtful, and thus do not list as a counter-factual, a significant reduction in the future in the Senate's reliance on ideology in evaluating

16. Christine Nemachek and Paul J. Wahlbeck, "The President's Choice of a Supreme Court Nominee," paper presented at the 1998 annual meeting of the Midwest Political Science Association, Chicago, Illinois.

17. Nemachek, *supra* n 5.

18. Robert A. Carp, Kenneth L. Manning, and Ronald Stidham, *The Voting Behavior of George W. Bush's Judges: How Sharp a Turn to the Right?* in Samuel Kernell and Steven S. Smith, eds., *PRINCIPLES AND PRACTICE OF AMERICAN POLITICS*, 3rd ed., 429-447. (Congressional Quarterly Press, 2007).

19. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

is mixed at best. Comiskey's review of various scholarly surveys rating Supreme Court justices revealed that the justices appointed since 1967 are not generally less competent than in the past, although there do seem to be somewhat fewer "great" justices. Segal and Epstein, however, observe that qualifications continue to matter substantially both in nomination and confirmation decisions. Since 1953, only a few nominations (Haynsworth, Carswell, Thomas) triggered newspaper editorials raising questions of qualifications, and highly-qualified nominees receive considerably more confirmation votes in the Senate.<sup>20</sup>

A judicial background also does not insure similar or less ideological behavior. As Baum points out,<sup>21</sup> William Brennan and Earl Warren were both liberal activists, though one had considerable judicial experience and the other had none. Justices Frankfurter and Harlan were frequent dissenters from and critics of that activism but, again, one was judicially experienced and the other was not. Reinforcing Frankfurter's point, all four have been highly ranked as successful justices by scholars. A shared judicial background additionally does not prevent justices from disagreeing, which is strongly evident on the current Court. All nine justices were previously U.S. court of appeals judges, yet they disagreed in the 2006 Term a majority of the time and divided 5-4 in fully a third of the Court's decisions.

Additionally, there is little evidence to support the view that judicially-experienced members are less prone to ideological behavior. Although Tate's 1981 study found a modest link between prior judicial experience and liberal voting,<sup>22</sup> most studies have failed to confirm a relationship between judicial background and liberal or conservative voting.<sup>23</sup> The eminent Supreme Court Justice Benjamin Cardozo provides the logical basis of this conclusion, observing that judges are of course

subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure

reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of man, do not turn aside in their course, and pass the judges by.<sup>24</sup>

While prior judicial service does not insure greatness, agreement, or neutrality, it is not without significance. Many, though not all,<sup>25</sup> empirical studies support the conclusion that career experiences are a critical factor affecting how justices understand and decide cases. For example, Ulmer found that Supreme Court justices with political experience were more likely to dissent while those with federal administrative experience had more conservative voting patterns.<sup>26</sup> Schmidhauser linked prior judicial experience on the Court with reduced willingness to follow precedent, certainly contrary to the expectations of advocates of a judicial experience requirement.<sup>27</sup>

Another study found that freshmen Supreme Court justices without prior judicial service are more likely to experience "acclimation effects," characterized by voting inconsistencies.<sup>28</sup> Several studies have confirmed that justices with prosecutorial experience vote more conservatively and less favorably to criminal defendants.<sup>29</sup> Epstein et al.'s review of 22 studies examining the linkage

between career background and judicial choice on a variety of courts concluded that

the near uniformity of the results is overwhelming. Whether the authors approached career path in specific ways (e.g., legal experience representing management) or more general ones (e.g., any experience in private practice) or whether they sought to account for the vote, legal reasoning, or some other feature of judicial decision making, they generally found that career experience influenced judicial decision making.<sup>30</sup>

The Epstein et al. study itself emphasizes how occupational heterogeneity affects decision making in a variety of settings, such as markets, democracies, and common law adjudication. The authors persuasively argue that a lack of heterogeneity there and on collegial courts like the U.S. Supreme Court produces "suboptimal" decision making, as both the diversity of inputs and the "experimentation, inquiry, and testing" of them is limited. It is for this reason that they urge the president and Senate to aim for diversity in making future appointments, taking into account existing career backgrounds and "avoid[ing] excessive duplication" of any particular occupation, whether law professor, private attorney, legislator, or judge.

