JUDICIAL SELECTION: A PRAGMATIC APPROACH

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When former President Eisenhower was asked if he made any mistakes during his Presidency, he exclaimed, "Yes, two, and they are both sitting on the Supreme Court."[1] He was referring to Chief Justice Earl Warren, a Republican, and Justice William Brennan, a Democrat. These men embraced a nontextualist jurisprudence under which statutes and executive actions are upheld or struck down based on their compliance, or lack thereof, with the judges' sense of social justice.[2] This

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1. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 266 (3d ed. 1992). *See generally* LAWRENCE BAUM, THE SUPREME COURT 41 (3d ed. 1989).

2. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (using the Justices' sense of social and economic justice to uphold the Minnesota Mortgage Moratorium law even though such law changed debt contracts in violation of the text and original intent of the Contracts Clause); Lochner v. New York, 198 U.S. 45 (1905) (using the Justices' sense of social and economic justice to strike down a

jurisprudential approach often placed the Warren Court at odds with the legislative policy agenda of the Eisenhower and later Republican Administrations. In contrast, the Rehnquist Court has embraced a more textualist jurisprudence under which statutes and executive actions are upheld or struck down based on their compliance, or lack thereof, with the text and original intent of the Constitution.[3] This jurisprudential approach has at times placed the Rehnquist Court at odds with the Clinton Administration.

These different judicial philosophies, when employed by up to four new appointees to the Supreme Court and hundreds of appointees to lower federal courts, will leave a long-term imprint on the viability of the Constitution's meaning and the distribution of practical policy-making power among the three branches of the federal government and between the federal and state governments. More immediately, the new President's judicial selections and the philosophies these judges employ on the bench will directly impact the short-term survivability of his legislative agenda. Current razor-thin margins on a few key constitutional issues place the viability of several major legislative proposals in jeopardy of being struck down by the courts if new members of the federal judiciary apply nontextualist jurisprudence.

Although numerous articles discuss the divergent philosophical approaches to judging,[4] this essay takes a more pragmatic view by: (1) outlining the impact of nontextualist versus textualist jurisprudence on the legislative initiatives of the new President; (2) providing practical advice on how to select nominees with a textualist judicial philosophy; and (3) discussing how to get these nominees confirmed.

New York regulation that limited the number of hours bakers could work, even though neither the text nor the original intent of the Due Process Clause encompassed a right to enter into a contract free of all government regulation).

3. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down a section of the Violence Against Women Act of 1994, which allowed a victim of sexual abuse to file a civil action in federal court against her attacker, because the provision exceeded Congress's power under the text and original intent of the Commerce Clause); United States v. Dixon, 509 U.S. 688 (1993) (upholding executive decision to prosecute defendant for "same conduct" because text and original intent of Double Jeopardy Clause only barred successive prosecutions for the "same offense," not the "same conduct").

4. *See, e.g.*, David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7 (1999); Thomas Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621 (1994); Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401 (1986).

Legislative initiatives on faith-based social programs, school choice, campaign finance, and criminal justice reform, are currently sustainable by slim majorities on the Supreme Court in Establishment Clause, Free Speech Clause, and Commerce Clause cases. The new President can best predict a candidate's future votes to uphold or to strike down his legislation by employing a team of legal experts to determine if the candidate has established a proven record of advancing a textualist philosophy in which the candidate's ego is vested. The new President should then balance a candidate's legal philosophy against the practical politics inherent in the confirmation process. To maximize chances of a successful confirmation, the new President should be especially careful to conduct thorough background checks, to develop a pool of potential nominees before vacancies arise, and to utilize experienced political advisors to assess each candidate's confirmability amid the shifting winds of Senatorial politics.

I. THE STAKES ARE HIGH

The next President's judicial nominations will dramatically impact his long-term constitutional legacy and his short-term legislative agenda. These nominations will likely determine whether the Constitution will be applied based on the text of the document that the people's representatives ratified and the intent of the Framers who wrote it, or based on judicial perceptions of contemporary, perhaps transitory, popular views of social justice.[5] The power to determine social policy will either be vested in the people's elected representatives, with clear textual boundaries for congressional and presidential action, or shared between those representatives and the courts by means of unclear and shifting boundaries for congressional and presidential action.

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5. *Compare, e.g.,* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-59 (1995) (Thomas, J., concurring in the judgment) (assessing the constitutionality of an Ohio statute prohibiting the distribution of anonymous political leaflets by looking at the text and original intent of the First Amendment), *with* William J. Brennan, The Constitution of the United States: Contemporary Ratification, Text and Teaching Symposium, Georgetown University (Oct. 12, 1985) (transcript available at the Supreme Court of the United States) (arguing that the Supreme Court is justified in changing the Constitution by the general acceptance of contemporary opinion, in lieu of proposal and ratification of amendments under Article V of the Constitution).

The practical allocation of policy-making power depends, in large part, upon the federal courts' employment of textualist or nontextualist methods of interpreting the Constitution and statutes. The interpretive approach, or judicial philosophy, of the new President's judicial nominees will impact whether his legislation will be upheld or struck down by the federal courts. This impact will be almost immediate because much of the new President's legislative agenda depends on critical precedents interpreting the Establishment Clause, the Free Speech Clause, and the Commerce Clause that derive their current support from slender textualist majorities on the appellate courts.

