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# INNOVATIONS DISGUISED AS TRADITIONS: A HISTORICAL REVIEW OF THE SUPREME COURT NOMINATIONS PROCESS

*Ronald D. Rotunda\**

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President Clinton's consideration of various candidates to replace Justices White and Blackmun consumed almost as much newsprint as his search for an attorney general. Given the age of some of the Justices, it would not be surprising if the President will have the opportunity to fill another vacancy before the end of his four-year term. We expect the media to report thoroughly on his possible choices, and rumors of his choices, long before he makes the actual nomination. Supreme Court appointments were not always such newsworthy events. The presidential and senatorial appointment process has changed much over the last two centuries, and recent innovations are often wrongly thought to be old traditions.

Appointment to the Supreme Court gives the recipient a very prestigious job, a powerful position, indoor work, no heaving lifting. While some things never change (the job is still indoors with no heav-

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\*\* *This abstract is a reprint of Professor James E. Pfander's introductory remarks.*

ing lifting), the position did not start off as either particularly powerful or prestigious, and so people often turned it down.<sup>1</sup> It was not uncommon in the early years for nominees to decline the honor, or to resign to take better jobs in the state judiciary,<sup>2</sup> or for Presidents to nominate a political opponent simply to get him out of the picture.

In grade school we learned that President Adams chose John Marshall to be the young nation's fourth Chief Justice. But fewer people recall that Marshall was Adams's *third or fourth* choice.<sup>4</sup> It was not unusual in those days to decline a position on the Supreme Court or to resign soon after appointment. By the time of Marshall's confirmation in 1801, the six-member Court had had ten individuals fill the five places reserved for Associate Justice, and four people had filled the one place reserved for Chief Justice.<sup>5</sup>

Washington, for example, nominated Robert Hanson Harrison for the first Court, but he rejected the honor in order to become Chancellor of Maryland.<sup>6</sup> Then Washington turned to James Iredell (thirt

1. Senator George Mitchell was reported to have withdrawn from consideration when President Clinton considered the vacancy created when Justice Blackmun retired. The news reports suggested various reasons. Senate Majority Leader Mitchell, who retired from the U.S. Senate in 1994, at the end of his term, explained that he wanted to focus his energies on passing comprehensive health care reform. However, whatever the reasons, it is clear that Mitchell did not withdraw from consideration on the ground that the job was not important enough.

2. John Rutledge, for example, resigned in 1791 so that he could become Chief Justice of the South Carolina Court of Common Pleas and Sessions. 4 RONALD D. ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE app. at 767 (2d ed. 1992).

3. When Postmaster General McLean objected to President Jackson's attempt to use the postal service for political purposes, Jackson "kicked McLean upstairs, which reveals something about the manner in which the court was regarded even as late as Jackson's time." CORTEZ A.M. ELLIOTT, THE JUDGES OF THE SUPREME COURT, 1789-1937: A STUDY OF THEIR QUALIFICATIONS 92 n.3 (1938).

4. 2 GEORGE L. HASKINS, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: HISTORY OF THE SUPREME COURT OF THE UNITED STATES FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 7 (Paul A. Freund ed., 1981).

Adams first appointed John Jay, who was then ending his term as Governor of New York, to the position of Chief Justice. The Senate quickly confirmed him, but Jay refused the appointment anyway. Adams then considered Justice Cushing (and apparently Paterson after Cushing); but Cushing and Paterson were already on the Supreme Court, and Adams began to question the wisdom of appointing from within the Court, which would require him to make another appointment to fill the vacancy that he would have created by the internal promotion. Adams then turned to Marshall. After that, some people tried to persuade Adams to replace Marshall's nomination with Paterson's, but Adams refused. The Senate, on January 27, 1801, unanimously confirmed Marshall. *Id.* at 103-04.

5. The four people who had filled the position for Chief Justice, by the time of Marshall's confirmation, were Jay, Rutledge, Ellsworth, and Marshall.

The ten people who had filled the five places reserved for Associate Justice, by the time Marshall had been confirmed, were Blair, Cushing, Rutledge, Wilson, Johnson, Iredell, Paterson, Chase, Washington, and Moore. 4 ROTUNDA & NOWAK, *supra* note 2, app. at 759.

