46

DAVID YALOF

From *Pursuit of Justices*

In selecting nominees to the Supreme Court, the president faces a daunting task. Legal scholar David Yalof takes readers inside the process, pointing out the many factions in the nation, in the branches of government, and even within the president's own circle that must be considered when making a nomination. The president today has access to large amounts of information about a potential justice, but so does everyone else in the political process. After all, remember that a Supreme Court justice is often the most significant and long lasting legacy that a president leaves behind.

ON JUNE 27, 1992, the Supreme Court inserted itself once again into the national debate over abortion with its surprising decision in *Planned Parenthood v. Casey*. Specifically, five of the nine justices refused to cast aside *Roe v. Wade*, the Court's controversial 1973 opinion establishing a constitutional right to abortion. Included among *Roe*'s saviors that day were Sandra Day O'Connor and Anthony Kennedy, both appointees of former President Ronald Reagan. As a candidate for the presidency in 1980 and 1984, Reagan had supported a constitutional amendment to overturn *Roe*, a ruling considered to be among the most vilified of public targets for social conservatives in his party. As president, Reagan had publicly promised to appoint justices to the Supreme Court willing to reverse *Roe v. Wade*. Yet just the opposite occurred in *Casey*: a majority of the Court reaffirmed the core right to privacy first discovered in *Roe*. And in a touch of irony, two of President Reagan's own nominees had played significant roles in safeguarding the decision from the Court's conservatives.

Obviously the selection of Supreme Court nominees is among the president's most significant duties. Yet as the outcome in *Casey* demonstrates, it is a task beset with difficulties and potential frustrations. On one hand, a president ordinarily tries to choose a nominee whose influence will reach beyond the current political environment. As a beneficiary of life tenure, a justice may well extend that president's legacy on judicial matters long into the future. Yet in selecting a nominee the president must also successfully maneuver through that immediate environment, lest he

suffer politically or (as in some cases) see his nominee rejected by the Senate outright. In recent years internal strife and factionalism within the executive branch have only further complicated what was already a delicate undertaking. . . .

A central question remains: why were these particular candidates chosen over others possessing similar—and in some cases superior—qualifications? The classic "textbook" portrayal of the Supreme Court nomination process depicts presidents as choosing Supreme Court justices more for their judicial politics than for their judicial talents. By this version of events, presidents, by nominating justices whose political views appear compatible with their own, try to gain increased influence over the Supreme Court. Once on the Court, a justice may then satisfy or disappoint the appointing president by his decisions. Such an oversimplified view of nomination politics usually ignores the more complex political environment in which modern presidents must act, including the various intricacies and nuances of executive branch politics.

. . . I contend that modern presidents are often forced to arbitrate among factions within their own administrations, each pursuing its own interests and agendas in the selection process. At first glance, presidential reliance on numerous high-level officials equipped with a variety of perspectives might seem a logical response to the often hostile and unpredictable political environment that surrounds modern appointments to the Court. Yet conflicts within the administration itself may have a debilitating effect on that president's overall interests. High-level advisors may be sincerely pursuing their own conceptions of what makes up the administration's best interests; but to achieve their own maximum preferred outcomes, they may feel compelled to skew the presentation of critical information, if not leave it out altogether. In recent administrations the final choice of a nominee has usually reflected one advisor's hard-won victory over his rivals, without necessarily accounting for the president's other political interests. . . .

The New Deal marked the beginning of a fundamental transformation in American politics. A national economic crisis demanded national solutions, and the government in Washington grew exponentially to meet these new demands. Beginning in the 1930s, the federal government entered one policy area after another that had previously been the exclusive province of state governments. Emergency conditions required quick institutional responses, and the executive branch in particular was drawn into critical aspects of national policymaking. Just as the character of national politics changed dramatically, the Supreme Court was undergoing a transformation of its own. Fundamental changes in the political landscape

affecting Supreme Court appointments were a by-product of these changes. At least ten critical developments in American politics substantially altered the character of the modern selection process for justices:

1. The *growth and bureaucratization of the Justice Department* facilitated the investment of considerable manpower and other resources towards the consideration of prospective Supreme Court candidates. As the size of the national government grew dramatically during the early twentieth century, the government's overall legal responsibilities quickly expanded. Congress reacted by increasing the size of the Justice Department and transferring to it most litigating functions from other federal agencies. Armed with a full staff of attorneys and more extensive bureaucratic support, attorneys general in modern times have enjoyed more regular input into the selection of Supreme Court nominees, often consulting with the president well before a vacancy on the Court even arises. . . .