For example, if the new President wishes to expand the use of faith-based social programs or to encourage States to adopt school choice programs that may include religious schools, he should assess how his judicial selections will impact the federal courts' Establishment Clause jurisprudence. In *Bowen v. Kendrick*,[6] the Supreme Court, by a 5-4 vote, held that a federal grant program that utilized secular and religious organizations to provide teen pregnancy counseling did not violate the text and original intent of the Establishment Clause. In *Mitchell v. Helms*,[7] a four-vote plurality maintained that broad government aid to private schools, including religious schools, does not

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6. 487 U.S. 589 (1988). *See generally* Joe Klein, *In God They Trust*, NEW YORKER, June 16, 1997, at 40, 47-48 (discussing then-Governor Bush's support of faith-based social programs, their promise, and the legal questions that they entail).

7. 120 S. Ct. 2530 (2000). *Compare, e.g.*, Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (holding, in a pre-*Mitchell v. Helms* case, that a school choice program violated the Establishment Clause), *and* Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., 738 A.2d 539 (Vt. 1999) (holding that a school voucher-type program that permitted parents to use public dollars to send their children to religious schools violated the Vermont Constitution's proscription on compelling taxpayers to support a religious organization), *with* Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (rejecting free exercise, establishment, and equal protection challenges to Maine's school voucher program), Bagley v. Raymond Sch. Dep't, 728 A.2d 127, 135, 147 (Me. 1999) (same), *and* Simmons-Harris v. Goff, 711 N.E.2d 203, 208-12 (Ohio 1999) (rejecting Establishment Clause challenges to a Cleveland voucher plan that included religious schools). *See generally* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 310-11 (2000) ("The United States Constitution—specifically, the First Amendment's 'Establishment Clause'—permits governments to enact, fund, and administer meaningful school-choice programs."); Jamie Steven Kilberg, Note, *Neutral and Indirect Aid: Designing a Constitutional School Voucher Program Under the Supreme Court's Accommodationist Jurisprudence*, 88 GEO. L.J. 739, 741 (2000) (arguing "that properly sculpted voucher programs that allow private sectarian schools to receive state educational funding do not violate the Establishment Clause" under the pre-*Mitchell v. Helms* case of *Agostini v. Felton*, 521 U.S. 203 (1997)).

violate the text or original intent of the Establishment Clause as long as the aid is offered on a neutral basis and is secular in content. How the new President's judicial nominees, especially his Supreme Court nominees, impact the current razor-thin margin on the Establishment Clause will determine whether he delivers on promises to allow religious organizations to help the inner city poor and to allow parents to choose where their children attend school.[8]

If the new President wants campaign finance reforms to cap both union and non-union political contributions or spending, he should assess how his judicial selections will impact the federal courts' First Amendment jurisprudence. In *Nixon v. Shrink Missouri Government PAC*,[9] the Supreme Court, by a 6-3 vote, held that certain narrow limits to campaign financing were permissible under the text of the Free Speech Clause. How the new President's nominees impact the current two-vote margin on the Free Speech Clause will determine his ability to shape or resist broad campaign finance reforms that do not include limits on union collection of political contributions from members' payroll checks.[10]

If the new President seeks to reform the criminal justice system, he should assess how his judicial selections will impact the federal courts' Commerce Clause jurisprudence. *In United States v. Morrison*,[11] the Court, by a 5-4 vote, held that federal legislation that dealt with civil lawsuits regarding non-economic activity—rape—was invalid because such activity was not within the text and original intent of Congress' power to regulate interstate commerce. Although the federal government can still make grants to alleviate the harm caused by such noncommercial activity, it cannot regulate the activity directly. How the new President's judicial nominees impact the current slim margin on the Commerce Clause will determine

8. *See, e.g.*, George W. Bush's Proposals for the Next Step of Welfare Reform (proposing to "[e]xpand 'charitable choice' to all federal laws that authorize the government to use non-governmental entities to provide services to beneficiaries with federal dollars"), *at* http://www.georgebush.com/issues/armiescompassion.html (visited Feb. 17, 2001).

9. 120 S. Ct. 897 (2000).

10. *See, e.g.*, Governor George W. Bush's Reform Proposals (proposing to "[b]an unions and corporations form giving 'soft' money to political parties [and to] [p]reserve the right of individuals and groups to engage in issue advocacy"), *at* http://www.georgebush.com/issues/campaignfin.html (visited Nov. 30, 2000).

11. 120 S. Ct. 1740 (2000).

his ability to shape criminal justice legislation, to avoid substantial increases in the number of federal crimes, and to deliver on promises to protect families.

Similarly, if the new President plans to pass legislation dealing with tough sentences for drug dealers who sell to school children,[12] legislative redistricting,[13] partial birth abortion and parental notification,[14] or character-based education programs,[15] he should carefully consider whether his judicial nominees will employ an interpretive approach more or less likely to uphold these legislative initiatives. Although it would be improper to ask how a candidate would vote in a

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12. Federal drug sentencing statutes allow an increase in the statutory maximum if the prosecutor shows certain factors existed, but do not require prosecutors to prove such factors beyond a reasonable doubt. *See* 21 U.S.C. § 841 (1994). In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), the Court, by a 5-4 vote, held that relevant conduct that could increase punishment beyond a statutory maximum must be presented to a jury and proven beyond a reasonable doubt.

In *United States v. Sheppard*, 219 F.3d 766 (8th Cir. 2000), the Eighth Circuit held that *Apprendi* would apply to 21 U.S.C. § 841, requiring factors that extend the statutory maximum to be presented to a jury and proven beyond a reasonable doubt. Thus, the new President may wish to amend the drug sentencing statute to address *Apprendi* and its progeny.

13. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court, by a 5-4 vote, held that the Equal Protection Clause prohibited the drawing of election districts based on race. This decision could impact the shape of districts and thus the makeup of the House of Representatives of the 108th Congress with which the new President will work.

14. In *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), the Court, by a 5-4 vote, struck down Nebraska's statute that banned partial birth abortions without providing a sufficiently broad exception for the health of the mother.

15. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-87 (1999), the Court, by a 5-4 vote, recognized that if conditions on spending inducements are too coercive, those conditions will exceed Congress's Spending Power. In *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), a panel of the Eighth Circuit held invalid section 504 of the federal Rehabilitation Act which conditioned receipt of all federal funding on state-government-wide compliance with certain non-discrimination provisions. Citing *College Savings Bank*, the panel held: "Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the [Rehabilitation Act], if it does not want to comply with § 504." *Id.* at 757. The Eighth Circuit, acting en banc, vacated this holding pending review on rehearing. *See* Jim C. v. Arkansas Dept. of Educ., 197 F.3d 958 (8th Cir. 1999). If the new President plans to condition existing or future federal grants to States upon the States' implementation of character-based education programs or performance and accountability standards, he will have to consider whether his judicial nominees will uphold such conditions as valid under the Spending Clause. Conditions placed on future grants that are narrowly focused on education, instead of applying across the board to all grants, have the strongest chance of being upheld and will provide greater overall flexibility to the states.

particular case, it is not improper to assess a candidate's jurisprudential approach, or legal philosophy. The judicial philosophies employed by the new President's nominees when interpreting a variety of constitutional and statutory provisions will determine whether the new President's campaign promises are effectively kept . . . or not.

II. ASSESSING A CANDIDATE'S LEGAL PHILOSOPHY

To increase the likelihood that his legislation will be upheld by the courts, the new President should select nominees that share his judicial, or legal, philosophy. Although Supreme Court and circuit court nominees should receive closer scrutiny, district court candidates should not be overlooked. They, after all, will form a substantial part of the pool from which the appellate nominees of tomorrow may be selected. History has shown the best predictor of how a candidate will vote once confirmed is not merely loyalty to the President, home-state Senators, or a political party, but a proven record of consistent application of a legal philosophy in which the candidate's ego is vested.

A. The Shortcomings of Political Loyalty

It is naive to suppose that nominees will be selected by politically accountable decision makers in a merit-based vacuum, wholly devoid of politics. A nominee's relationship and record of service to the President, to his home state Senators, and to his political party often brings his name to the attention of the nomination and confirmation decision makers in the first place. These politicians owe their past election and future re-election to various interest groups that want favors, including judicial appointments. Yet, as explained above, the subsequent votes of judicial nominees on the President's legislative agenda can impact his re-election prospects. With this stark back-end political reality in mind, the new President should carefully consider how much weight to give politics alone on the front end.

In particular, picking Justices based on politics alone can cause problems—many Justices who were nominated for political reasons eventually harmed the presidents who nominated them. President Truman's nomination of Attorney

General Tom Clark, a loyal political friend, later bitterly disappointed the President when Clark voted with the majority in *Youngstown Sheet & Tube Co. v. Sawyer,*[16] holding Truman's seizure of the nation's steel mills during the Korean War unconstitutional and providing a stinging public rebuke to Truman. President Kennedy's nomination of Byron White, a friend and loyal supporter, subsequently disappointed many liberals when Justice White dissented in *Doe v. Bolten,*[17] an extension of *Roe v. Wade,*[18] because he was unwilling to accept that the Constitution included a right of abortion. Similarly, President Nixon's nomination of Harry Blackmun, a personal friend of Chief Justice Burger and other Republicans, subsequently disappointed many conservatives when Justice Blackmun wrote the majority opinion in *Roe v. Wade,* recognizing a constitutional right to abortion. Justice Blackmun continued to disappoint conservatives when he "grew" to embrace the position that capital punishment is unconstitutional.[19] Although all these candidates had been loyal to their President and their political party, none proved philosophically consistent with their President once on the bench.[20]

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16. 343 U.S. 579, 661 (1952) (Clark, J., concurring in the judgment); *id.* at 699 (Vinson, C.J., dissenting) (noting that several prior Attorneys General, including Tom Clark, before his appointment to the Supreme Court, had expressed the view that the President had the power to seize production facilities in times of national emergency); *See* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 35, 40 (1999) (stating that Truman had selected Clark because of loyalty, that Attorney General Clark had written a memorandum concluding that the President's power to act in emergencies was "exceedingly great," and that Truman was "outraged" by the *Youngstown* decision in which Justice Clark joined the majority in rejecting Truman's exercise of presidential authority); *see* ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE: YOUNGSTOWN SHEET & TUBE CO. V. SAWYER: THE STEEL SEIZURE DECISION *passim* (1958) (discussing the events leading up to, the political and legal struggles involved with, and the court opinion settling President Truman's seizure of the nation's steel mills).

17. 410 U.S. 179 (1973) (White, J., dissenting).

18. 410 U.S. 113 (1973).

19. *See* Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting) (stating that he would no longer vote to uphold any death sentence).

20. *See* YALOF, *supra* note 16, at 76, 95 (reporting that Byron White's World War II relationship with Kennedy and his Washington connections with President Kennedy weighed heavily in his selection); *id.* at 113-14 (discussing the Nixon Administration's selection of Blackmun).