Professor Vermeule makes a similar argument, urging the appointment of lay justices or at least "dual competent" justices with expertise both in the law and another substan-

20. Lee Epstein and Jeffrey A. Segal, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (Oxford University Press, 2005). See also Epstein et al., *supra* n 14.

21. Baum, *supra* n. 3, at 59.

22. C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices*, 75 AM. POL. SCI. REV. 355 (1981).

23. John D. Sprague, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT* (1968); C. Neal Tate and Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, 1916-88, 35 AM. J. POL. SCI. 460 (1991).

24. Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 167-68. (1921).

25. Gerard S. Gryski, et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986); Michael W. Giles and Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917 (1975); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966); Sheldon Goldman, *Voting Behavior on the*

*United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975).

26. S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580 (1970); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 MIDWEST J. POL. SCI. 622 (1973).

27. John R. Schmidhauser, *Stare Decisis, Dissent, and the Backgrounds of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L. J. 194 (1962).

28. Sandra L. Wood, Linda Camp Keith, Drew Noble Lanier, and Ayo Ogundele, "Acclimation Effects" for Supreme Court Justices: A Cross-Validation, 1888-1940, 42 AM. J. POL. SCI. 690-697 (1988).

29. Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in Robert L. Peabody, ed., *CASES IN AMERICAN POLITICS* (1976); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333 (1962); Tate and Handberg, *supra* n. 23.

30. Epstein et al., *supra* n. 2, at 956.

tive field or professional discipline; he predicts that compositional diversity would expand the range of cases properly considered by the Court, improve the collective reasoning process, and reduce decision making error, particularly in the class of cases where non-lawyers are more competent decision makers.<sup>31</sup>

I find these arguments to be quite compelling. What they overlook, however, is the potential problems posed not just by homogeneity but by the absence of strong political experience among the Court's members.

### Value of political experience

It is a simple but powerful truth that membership matters in all organizations. The set of experiences and skills possessed by members will enable the organization to perform some tasks well, some poorly, and others not at all. The question here is, by selecting federal appellate judges rather than prominent politicians, for what tasks are we well-equipping and ill-equipping the Court? I have (informally) found a good deal of scholarly interest in this question and a strong sense that it *must* matter, but surprisingly little serious analysis. In the discussion that follows, I attempt to move us forward by identifying and exploring several areas of concern, examining the likely effects of political inexperience on the Court's capacity to serve a representative function, make policy effectively, and maintain its power and relevance in a system of divided government. I make no claim that this exhausts the possible effects of this significant member-

ship transformation and invite others to join this inquiry.

### Representativeness

One area likely to benefit from greater political experience is the Court's representational qualities. Some might claim that this should hardly be our primary goal in selecting the Court's membership. However, we must acknowledge the powerful evidence that a justice's personal preferences strongly influence her decisions and that the political views of new members on the Court are a significant source of legal policy change.<sup>32</sup> Justices whose views are representative will render decisions that are representative. This result should be welcomed by those concerned with the seemingly undemocratic power of judicial review. When the justices' views anchoring their decisions have been consciously chosen and sanctioned by elected officials, we can hardly accuse the Court of being a counter-majoritarian institution imposing its elitist views against the wishes of the people.

Insisting that nominees possess political experience would enhance the Court's representational qualities primarily as a product of enhanced visibility and transparency in the selection process. Suppose, for example, that a federal law was enacted requiring that Supreme Court nominees possess federal or state legislative experience (thus making all of its current members ineligible!). The result would be that all candidates would come before the Senate with a public record of position-taking on contemporary issues and a peer group of legislators able to evaluate a nominee's views and qualifications.

Such a requirement would make it more difficult for the president to sneak politically-unacceptable individuals onto the Court. The Senate, and by implication the public, would no longer have to accept the president's offer of "a pig in a poke." He would be denied the luxury of nominating stealth candidates, such as David Souter, with a weak or nonexistent

record on the issues of the day, and nominees themselves would find it more difficult to evade senators' questions about their views. Senators, interest groups, the media, and the public would have more information at their disposal for purposes of evaluating nominees. The result would be a more transparent process, candidates whose ideological views are more readily discernible and, thus, appointees whose views are more consciously acceptable to the president, Senate, and public. The Court would thus become more reliably representative.

More frequent and regularized turnover would also have a positive effect on the Court's representational qualities, enabling "fresh blood" and new viewpoints to be added to the Court.<sup>33</sup> Recent Courts composed of former judges have experienced lengthening terms and greatly reduced turnover. It certainly makes sense that a judge who has reached the pinnacle of her career is unlikely to leave that position, except upon retirement; in contrast, prominent politicians may still avail themselves of intriguing career opportunities.