2. The *growth and bureaucratization of the White House* has also had an impact on the nomination process. The White House staff, once limited to a handful of personal assistants, was barely a factor in political decision-making for most of the nineteenth and early twentieth centuries. Starting with Franklin Roosevelt's administration, however, the White House staff experienced prodigious growth, expanding from just thirty-seven employees in the early 1930s to more than nine hundred by the late 1980s. As the modern presidency has brought more policymaking activities within the White House, the White House staff has increasingly figured in matters of high presidential priority.

Modern presidents often rely on the White House Counsel's Office to assist them in screening and selecting prospective Supreme Court nominees. Thus, increasingly, the attorney general's most constant and genuine competitor for influence has been the White House Counsel. Theodore Sorenson, John Kennedy's special counsel, asserted that his duties did not overlap with the attorney general's; rather he was involved "as a policy advisor to the president with respect to legislation, with respect to his programs and messages, with respect to executive orders, and with respect to those few formally legal problems, which come to the White House." But those supposed lines of demarcation have blurred considerably during the past thirty years. Today, a president has at his disposal two distinct organizations, each with its own bureaucratic resources; the president may rely on either or both offices for counsel concerning the selection of Supreme Court nominees.

3. Paralleling the increased role for national political institutions in American life has been the *growth in size and influence of federal courts*. Congress's willingness in the past to meet increased caseloads with new judgeships has steadily multiplied the president's opportunities to place his imprint on lower court policymaking. The total number of district and circuit judgeships rose from under two hundred in 1930 to well over seven hundred by the late 1980s. Thus between thirty and forty vacancies may occur annually on the federal bench. These federal judges must be counted on to interpret, enforce, and in some cases limit the expansion of federal governmental authority. At times federal courts have even fashioned national law and policy, serving as key facilitators of social, economic, and political growth.

Senatorial courtesy, to be sure, remains the dominant factor in lower court selections, but the steady increase in the number of judgeships has provided presidents with more than an occasional opportunity to nominate candidates of their own choosing after the preferences of individual senators have been satisfied. The growing size and prestige of the D.C. Circuit have given presidents additional opportunities to hand out plum assignments: because senatorial courtesy does not apply to those seats, presidents may freely nominate ideologically compatible law professors, former administration officials, and others to positions of considerable prestige in the federal judicial system. Thus more than ever before, the federal courts today provide an especially useful "proving ground" for candidates who might one day be considered for a seat on the high court.

4. *Divided party government* has become a recurring theme in American government since World War II. Between 1896 and 1946, opposing parties controlled the White House and the Senate during just two sessions of Congress. By contrast, split party conditions now seem almost routine. . . .

5. The *confirmation process has become increasingly public.* For much of our nation's history the confirmation process unfolded largely behind closed doors. Though the Senate Judiciary Committee often met and offered recommendations on nominees during the nineteenth century, closed investigative hearings were not conducted until 1873 when President Ulysses Grant unsuccessfully nominated George Williams to be chief justice. Open hearings were held for the first time only in 1916, when the Senate considered Louis Brandeis's candidacy. Nine years later Harlan Fiske Stone became the first nominee in history to appear before the committee personally. Full-fledged public hearings were finally instituted on a regular basis beginning in 1930 with President Hoover's nomination of John J. Parker.

Since 1955, virtually all Supreme Court nominees have formally testified before the Senate Judiciary Committee. Hearings have been televised live since 1981, insuring heightened public access to the process. The increasingly public nature of confirmation-stage politics has placed added

strain on senators, many of whom may be reluctant to spend their time and political capital on an arduous process that will only create enemies back home. Meanwhile, the president must now find nominees who, aside from meeting ideological or professional criteria, will fare well in front of television cameras when facing a barrage of senators' questions.