B. Proven Record of Legal Philosophy

In addition to political service, the new President's staff should assess whether each candidate has a proven record of applying consistent legal philosophy in practice, in academia, or even better, on the bench. A personal interview is useful in determining whether a candidate can demonstrate knowledge of the key constitutional, statutory, and jurisprudential issues of the day. A candidate's inability to orally demonstrate his possession of a developed legal philosophy would cast much doubt on his philosophic consistency once on the bench. A thorough examination of the candidate's record, however, should be the determinative factor in assessing whether a candidate possesses, and will retain, a consistent legal philosophy post confirmation. Ambitious candidates often want to please the decision maker in a personal interview, and as a result the way a candidate sells himself can be misleading. For example, Earl Warren assured President Eisenhower's Attorney General that he generally sympathized with the policies of the Republican Administration.[21] Once confirmed, though, Warren issued numerous rulings that were inconsistent with the philosophy he espoused in his interview.[22]

When examining a candidate's record, it is important to look for the controlling principles that guided his work. Do his actions reflect a textualist or nontextualist approach to judging? Do his actions indicate a belief that the text of the Constitution and statutes, and the original intent of the Framers, are paramount? Or do his actions indicate a belief that contemporary views of social justice should guide decisions? These are often technical legal questions that require research and analysis by legal experts in the Department of Justice and the Office of White House Counsel.

In assessing the jurisprudential philosophy of candidates, President Reagan's White House Counsel attorneys employed the following four criteria,[23] among others:[24]

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21. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 252 (1997).

22. For example, in *Miranda v. Arizona*, 384 U.S. 436 (1966), Chief Justice Warren led the Court in a 5-4 decision establishing an exclusionary rule for criminal confessions.

23. *See* YALOF, *supra* note 16, at 138-39 (stating that Deputy White House Counsel Herbert Ellingwood's list of factors included these four).

1. How has this person exercised judicial restraint in the past? Many candidates have admirable records as zealous advocates for clients and causes. However, if a candidate cannot put aside his role of advocate, legislator, or executive, and respect the limited power of an Article III judge, he is unfit for the office. Conservative or liberal, Democrat or Republican, if our constitutional system is to survive, when the candidate dons the judicial robe he must leave the results-oriented zeal of the advocate behind and defer to the legislative and executive branches. The best record to examine is an Article III record, as Article III's grant of life tenure leaves a judge free to express his own judicial views.[25] If the candidate has performed different roles over the years, such as lawyer, judge, and county commissioner, the new President's staff should determine whether the candidate's performance in each job reflects an appreciation for the differences in roles and in power of each position.

2. Is there a commitment to being an interpreter, rather than a creator of the law? One important inquiry is how a candidate analyzes constitutional and statutory questions of law. Can he tie his conclusion back to the text and original intent of the law at issue? For example, a candidate's record may show that he believes the death penalty is facially unconstitutional. Because the Constitution makes several references to the operation of

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24. President Reagan's Office of Legal Counsel developed a longer list of factors:

> (1) awareness of the importance of strict justiciability and procedural requirements
> (2) refusal to create new constitutional rights for the individual
> (3) deference to states in their spheres
> (4) appropriate deference to agencies
> (5) commitment to strict principles of 'nondiscrimination'
> (6) disposition towards criminal law as a system for determining guilt or innocence
> (7) disposition towards 'less government rather than more'
> (8) recognition that the federal government is one of enumerated powers
> (9) appreciation for the role of the free market in our society
> (10) respect for traditional values
> (11) legal competence
> (12) strong leadership on the court/young and vigorous.

YALOF, *supra* note 16, at 143-44 (discussing portions of a report authored by Roger Clegg, Special Assistant to the Attorney General, defining the attributes of a so-called ideal Supreme Court candidate).

25. A candidate's record on the federal bench however, is not conclusive proof of future philosophic consistency. *See, e.g.*, YALOF, *supra* note 16, at 113 ("Blackmun's record on the Eighth Circuit provided ample evidence of a conservative judicial philosophy.").

the death penalty,[26] such a position indicates a propensity to employ a nontextualist judicial philosophy that could threaten the new President's legislative agenda in other areas.

3. What does this person believe are the most important issues before the Court? If a candidate is not conversant in the key issues before the Supreme Court—federalism, partial birth abortion, establishment of religion, free speech, etc.—he can hardly be expected to possess a developed legal, or judicial, philosophy. Without a developed legal philosophy, the nominee's future voting patterns are less predictable.

4. Is this person strongly convinced of his own philosophy? Will he likely be unduly swayed by academic, media, peer or other pressures? Whether the candidate is a conservative or a liberal, he should not be so uncertain about the rule of law and the role of a judge to interpret the law that outside pressures could influence his judgment or his legal philosophy once confirmed.[27] The new President's staff should determine whether the candidate has held to his legal philosophy under fire. Has he participated in debates, filed pro bono amicus briefs, or led legislative initiatives in the face of criticism?

C. Where His Ego Is, There Will His Vote Be Also

In addition to a proven track record of philosophically consistent action, the new President's staff should determine if the candidate's ego is vested in his application of textualist philosophy. Candidates for higher judicial offices usually do not reach that point by being shrinking violets. They are generally ambitious people who want to make a mark. It is

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26. *See, e.g.*, U.S. CONST. amend. V ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . ."); *id.* ("No person shall . . . be deprived of life . . . without due process of law . . . ."); *id.* at amend. XIV, § 2 ("No State shall . . . deprive any person of life . . . without due process of law . . . .").