Regardless of the precise causal relationship, it is a fact that recent Courts are strongly characterized by the twin developments of greater judicial experience and longer terms of service. Thomas Marshall's research makes those developments quite problematic for those concerned with Court responsiveness. Marshall reports that the odds of a 50-year-old justice with judicial experience agreeing with public opinion is 66 percent, compared to 71 percent for those without such experience. However, at age 80, those differences become substantial, with the odds of judicially-experienced justices agreeing with public opinion dropping to 44 percent, compared to 69 percent for justices lacking judicial experience.<sup>34</sup> Judicial experience thus appears to worsen the already harmful consequences of long terms and reduced turnover; both inhibit a regular renewal of representation by the Court.

31. Adrian Vermeule, "Should We Have Lay Justices?" *Harvard Public Law Working Paper No. 134* (<http://ssrn.com/abstract=943369>). See also Arthur S. Miller and Jeffrey H. Bowman, *Break the Monopoly of Lawyers on the Supreme Court*, 39 VAND. L. REV. 305-320 (1986) and John Denvir, *Proudly Political*, 37 U. S. F. L. REV. 27-35 (2002).

32. Segal and Spaeth, *supra* n. 13; Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3 (1992).

33. Roger Cramton and Paul Carrington, eds., *REFORMING THE SUPREME COURT*. (Durham, NC: Carolina Academic Press, 2006).

34. Thomas Marshall, "Term Limits for Supreme Court Justices: Real Old and Out of Touch?" Paper presented at the Annual Meeting of the Western Political Science Association, Las Vegas, Nevada, March 8-10, 2007.

## Policy effectiveness

Another area of concern is policy effectiveness. Currently, the Court's members have quite limited real-world experience, having come primarily and often exclusively from academic law and/or the appellate courts. As Stuart Taylor notes, few recent justices have actually practiced law and, even as judges, only Souter can claim to have presided over a civil or criminal trial. The current justices "have never cross-examined a lying cop or a slippery CEO, never faced a jury, never slogged through the swamps of the modern discovery process" and have "absolutely no idea what business litigation in America now looks like."<sup>35</sup> It should not be surprising when their decisions prove nonsensical and even harmful to the justice system over which they preside, as many believe is currently the case regarding criminal sentencing, for example.

Occupational heterogeneity as Epstein et al. recommend—having some justices come from private practice and state trial courts—would serve as a direct and desirable corrective to this particular problem. The appointment of politicians, particularly legislators, would likely contribute in a positive way as well. Legislators have typically accumulated a broad range of real-world experiences and spent their careers talking with constituents from many walks of life about their problems. They are not as disconnected and isolated from the world as most law professors and higher court judges, have grappled with a variety of issues in the electoral and legislative spheres, and care about and understand the implications of their decisions. Additionally, politicians are experienced in negotiating among competing interests and viewpoints and working on satisfactory policy solutions.

Such political experience and skill are invaluable throughout the Court's decision making process—picking the right battles, asking the right questions, crafting effective answers, knowing how to build workable coalitions inside and outside the Court, and sensing when to adjust or retreat

as conditions require. We mustn't forget that the Court's function is political in the strongest sense. It must decide difficult and contentious political issues, yet it lacks traditional mechanisms like elections for tapping into or building political support for its choices. Furthermore, compliance with the Court's rulings is highly dependent on the willingness of other government officials to fund and enforce them. It takes political experience and skill to make the sorts of judgments that are critical for policy success. A Court composed exclusively of appellate court judges with limited political experience will be more poorly staffed with regard to these varied and vital tasks.

The politically-experienced Courts of the mid-twentieth century demonstrated considerable political skill and sensitivity in navigating the tempestuous waters of civil rights. For example, the *Brown* ruling was delayed until unanimity was assured, with the justices reasoning that a divided Court would more likely empower Southern resistance. The Court deliberately crafted an opinion that was short and non-legalistic and thus publishable in the nation's newspapers. It took the form of a public appeal rather than a cogent legal argument whose reasoning lawyers and academics would admire.