6. Some secondary sources claim that Harrison decided to reject the appointment so because of his ill health. However, he did accept the state appointment, notwithstanding his health, and when he wrote Washington on October 27, 1789, he did not rely on that excuse. Instead, he offered these reasons:

Should I accept the appointment, I should be constrained to take the more unfavourable residence [the seat of government, then in New York]. The number of my family has been

eight years old), who accepted but died nine short years later in 1799.<sup>7</sup> Our first Chief Justice, John Jay (who was only forty-four years old when appointed), resigned six years later to become Governor of New York. John Rutledge, whom George Washington appointed in 1789, never actually sat with the Court and resigned in 1791. Washington made him the young nation's second Chief Justice in 1795, but he left the recess appointment later that year when the Senate rejected him. The following year, after one of his choices declined to serve, Washington appointed Senator Oliver Ellsworth as Chief Justice. In 1799, Ellsworth became ambassador to France, and the following year he also resigned from the Court.<sup>8</sup>

Nowadays, the health of a nominee would be considered quite relevant, but that was not always so. When President Washington chose candidates to the U.S. Supreme Court, he did not bother to make any inquiries into health. We now know that many of his choices were of poor health, yet they accepted. Jay, for example, had rheumatism; Blair complained of an inner ear problem that was so distracting that it eventually caused him to resign; Cushing developed a growth on his lip; Chase and Ellsworth both had the gout and renal stones.<sup>9</sup> It would be unheard of for a present-day candidate to refuse to share relevant medical data with the Senate Judiciary Committee, but Washington never even asked his nominees about their health.

Geographic diversity also used to be very important in the selection process. When President Madison sought a replacement for Justice Cushing of Massachusetts, he turned to Joseph Story only after Levi Lincoln—and then John Quincy Adams—declined the invita-

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increased [sic] by the unfortunate event of a Brother's death, and I consider myself under an indispensable necessity of attending to the affairs of his Children, as their friend and Guardian—both for their interest and for my own indemnity. These considerations, Sir, and one more, of still greater weight,—a distrust of my competency to the arduous & exalted Station—and the persuasion that my not accepting, will not be a matter of public detriment, induce me to determine that I cannot but decline the appointment.

Letter from Robert H. Harrison to George Washington (Oct. 27, 1789), reprinted in 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1779-1800, pt. 1, at 38 (Maeva Marcus et al. eds., 1985) [hereinafter DOCUMENTARY HISTORY].

During his life, Harrison declined a lot of appointments, even when in good health. In 1785, long before his death, he declined a congressional appointment to decide a land dispute. In 1787, he even refused to be one of Maryland's delegates to the Constitutional Convention of 1787. *Id.* at 33. On health issues, see *infra* text accompanying note 9.

7. Iredell stopped attending Court sessions starting with the August 1799 Term of the Court. See H.G. Connor, *James Iredell: Lawyer, Statesman, Judge*, 60 U. PENN. L. REV. 225, 252 (1912). But Iredell did not die until some months later, apparently on October 10, 1799. Surprisingly, no formal notification exists of the death of James Iredell. See DOCUMENTARY HISTORY, *supra* note 6, at 68.

8. See 1 ROTUNDA & NOWAK, *supra* note 2, § 1.2(a)-(b).

9. 1 JULIUS GOEBEL, JR., *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: ANTECEDENTS AND BEGINNINGS TO 1801*, at 553 & n.8 (Paul A. Freund ed., 1971).

tion.<sup>10</sup> All three individuals were residents of Massachusetts. That was no accident, because Madison insisted that the nominee be from a New England state. It is only quite recently that Presidents have, with regularity, ignored the custom of geographic diversity.<sup>11</sup>

Until modern times, it was unusual for two Justices to come from the same state,<sup>12</sup> but the news media paid little attention to that fact in 1981, when President Reagan appointed Justice O'Connor even though both she and Justice Rehnquist were residents of Arizona. When President Clinton replaced Justice White, he considered, but ultimately did not appoint, Secretary of the Interior Bruce Babbitt—even though he, like Chief Justice Rehnquist and Justice O'Connor, hails from Arizona. Bruce Babbitt's name was again mentioned as being on the short list of candidates who might replace Justice Blackmun. Although the President did not choose him, the fact that he would have been the *third* Justice from the same state did not appear to have been a stumbling block.<sup>13</sup> Nowadays, the simple fact is that geographic diversity and state residency are less important to people than other types of diversity, mainly race and sex, and perhaps religion. (For many years, commentators referred to a "Jewish seat" on the Court.)

As the Court has become more powerful, the nature of the confirmation hearing has also changed. To say that the earlier hearings were not as elaborate and public as today is, to say the least, an understatement. For example, on September 4, 1922, Justice John Hessin Clarke resigned from the Supreme Court. The next day President Harding nominated his successor, George Sutherland, and the Senate confirmed the lifetime appointment later that very same day.<sup>14</sup> In fact, for over a third of a century, from 1894 until 1930, the Senate never rejected a nominee, although there were some bitter confirma-

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10. Ronald D. Rotunda & John E. Nowak, *Joseph Story: A Man for All Seasons*, in 1990 JOURNAL OF SUPREME COURT HISTORY: YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 17 (1990).