27. With respect to media praise and criticism of a judge, see *Across the USA: News from Every State, Alabama*, USA TODAY, May 1, 1997 at 13A (reporting that Alabama state Judge Charles Price received a John F. Kennedy "Profiles in Courage Award" for ruling that fellow state judge Roy Moore should remove the Ten Commandments from his, Moore's, courtroom), *and* Phyllis Schlafly, *Rulings on Abortion, Disabilities Draw Scorn; Calling Activist Judges Down*, CHATTANOOGA FREE PRESS, June 29, 1998, at A5 (reporting that the Family Research Council gave its "Lifetime Achievement [Court Jester] Award," for a career that produced many examples of activist decisions, to United States Circuit Court Judge Stephen Reinhardt, and stating that the Supreme Court overturned the Ninth Circuit 28 out of 29 times during the 1996-97 Supreme Court term).

essential, therefore, to inquire how the candidate will attempt to make his mark once confirmed. In particular, will his efforts be focused on the employment of a particular judicial philosophy? Often, the answer may be found in the actions that a candidate took to build a reputation that got him on a short list for judicial nomination.

Chief Justice John Marshall was an outstanding lawyer and became a renowned national figure by joining with George Washington to fight in the Revolutionary War, advocating the ratification of the Constitution in the Virginia convention, and serving as a special envoy to France for President Adams.[28] He revered Washington but hated Jefferson.[29] Accordingly, he was a prominent supporter of a strong central government and rejected radical States' rights views. This nationalist legal and political philosophy laid the foundation for his work as Chief Justice, where he consistently interpreted the Constitution as providing for the predominant federal powers necessary to protect and to strengthen the young nation.[30]

Louis Brandeis's brilliant legal career was complemented by his work as a reform activist in Massachusetts. Although he

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28. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 52-68 (1996) (discussing Marshall's service in the Revolutionary War); *id.* at 115 ("Ever since his experience in the War of Independence, Marshall had stood steadfast in the belief that the survival of the United States depended on national unity, and he now threw himself wholeheartedly into the struggle for ratification of the Constitution."); *id.* at 192-233 (describing Marshall's representation of President Adams in negotiations with France and Marshall's rejection of French Minister Tallyrand's overtures for a bribe in the "XYZ Affair").

29. Marshall's biographer relates of the great Chief Justice:

> His hero was George Washington. (In his early years as Chief Justice, Marshall wrote an imposing 5-volume biography of Washington, which remained the definitive account for the first president's life for over thirty years.) In fact, support for Washington was a litmus test for Marshall. His long-standing animosity toward his kinsman Thomas Jefferson—Marshall and Jefferson were second cousins—traced in part to Jefferson's partisan criticism of Washington in the late 1790s.

Id. at 4.

30. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the power of Congress to incorporate the Second Bank of the United States under the Necessary and Proper Clause of the Constitution); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding that the federal Constitution's Contracts Clause applied broadly, encompassing state charters of private colleges, and thus barred a state from abrogating such colleges); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C.J.) (holding that the federal government had broad power to regulate interstate commerce and such power, where exercised, trumped that of the States).

was initially recognized for his representation of large corporations, he also lead political attacks on corporate abuses, particularly those of the utility and insurance companies.[31] Brandeis was also a chief supporter of the labor union movement.[32] He then carried his progressive political and legal philosophy onto the bench, and gained a reputation there for his effort to expand the rights of working class persons.[33]

Charles Evans Hughes was also a reform-minded figure. As a lawyer, and later as the governor of New York he challenged traditional Republican interests—insurance companies and utilities—through public investigations and pro-consumer legislation.[34] As Secretary of State under President Harding, he fought for arms limitations agreements that he believed provided bilateral benefits while preserving the interests of the United States.[35] Hughes built his career on his work to promote just government and his celebrated eloquence.[36] As Chief Justice, he took part in the effort to break the anti-New Deal judicial activism of the Court, extend constitutional protections to working class individuals, and protect the integrity of the

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31. *See* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 153-77 (1946) (describing Brandeis's fight to provide a low-cost alternative industrial life insurance to the products provided by the insurance industry); *id.* at 177 -214 (outlining Brandeis's multi-year battle against the New Haven Railway's attempt to control railroad traffic in the Northeast).

32. *See id.* at 149-50 (stating that Brandeis openly supported trade unions).

33. *See, e.g.*, Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting) (suggesting for the first time in Supreme Court history that the term "liberty" as used in the Fourteenth Amendment could extend beyond property rights to protect individual rights); *and* Olmstead v. United States, 277 U.S. 428, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the government, the right to be let alone the most comprehensive of rights and the right most valued by civilized men.").

34. *See* 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 132-39 (1951) (describing attorney Hughes's investigation of overcharges by gas utilities in New York and calling for the establishment of a public service commission); *id.* at 140-68 (recounting attorney Hughes's investigation and resulting reform of life insurance companies who had severely overcharged the citizens of New York); *id.* at 225 (discussing Governor Hughes's fight for labor and conservation measures as well as a pure food laws).

35. *See* 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 474-90 (1951).

36. *See* 1 PUSEY, *supra* note 34, at 385 ("Judge Cardozo of the New York Court of Appeals once said that he always reserved judgment for twenty-four hours in any case argued by Hughes to avoid being carried away by the force of his personality and intellect."); *id.* at 209 (quoting a New York Assemblyman of Governor Hughes, "It is . . . impossible for those who were not eye witnesses to appreciate the dramatic qualities which characterized his efforts, or the overpowering quality of his arguments during those stormy years . . . .").

Court against FDR's "packing plan."[37] Like Marshall and Brandeis, Hughes's ego was vested in his legal and political philosophy, and he retained that philosophy once on the Supreme Court.