Additionally, the Court initially withdrew in the implementation phase, deferring to local school authorities and federal district courts. Driven by political necessity, it allowed the conflict to play itself out, intervening infrequently at first but with strength and consistency when policy support arrived from the other branches in the mid- to late-1960s. The Court also focused its strongest efforts on the most important policy areas—education, voting, and housing—while adopting evasive strategies in others, such as the anti-miscegenation and sit-in cases. After all, why alienate the South further and risk the Court's efforts in policy areas that were far more crucial to improving equal opportunity and quality of life for African-Americans? These strategic choices could

be and have been attacked as indefensible in terms of neutrality and consistency in applying constitutional principle. However, they can also be defended as shrewd political tactics effectively designed to accomplish a higher policy mission, one after all that had been planted on the Court by elected officials.<sup>36</sup>

The reapportionment cases provide another example. Legal scholars predicted disaster for the Court's intervention in this "political thicket." They expressed concern about the absence of judicially-manageable standards, yet the Court devised the simple and appealing one person-one vote rule. Warnings that the Court's apolitical image and legitimacy would be destroyed also proved baseless.

It is impossible (nor do I wish) to defend each and every judgment made by the politically experienced justices of the Warren Court as wise policy and sound politics. It certainly made mistakes, no doubt intervening too aggressively across too broad a range of policy areas. Particularly in the criminal justice area, it often disparaged and displaced local expertise in policy design, with the overly specific *Miranda* warning as a prime example. And, in the end, it provided considerable ammunition for Nixon's presidential election campaign, leading rather quickly to a more conservative Court that offered less support to civil rights and civil liberties, an outcome that Warren Court liberals would not have favored.

Although more is needed to answer this historical and comparative question, logic and some initial anecdotal evidence suggest that recent Courts composed of justices whose primary occupational experiences are teaching law school or sitting on federal appellate courts are less effective policy makers than the politically experienced Courts of the

35. Stuart Taylor, Jr., *Remote Control*, *The Atlantic Monthly*, September 2005, at 37-39.

36. Kevin J. McMahon, *RECONSIDERING ROOSEVELT ON RACE*. (University of Chicago Press, 2004); Lucas A. Powe, Jr., *THE WARREN COURT AND AMERICAN POLITICS*. (Harvard University Press, 2000).

past. After all, they will not possess practical legal experience that would enhance their design of civil and criminal justice policies. Politically inexperienced justices are less likely to have that keen sense for when and how to intervene on sensitive political issues or how to accomplish more effectively the policy goals they (and elected officials) have set for the Court. Political experience is no guarantee that mistakes won't be made, but the chances of policy failure and error should be reduced.

Hughes, Powe argues, had judgment, largely as a product of their political backgrounds with both having served as governors of large states (California and New York respectively). Their political skills served them well on the Court as they navigated the difficult waters of the New Deal constitutional crisis and the anti-Communist hysteria and racial violence of the 1950s and 60s. In contrast is the Rehnquist Court which, in the view of many, displayed a “muscular judicial assertiveness,”<sup>39</sup>

bar association meeting.

David Garrow speculates that, in contrast to the more aggressive and reckless Rehnquist Court, a Court alternatively composed of “experienced national political figures” would have had a greater appreciation of when and how to exercise its power and would have been more measured and astute in its approach. Prominent politicians, like those appointed by FDR and Truman for example, would be knowledgeable about congressional and executive branch politics, would know many of those officials personally, and would likely have a greater understanding and appreciation of their tasks, processes, and policies. For example, many have attributed Justice Breyer's reluctance to strike down federal laws—he was the least likely to do so on the Rehnquist Court—to his Capitol Hill experience as chief counsel to the Senate Judiciary Committee.

Adding to the High Bench some justices who had formerly served in Congress would in fact bring much to the Court's decision making, particularly its deliberative processes. Their expert insights would benefit the Court's less politically experienced members across a variety of cases, and their familiarity with congressional workings would prove especially helpful in cases of statutory interpretation and legislative powers. For example, having congressional experience on the Court when the *Chadha* decision was made would likely have led to a different and more realistic result. The Court in *INS v. Chadha* (1983) struck down the legislative veto that Congress had used for decades to insure legislative oversight of executive agency decision making. As Louis Fisher observed,

The decision far exceeded the Court's understanding of executive-legislative relations. Through an endless variety of formal and informal agreements, congressional committees will continue to exercise control over administrative decisions. Neither Congress nor the executive branch want the static model of government offered by the Court, which placed upon Congress the requirement of acting through both Houses and then presenting a bill or resolution to the president for his signa-

## Politically inexperienced justices are less likely to have that keen sense for when and how to intervene on sensitive political issues.