11. E.g., GOEBEL, *supra* note 9, at 553 (pointing out that "proper geographic distribution of the posts" on the Supreme Court started with President Washington).

12. A rare exception was Hoover's third appointment—Cardozo from New York—although Justice Stone and Chief Justice Hughes were also from New York. Cardozo replaced Holmes of Massachusetts. The circumstances were unusual. Hoover, in 1932, was politically very weak, and Cardozo was very popular, someone who could get readily confirmed. The Senate approved him unanimously. See Ira H. Carmen, *The President, Politics and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 616 (1969).

Cardozo's nomination was "a violation of the long standing tradition that the membership of the Court represent as wide a geographic base as possible." *Id.* at 616. It was important that Senator Borah of Idaho supported Cardozo, even though Hoover was thinking of naming a westerner to the Court.

13. The President nominated, and the Senate confirmed, Judge Stephen G. Breyer of the First Circuit, a resident of Massachusetts.

14. 1 ROTUNDA & NOWAK, *supra* note 2, § 2.7, at 109.

tion fights.<sup>15</sup> A modern president never would assume that Senate confirmation is assured. Yet, until quite recently, the Senate confirmation process was usually brief. For example, in 1969, the Democratic-dominated Senate confirmed Warren Burger only nineteen days after President Nixon had nominated him.<sup>16</sup>

Until 1929, the Senate had a rule that all nominations would be considered in executive session unless two-thirds of the senators voted otherwise. Over the years, as the media began to look at nominees more actively, the Senate began to reconsider its policy of conducting confirmation hearings and debates on the Senate floor in private. In 1929, the Senate changed its policy so that now the default rule is public debate unless a majority votes otherwise.<sup>17</sup> Before that, this century saw open debate only in the very public and extended debate over Justice Brandeis (in which the opposition laced its rejection of his social activism with extensive anti-Semitic rhetoric)<sup>18</sup> and in the controversy over the nomination of Justice Stone.

The Stone controversy is interesting because it marked the first time in history that a Supreme Court nominee ever personally appeared before the Senate Committee considering the confirmation of the nominee. Until that time, the nominee might send telegrams or other written communications to the Committee in order to respond to issues, but the nominee himself would not appear. Even Justice Brandeis did not appear personally to respond to ethics and other charges (though he did have an informal dinner meeting with two senators who had doubts about his nomination).<sup>19</sup> Until the Stone nomination, if a candidate did ask to appear in person, the Committee would simply deny the request.<sup>20</sup>

The Stone appointment changed all that. The circumstances were unusual. Coolidge nominated Stone on January 25, 1925, and the Senate Judiciary Committee approved him *unanimously*. As was the custom, Stone did not appear before the Committee. Then, Senator

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15. The confirmation battle over Justice Brandeis, *see infra* note 18 and accompanying text, had the characteristics of a major political campaign. *See* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1151 (1988). Professor Freund told me some years ago that when the media spends a lot less attention on Supreme Court nominees, that will be a sign that civilization has progressed.

16. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1214 (1988).

17. Freund, *supra* note 15, at 1157.

18. *See, e.g.*, ALEXANDER M. BICKEL, 9 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21, at 357-92 (Paul A. Freund & Stanley N. Katz eds., 1984); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

19. ALPHEUS MASON, *BRANDEIS: A FREE MAN'S LIFE* 503-04 (1946).

20. *See* John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles, and Politics*, 1941 WIS. L. REV. 172, 200-10.

Burton K. Wheeler of Montana objected strenuously and persuaded the Senate to recommit the nomination to the Committee.

Wheeler claimed that Stone, while Attorney General, should have dismissed an allegedly improper indictment that Stone's predecessor had brought against Wheeler. Stone asked to be heard in person to defend his action, and the Committee accepted. Stone limited his responses to this one issue, the Committee once again approved him, and the Senate then confirmed him, with both Montana Senators abstaining.<sup>21</sup>

After the Stone nomination, the Senate went back to the tradition of not calling the nominees to testify. Hoover's nominee, Judge Parker of the Fourth Circuit, asked the Senate Committee to allow him to respond in person to charges that he was antilabor and racist, but the Senate denied that request, only allowed written responses,<sup>22</sup> rejected him, and then confirmed Hoover's second choice, Owen Roberts.