Earl Warren was an extremely successful politician as well. He won a number of elections in California's open primary system, where he was permitted to run on both Democratic and Republican tickets.[38] Repeatedly, he demonstrated a desire to gain bipartisan public approval for taking decisive action that the public could perceive as just.[39] Upon becoming Chief Justice, Warren was initially separated from the public approval that he had enjoyed throughout his 30 years of political service as Attorney General and then Governor of California. Eventually, however, he found ways to use the bench to effect "fair" outcomes. Therefore, it can be said that after gaining notoriety for his willingness to take unilateral executive action to implement his ideas, he continued this practice as Chief Justice by advancing his view of justice with little concern for the restraints of Article III Justices, the text of, or the original intent of, the Constitution.[40] His ego was vested in his political philosophy of the active pursuit of fairness and equality regardless of the legal technicalities, and he retained that approach on the Supreme Court.

In contrast, Chief Justice Taft was a political apologist for

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37. *See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding Minnesota Mortgage Moratorium Law despite text and history of Contracts Clause); Bailey v. Alabama, 219 U.S. 219 (1911) (holding that an Alabama peonage statute, providing for contracts of involuntary servitude, violated the 13th Amendment rights of workers); *and* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Hughes, C.J.) (upholding a Washington State minimum wage law for women and abandoning the anti-New Deal conservative activism based on liberty of contract theory espoused in *Lochner*).

38. *See* CRAY, *supra*, note 21, at 92-94, 130-31 (discussing Warren's cross-filing as a candidate in both the Democratic and Republican primaries for Attorney General and Governor of California).

39. *See id.* at 85-89 (describing District Attorney Warren's tough and highly publicized prosecution, in 1936, of allegedly communist union members and his popular statement that he supported loyal union members); *id.* at 101-03 (describing Attorney General Warren's highly publicized seizures of gambling boats that was popular in 1939); *id.* at 109-23 (describing Attorney General Warren's highly publicized measures against Japanese citizens during World War II that were popular in 1942); *id.* at 141-42 (describing Governor Warren's adoption of a code of ethics for state agencies, during his first Administration which started in 1944, that enhanced the actual and apparent justness of his Administration).

40. *See id.*

conservative interests. As President, although continuing with some of the progressive agenda of his predecessor, Teddy Roosevelt, Taft generally adhered more to the traditional party line.[41] As President, he protected Republican interests and appointed conservative Justices.[42] He would build his reputation as Chief Justice by working to enhance the conservative judicial activist block on the Supreme Court and to guide presidents in selecting judicial nominees.[43] His ego was vested in his conservative legal and political philosophy, and he retained that philosophy once on the Supreme Court.

Similarly, Justice Scalia seems to have built his reputation on being an extremely bright conservative legal mind. His tenures in the White House Counsel's office, as a law professor, and as a Circuit Judge on the District of Columbia Circuit established his conservative ideological credentials.[44] Scalia built his reputation as a lawyer and circuit judge by writing conservative and intellectually profound legal opinions, law review articles, and judicial opinions.[45] He built his reputation as a Justice by writing intellectually striking, conservative opinions.[46] His ego was vested in his textualist, conservative judicial philosophy, and he has maintained that philosophy on the Supreme Court.

D. Ability To Groom a Coalition on the Court

In addition to a proven track record and a vested personal

41. *See* ABRAHAM, *supra* note 1, at 165-67.

42. *See id.*

43. *See id.* at 165-75, 186-88 (discussing Taft's interest in appointing Justices and judges as President and his wielding of influence over appointments as Chief Justice); ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 157 (1965) ("'Probably no man has ever had as much influence on the choice of judicial personnel' as William Howard Taft. . . . Conservative principles, not party labels, were his criteria.") (citations omitted); Truax v. Corrigan, 257 U.S. 312 (1921) (Taft, C.J.) (holding that a pro-labor, no-injunction law, designed to prohibit judges from enjoining strikes, violated the Due Process Clause of the Fourteenth Amendment by depriving that company owner of the use of his property).

44. *See* ABRAHAM, *supra* note 1, at 353 (discussing "Scalia's impeccable professional and personal attributes, his well-articulated conservative ideology, and his restraintist jurisprudence").

45. *See* YALOF, *supra* note 16, at 146.

46. *See, e.g.*, Lucas v. South Carolina, 505 U.S. 1003 (1992) (Scalia, J.) (holding that an environmental law that deprived an owner of a beach lot of all economically viable use of his land could effect a taking under the Fifth Amendment as incorporated to the States by the Fourteenth Amendment for which compensation was required).

interest in a legal philosophy that will predict their own votes, candidates for appellate courts will also be able to influence other judges' votes by the force of their arguments and their interpersonal demeanors. Thus, the new President should assess Supreme Court and circuit court candidates for their abilities to wield majorities on the court for which they are being considered—i.e., their ability to command the respect of the other Justices and judges—and their interpersonal skills that could persuade the other Justices or judges to join opinions. For example, Chief Justice Charles Evans Hughes, a former Governor of New York, Secretary of State, and presidential candidate, commanded the respect of his fellow Justices and thus maintained a cordial Court during both the hard-fought shift from conservative activism and the fight against President Roosevelt's court-packing plan.[47] Chief Justice Earl Warren used his political skills and natural gregariousness to groom coalitions that changed the face of American constitutional law.[48] In contrast, Justice Frankfurter's condescending lecturing of Warren during the Chief Justice's early tenure on the Court may have helped to drive Warren toward the Hugo Black wing of the Court.[49]

The new President's staff should assess the legal philosophy of each candidate as evidenced by a proven record, the depth of the candidate's belief in that philosophy, and the candidate's ability to groom coalitions once on the bench. Once this wish list of factors has been examined, however, the new President must consider the political struggle of confirmation.