6. The *rise in power of the organized bar* has figured significantly in recent Supreme Court selections. The American Bar Association's Special Committee on the (federal) Judiciary (later renamed the "Standing Committee on Federal Judiciary") was founded in 1947 to "promote the nomination of competent persons and to oppose the nomination of unfit persons" to the federal courts. During the past half-century that committee has played a significant if uneven role in the appointment of lower federal court judges. Not surprisingly, the ABA has taken an especially strong interest in the nomination of Supreme Court justices as well. Beginning with Eisenhower's nomination of Harlan in 1954, the ABA has formally reviewed all Supreme Court nominees for the Senate Judiciary Committee. Thus in selecting nominees, presidents must incorporate into their calculations the possibility that a less-than-exceptional rating from the ABA could serve as a rallying point for opposition during the subsequent confirmation process. Still, the bar's actual influence over the choice of nominees has varied largely depending upon the administration in power. In 1956, the Eisenhower administration began to submit names of potential Supreme Court nominees to the ABA at the same time that the FBI began its background check. During this period the ABA exerted little direct influence during initial deliberations over prospective candidates. By contrast, subsequent administrations have often enlisted the committee's services during much earlier stages of the process. High-ranking officials in the Justice Department have consulted with committee members to gauge potential support for and opposition to a prospective candidate. . . .

7. *Increased participation by interest groups* has also altered the character of the Supreme Court nomination process. This is not an entirely new phenomenon. Organized interests (including the National Grange and the Anti-Monopoly League) figured significantly in defeating Stanley Matthews's nomination to the Court in 1881. Almost fifty years later, an unlikely coalition of labor interests and civil rights groups joined together to defeat the nomination of John Parker. Since World War II, interest groups have extended their influence into the early stages of nominee selection by virtue of their increased numbers and political power. Groups such as the Alliance for Justice, People for the American Way, and the Leadership Conference on Civil Rights have made Supreme Court appointments a high priority in their respective organizations. Many interest groups now conduct their own research into the backgrounds of prospective nominees and inundate the administration with information and analysis about various individual candidates.

8. *Increased media attention* has further transformed nominee selection politics. Presidents in the nineteenth and early twentieth centuries, working outside the media's glare, could often delay the selection of a nominee for many months while suffering few political repercussions. By contrast, contemporary presidents must contend with daily coverage of their aides' ruminations concerning a Supreme Court vacancy. Reporters assigned to the "Supreme Court beat" often provide their readership with the most recent "shortlists" of candidates under consideration by the president. A long delay in naming a replacement may be viewed by the press as a sign of indecision and uncertainty on the part of the president. Delay may also work to an administration's benefit, especially if media outlets expend their own resources investigating prospective candidates and airing potential political liabilities prior to any formal commitment by the administration.

9. *Advances in legal research technology* have had a pronounced effect on the selection process. All modern participants in the appointment process, including officials within the White House and the Justice Department, enjoy access to sophisticated tools for researching the backgrounds of prospective Supreme Court candidates. Legal software programs such as LEXIS/NEXIS and WESTLAW allow officials to quickly gather all of a prospective candidate's past judicial opinions, scholarship, and other public commentary as part of an increasingly elaborate screening process. Computer searches may be either tailored around narrow subject issues or they may be comprehensive in scope. The prevalence of C-SPAN and other cable and video outlets has made it possible to analyze prospective candidates' speeches and activities that would have otherwise gone unnoticed. Of course, advanced research technology is a double-edged sword: media outlets and interest groups may just as effectively publicize negative information about prospective candidates, undermining the president's carefully laid plans for a particular vacancy.

10. Finally, the *more visible role the Supreme Court has assumed in American political life* has increased the perceived stakes of the nomination process for everyone involved. Several of the critical developments listed above, including increased media attention and interest group influence in the nominee selection process, stem from a larger political development involving the Court itself: during this century the Supreme Court has entrenched itself at the forefront of American politics. Prior to the New

Deal, the Court only occasionally tried to compete with other governmental institutions for national influence. For example, the Taney Court inserted itself into the debate over slavery with its decision in *Dred Scott v. Sanford* (1857). The Court's aggressive protection of property rights in the late nineteenth century pitted it first against state governments, and then later against Congress and the president during the early part of the twentieth century. In each instance the judiciary usually represented a political ideology in decline; after a period of time the Court eventually returned to its role as an essentially reaffirming institution.

Since the early 1940s, however, the Supreme Court has positioned itself at the center of major political controversies on a nearly continuous basis. Driven by a primarily rights-based agenda, the Court has found itself wrestling with matters embedded in the American psyche: desegregation, privacy rights, affirmative action, and law enforcement. With the Court's continuously high visibility in the American political system, each appointment of a new justice now draws the attention of nearly all segments of society. The stakes of Supreme Court appointments may only seem higher than before, but that perception alone has caused a veritable sea change in the way presidents . . . must treat the selection of Supreme Court nominees.