The hearing process began to change more dramatically during the New Deal. When Roosevelt nominated Senator Hugo Black in 1937, the Senate, for the first time in a half century, decided to hold hearings on a senator. Before that, if the nominee was a senator, the Senate tradition had been to hold no hearings and confirm immediately. Still, Hugo Black, as was the custom, never appeared before the Committee.

That custom finally changed with Felix Frankfurter's nomination in 1939. Frankfurter's opponents claimed that Frankfurter was too radical, was too chummy with F.D.R., was Jewish, and that the next nominee should be someone west of the Mississippi. This time the Senate Committee invited Frankfurter to attend. At first he refused (claiming that the press of his law teaching prevented him!), but he relented after witnesses attacked him, his associations, his foreign birth, and his religion. Accompanied by his lawyer, Dean Acheson, Frankfurter read a prepared statement, which explained that he would not express his personal views on controversial issues before the Court. He responded to a question from Senator McCarran regarding his patriotism by reaffirming his belief in "Americanism." The entire episode lasted only about ninety minutes.<sup>23</sup>

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21. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 193-94* (2d ed. 1985).

22. WILLIAM C. BURRIS, *DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION 84-85* (1987).

23. See *Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court: Hearings Before the Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess.* (1939) (response of Felix Frankfurter); see also LIVA BAKER, *FELIX FRANKFURTER 208-10* (1969).

After Frankfurter's appearance, all other nominees, except for Sherman Minton, followed suit. When Minton, whom Truman nominated in 1949, refused to appear before the Committee, some Senators criticized his refusal. There was an attempt to recommit his nomination to the Committee, but it failed, forty-five to twenty-one.<sup>24</sup> Nowadays, it would be unheard of for the nominee to refuse to appear and to be questioned in person.

To bolster their position with the Senate, Presidents began, in 1948, a new tradition: seeking the advice of the American Bar Association on Supreme Court appointments. Four years after that, President Eisenhower began the regular practice of sending nearly every federal judicial appointment to the ABA's Standing Committee on the Federal Judiciary. That Committee—again, until recently—normally approved the nominees. In 1970, for example, the ABA approved G. Harrold Carswell of the Fifth Circuit, who was widely accused not only of mediocrity but also of racism.<sup>25</sup> The Senate rejected Carswell, although Lawrence Walsh, then the Chair of the ABA Standing Committee on the Federal Judiciary (and later, the Independent Prosecutor in the Iran-Contra affair) defended the ABA's recommendation.<sup>26</sup>

More recently some commentators have accused the ABA of politicizing the process in a way that is unfavorable to politically incorrect nominees, but the present chair of the ABA Standing Committee expects that friction will continue even under a Democratic president.<sup>27</sup> Under President Clinton, the ABA Standing Committee has continued its role of evaluating judicial appointments. In fact, because of the increased number of appointments, the Board of Governors, at the ABA midyear meeting in February 1994, increased the Standing Committee's budget twenty-five percent, to \$250,000.<sup>28</sup>

An even more recent innovation in the confirmation process is the nominee's private "courtesy call." Only since the 1970s has it been the norm for Supreme Court nominees to pay courtesy calls on selected Senators, moving from office to office. Because the meetings are

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24. Freund, *supra* note 15, at 1161.

25. In 1948, Carswell gave a speech advocating racism. In 1956, he was one of the incorporators who converted a public golf course into a private one so that it could remain racially segregated. At his confirmation hearings, he denied that he had seen these incorporation documents since 1956. Later, press reports revealed that he had seen the documents on the eve of his confirmation hearings and that the ABA Judicial Selection Committee had asked him questions about them. RICHARD HARRIS, DECISION 18-43 (1971); Totenberg, *supra* note 16, at 1217.

26. Lawrence E. Walsh, *Selection of Supreme Court Justices*, 56 A.B.A. J. 555-60 (1970).

27. See *The ABA Role in the Judicial Nomination Process: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989); *Clinton Camp's Bid to Fill Judgeships Has ABA Expanding Its Resources*, CHAMPAIGN-URBANA NEWS GAZETTE, Feb. 7, 1994, at A7 (quoting Robert P. Watkins, Chairman, ABA Standing Committee).

28. *Clinton Camp's Bid to Fill Judgeships Has ABA Expanding Its Resources*, CHAMPAIGN-URBANA NEWS GAZETTE, Feb. 7, 1994, at A7.

held in private, there is no record of what is said, or promised, or alleged to have been said or promised.<sup>29</sup> A candidate who nowadays refused to engage in such private meetings would put the nomination at risk, although the private nature of such meetings eliminates the important check of public scrutiny.