47. *See* 2 PUSEY, *supra* note 35, at 672, 676-77 (1951) (discussing Chief Justice Hughes's forceful intellect and commanding presence at conference with the other Justices); *id.* at 749-65 (describing Chief Justice Hughes's fight against President Roosevelt's Court-packing bill).

48. *See, e.g.*, CRAY, *supra* note 21, at 294 (describing how Chief Justice Warren's "collegial style promoted a sense of harmony among the brethren" that helped obtain a unanimous vote in *Brown v. Board of Education*).

49. Justice Frankfurter gave the new Chief Justice Warren ceaseless advice and critiques. For example, after a conference of the Justices, Justice Frankfurter sent a number of books to Warren with a note stating, "Chief: You said in conference you never heard of *Martin v. Hunter's Lessee*. You really have to read up on it. Here are some useful places to start. I suggest you read—" CRAY, *supra* note 21, at 305. "Warren was livid." *Id.* Further, in another conference Justice Frankfurter blew up at Chief Justice Warren's variance from the text and history of the Constitution and votes for who he thought had a better moral case: "'God d___ it, you're a judge! You don't decide cases by your sense of justice or your personal predilections.'" *Id.* at 356 (expletive omitted).

III. ASSESSING CONFIRMABILITY

Article II, Section 2 of the Constitution provides, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ."[50] Because the President has to deal with the Senate in the appointments process, he will be well-served to consider the confirmation process and to assess each candidate's likelihood of garnering the votes of fifty Senators (plus his Vice President) before making the nomination decision. Various political interest groups will conduct extensive background research on a candidate and may orchestrate media campaigns against that candidate based on real or imaginary ethical or political shortcomings.[51] A failure in the confirmations process would not only embarrass the new President, but it would also show political weakness and invite further attacks. Thus, the new President should carefully assess the confirmability of each candidate in two steps. First, his legal experts, the Federal Bureau of Investigation ("FBI"), and a team of trusted lawyers from the candidate's home state should assess the candidate's qualifications and background issues, if any. Second, the new President's political experts should use their experience in working with the Senate to assess each candidate's likelihood of confirmation.

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50. U.S. CONST. art. II, § 2.

51. Indeed, Senators Biden and Leahy, the People for the American Way, and various law professors are currently gearing up for ideological campaigns against conservative nominees. *See, e.g.*, 146 CONG. REC. S7598 (daily ed. July 26, 2000) (statement of Sen. Biden) (attacking the "Imperial Judiciary" and its federalism jurisprudence); 146 CONG. REC. S7758 (daily ed. July 27, 2000) (statement of Sen. Leahy) (attacking the Rehnquist Court's "second-guessing" of Congress); Courting Disaster: How a Scalia-Thomas Supreme Court Would Endanger our Rights and Freedoms, People for the American Way, *at* http://www.supremecourtvote.org/courtingdisaster.pdf (June 2000) (listing the following targets for potential attacks: Judge Michael Luttig of the Fourth Circuit, and Judges Edith Jones and Emilio Garza of the Fifth Circuit); Anthony Lewis, *Abroad at Home; 'No Limit But the Sky'*, N.Y. TIMES, Jan. 15, 2000, at A17 (asserting that "five members of the Supreme Court . . . are carrying out a radical reshaping of our constitutional structure"); Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. J. URB. & CONTEMP. L. 37 (1999) (stating that "the Rehnquist Court is an activist, conservative Court. . . . [C]onservative in the sense that it is animated by the right-wing political agenda").

A. Having a Good Clean Record

The critical step in avoiding politically costly embarrassment to the new President in the confirmations process is determining whether a judicial candidate is technically and ethically qualified for judicial office. The FBI, Justice Department and White House staff, along with a team of lawyers in the candidate's home state, should perform exhaustive evaluations of each candidate's personal and professional integrity, technical qualifications, temperament, ability to handle a work load, and age and health in order to anticipate and to address possible attacks on the confirmation process.

In developing a pool of qualified candidates for the Supreme Court, the circuit courts of appeal, and the district courts, the President's team should first develop a basic list of those potential candidates that meet the initial technical qualifications. A candidate's proven record of successful experience in education, private practice, or the government is also important. The candidate's age and health should be considered because a tenure of less than ten years is unlikely to have a substantial impact on the judicial system. In addition, members of the bar will care about a candidate's ability to handle a heavy caseload. If a judge cannot rule on motions or generate opinions in a timely manner, justice will be delayed.[52]

All of these technical and philosophical factors will serve as important matters in debates in the Committee on the Judiciary and on the Senate floor during the confirmations process. Once a pool of candidates with technical qualifications and proven records of legal philosophy is developed, exhaustive background checks should begin to avoid unexpected embarrassment in the Senate.

B. Avoiding Embarrassment

If ethical questions exist in a candidate's background, they can explode in the public light and embarrass the President.

52. A wide disparity exists in the average caseload per judge in the circuit courts of appeal. At the end of fiscal year 1999, the total written decisions per active judge was 267 for the Eleventh Circuit but only 60 for the District of Columbia Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, CASE MANAGEMENT STATISTICS 2, 24 (2000). This disparity should help the new President set priorities in the timing of his appointments.