### Enhanced judgment

Chief Justice Rehnquist expressed his concern that a homogeneous Court drawn predominantly from the federal judiciary would become more like the career judiciaries in civil law countries and would accordingly lose its high respect and independence.<sup>37</sup> Though unclear about the logical chain of events that would lead to this outcome, Rehnquist has a point. A politically-inexperienced Court seems less well-equipped to make decisions that protect its power and institutional relevance and that preserve its proper place in a system of federalism and co-equal branches, a final area of concern.

As Professor Powe has observed, good politicians possess “judgment” which helps them to know “how far they can go, and when they have reached a good stopping point.”<sup>38</sup> Earl Warren and Charles Evans

arrogantly exercising its power, particularly in restricting congressional law making in a number of Tenth and Eleventh Amendment and commerce clause cases.

That Court was also accused of acting recklessly, without regard to political realities and risks. The most obvious example is *Bush v. Gore*, with the Court's shocking and blatantly partisan intervention in the 2000 presidential election. In *Clinton v. Jones*, the Court astonished many observers with its completely unrealistic claim that allowing Paula Jones' lawsuit to go forward would not act as a significant drain on the president's time or threaten his duties (with Justice Breyer's concurrence offering a more cautious and realistic assessment).

In another example, it is doubtful that the Court majority anticipated the strong populist reaction against its 2005 *Kelo* eminent domain decision, leading to two quick and surprising responses: voters in eight states in November 2006 elections restricting the use of eminent domain and Justice Stevens offering an apology for his *Kelo* opinion at a

37. William J. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, discussed in Epstein et al., *supra* n. 2, at 906-907.

38. Linda Greenhouse, *Picking Nonjudge Justice Would Return to Tradition*, New York Times, July 14, 2005.

39. David J. Garrow, *The Once and Future Supreme Court*, American History, February 2005, at 29-36.

ture or veto. In one form or another, legislative vetoes will remain an important mechanism for reconciling legislative and executive interests. The accommodations fashioned by committees and agency officials will easily trump the doctrinaire and impractical rules announced by the Court.<sup>40</sup>

In fact, Congress has enacted hundreds of legislative vetoes since *Chadha*, making the Court a rather foolish and irrelevant actor in this area. More of such missteps, whether the result of arrogance or imprudence, could hurt the Court and the balance of power in the national government. Adding justices with past experience in Congress would be highly beneficial. As John Dean correctly points out, “when an individual moves from branch to branch, he or she takes knowledge and experiences along...only strengthen[ing]...the system” of checks and balances.<sup>41</sup> Of course, the same dynamic should occur with state legislative experience being added to the Court, enhancing its understanding of and sensitivity to issues of federalism and state power.

## Conclusion

The process and criteria we employ

for selecting the Court’s members are directly tied to its democratic legitimacy and its policy and institutional effectiveness, facts we too often ignore. Monitoring the health of the selection process and assessing the consequences of changes in it is thus a critical task for legal scholars. This essay seeks to sound the alarm with regard to a notable dual development—the “judicializing” and depoliticizing of the Supreme Court’s membership. On the one hand, this trend may not be as uniform as originally thought, being likely rooted in political conditions present in the last half century: Republican domination in presidential elections, ideological polarization, and divided government. It nonetheless represents a profound change from the dominant historical pattern of selecting prominent politicians. Many important questions remain, especially regarding the consequences of this compositional shift. My own concern lies with the effect of reduced political experience on the Court’s representative character, policy effectiveness, and sys-

temic relevance.

While the Harriet Miers nomination received considerable criticism, it beneficially triggered a new and proper concern with whom and how we recruit for the High Bench. While agreeing with the commentators who urge the president to cast his net more widely, my concern is that experienced politicians are specifically included in that net. They can bring much to the Court’s deliberative processes, and their absence poses a risk to Court capacity. ❧

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40. Louis Fisher, *Judicial Finality or an Ongoing Colloquy?* in Mark C. Miller and Jeb Barnes, eds., *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 165. (Georgetown University Press, 2004).

41. John Dean, “When President Bush Chooses Supreme Court Appointees, He Should Look to Congress,” February 16, 2001 (<http://writ.news.findlaw.com/dean/20010216.html>)

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