Amazingly, even the practice of allowing radio microphones or television cameras is a recent innovation. It was not until 1981, with the confirmation of the first woman on the Court, that the Senate finally allowed radio and television to record the event. Before that, the public could read about the nominee but could never hear her words or see her testimony.<sup>30</sup>

Over the years, one of the few constants in the nomination process has been the fact that the President does not formally consult with the Senate, as a body, prior to his announcement, even though the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . ."<sup>31</sup> That same clause of the Constitution also provides that the President shall make treaties "by and with the Advice and Consent of the Senate . . ."<sup>32</sup> Just as Presidents have not consulted with the Senate prior to making treaties, they have not followed the practice of consulting with the Senate prior to announcing their Supreme Court nominees. President Washington did consult with the Senate (which was a much smaller body at the time) while he was in the process of negotiating an Indian Treaty, but he found the experience so frustrating that he vowed never to do it again, a promise that he and subsequent Presidents have kept.<sup>33</sup>

Over the last two centuries, there have been important changes in the selection process, the questions asked of nominees, the role of geographic diversity, the type of hearing that the Senate Committee conducts, and the media's coverage of the hearing. What was aberrational is now commonplace.

For good or ill, the trend in modern times is for the Senate and the media to become more involved in the nomination process.<sup>34</sup> One

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29. See Carl Marcy, *Nominees Shouldn't Pay Courtesy Calls on Senators*, N.Y. TIMES, JULY 29, 1981, at 23; see also *Judge O'Connor Talks with Potential Critics*, N.Y. TIMES, July 18, 1981, at 24; *Mrs. O'Connor Makes the Scene*, N.Y. TIMES, July 19, 1981, § IV, at 4.

30. Totenberg, *supra* note 16, at 1213 & n.1 (referring to telephone interview with a member of the Senate Judiciary staff).

31. U.S. CONST. art. II, § 2, cl. 2.

32. *Id.*

33. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787-1984*, at 238-40 (Randall W. Bland et al. eds., 5th rev. ed. 1984); I ROTUNDA & NOWAK, *supra* note 2, § 6.1, at 487-88.

34. At least one respected commentator has recently urged the Senate to take an even more active role and add "more politics—especially more racial politics—to the judicial selection process . . ." W. William Hodes, *The Overtly "Political" Character of the Advise and Consent Function: Offsetting the Presidential Veto with Senatorial Rejection*, 7 ST. JOHN'S J. LEGAL COM-

cannot explain this tendency by assuming that the Senate's increased role is a function of the fact that the Republicans have often controlled the presidency in recent years while the Democrats have usually controlled the Senate. The change in the nature of the confirmation process began during F.D.R.'s presidency and has continued unabated under both Republican and Democratic presidents.

The increased public scrutiny may encourage the nomination of relative unknowns to the Court because there is less of a paper trail that might draw questions. Although weak Presidents have always found it politic to nominate compromise or unknown candidates, the creation of a confirmation hearing as a media event may encourage such action. In addition, some first-class nominees may refuse to be considered because they do not wish to endure the gauntlet of being subjected to unfair flyspecking of one's career. And a president, particularly a weak one, may refuse to nominate some candidates because that president does not wish to take a risk with those who may be the object of various rumors of long past events. That the rumors may prove to be false is relevant but not conclusive.

However the process for approving nominees changes, we should realize that the Senate does not choose a new Justice for today, tomorrow, or even for next year. For example, Souter, when Bush chose him, was the same age (fifty) as Brennan was when Eisenhower selected him.<sup>35</sup> If Souter's tenure on the Court is as long as Brennan's, he will be deciding cases in 2024. Although Holmes was sixty-one years old when Theodore Roosevelt appointed him to the Court in 1902, he sat for thirty years.

To the extent that the confirmation process tries to determine how the nominee will vote in particular cases, it is focusing on an issue that cannot really be answered. We do not know what the major legal questions will be ten years from now, much less thirty years. Nor do we know what the liberal or conservative answers to those questions will be. However, if the more active confirmation process focuses on the nominee's integrity, intellectual ability, and good judgment, it may produce better Justices. A more public confirmation process does not preclude that focus.

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MENT 109, 123 (1991). *Contra, e.g.,* Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

35. President Bush appointed Souter in July of 1990. Maureen Dowd, *Souter, New Hampshire Judge; Named by Bush for High Court; No 'Litmus Test,' President Says*, N.Y. TIMES, July 24, 1990, at A1. Souter turned 51 in September of 1990, and joined the Court in October of that year.