For example, President Johnson's nomination of Justice Abe Fortas to be Chief Justice collapsed in part because of belated revelations that Fortas, while on the Court, had accepted a $20,000 honorarium from a charitable foundation headed by one of his former clients who was under criminal investigation at the time.[53] Although Fortas returned the honorarium after the friend's indictment, the ABA declared that Fortas's initial acceptance was inconsistent with a judge's duty to avoid the appearance of impropriety.[54]

President Nixon's nomination of Judge Clement Haynesworth to the Supreme Court was defeated in part because of his participation in two cases in which he allegedly had a conflict of interest arising from a financial interest in a corporation that was a party to the litigation.[55] During the background review, the President's staff minimized the impact of the allegations that ultimately helped doom the nomination.[56] President Nixon blamed his staff for "not having all the facts" and for the political misjudgment of "coasting on assurances from [Senators] Eastland and Hollings . . . ."[57]

President Reagan suffered a similar political setback when reporters confronted Judge Douglas Ginsburg, a nominee for the Supreme Court, with revelations that Ginsburg had smoked marijuana while a professor at Harvard. Although presidential advisors questioned Ginsburg in general terms on whether he had done anything that could embarrass the President, Ginsburg did not reveal that he had used marijuana many years before.[58] Investigative reporters, however, were able to discover key facts that the President's advisors did not, causing Judge Ginsburg to withdraw his nomination.[59]

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53. *See* Laura Kalman, *Fortas Resignation*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 309 (Kermit Hall et al. eds., 1992).

54. *See id.*

55. *See* YALOF, *supra* note 16, at 106-08.

56. *See id.* at 108.

57. *Id.* at 107 (quotations from Diary Entry of 21 November 1969, *in* THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 110 (New York: G.P. Putnam, 1994)).

58. *See* YALOF, *supra* note 16, at 164 ("Meese and Reynolds had quizzed Ginsburg prior to his nomination about whether anything in his background might jeopardize the nomination. On those and other occasions, Ginsburg had never mentioned his use of marijuana.").

59. *See Bennett Tells Ginsburg to Withdraw*, L.A. TIMES, Nov. 8, 1987, at 1; James Gerstenzang & Karen Tumulty, *Ginsburg Withdraws, Citing Furor over Use of Marijuana: Court Nominee Urges Youths To Learn from His Mistake*, L.A. Times, Nov.

President Clinton suffered a political setback when Pennsylvania trial Judge Frederica Massiah-Jackson asked to withdraw her nomination for the federal district court because of belated disclosures that she used profanity on the bench and exposed undercover police officers in open court.[60] In-depth reviews of newspaper articles, interviews with local prosecutors, judges, and the candidate herself, as well as frank confirmability assessments, could have averted this mishap.

To avoid the embarrassments of past Presidents, the new President should follow a three-tiered strategy. First, local lawyers should be commissioned to interview the candidate's associates, employees, judges before whom he practiced, and friends. These inquiries can be performed by trusted lawyers in the candidate's home state.[61] The FBI will also perform the initial exhaustive background check including personal interviews. Second, the Justice Department lawyers should sift through the records compiled by local lawyers and the FBI, the candidate's writings and opinions, and any newspaper articles mentioning the candidate. The Justice Department can also conduct a personal interview of the candidate. Third, a separate team of lawyers in the White House Counsel's Office can conduct an independent background review of the candidate's record and a personal interview for high-profile candidates.[62] In addition, an investigative reporter should be added to the Justice Department's and the White House Counsel's staffs to discover, from a non-legal perspective, any details that the candidate may not have mentioned and that opposition

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8, 1987, at 1.

60. *See Judge Under Fire Withdraws Nomination*, CHICAGO TRIBUNE, Mar. 17, 1998, at 9 (noting Judge Massiah-Jackson's use of profanity on the bench); 144 CONG. REC. S1970 (1998) (statement of Sen. Hatch) (discussing Judge Massiah-Jackson's exposure of police undercover officers).

61. There has been much controversy over the American Bar Association's rating of Republican nominees. *See* The Federalist Society, *ABA Watch*, July 2000, at 15 (comparing high ABA ratings of Democratic judicial nominees with low ABA ratings of Republican nominees); Letter from Orrin Hatch, Chairman, Committee on the Judiciary, United States Senate, to Members of the U.S. Senate Judiciary Committee (Feb. 24, 1997) (announcing the end of the ABA's official role in advising the Committee on judicial nominations), *available at* http://www.fed-soc.org/abaw3972.htm. On March 22, 2001, White House Counsel Alberto Gonzalez ended the ABA's official role in vetting nominees. *See* Amy Goldstein, *Bush Curtails ABA's Role in Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001, at A1. Accordingly, the new President should consider utilizing trusted lawyers in a nominee's home state to conduct in-depth interviews of judges, lawyers, and others who have known and dealt with the candidate.

62. *See* YALOF, *supra* note 16, at 150-51.

researchers might discover. These steps should help the new President minimize the risk he will be embarrassed, lose a nomination fight, and waste limited political capital.

C. Sizing Up the Senate

All the work in researching a candidate's background and legal philosophy will be meaningless if he cannot secure 51 votes for confirmation in the Senate. Accordingly, the new President should take care in making the political assessment of whether a candidate is confirmable. The political assessment of confirmability differs qualitatively from the technical assessment of the candidate's professional qualifications and legal philosophy. These two assessment talents are rarely found to the same degree in the same person. For example, Justice Department expert legal personnel thought that Robert Bork's stellar qualifications would carry him through a confirmation fight, even though Senate Majority Leader Robert Byrd and Judiciary Committee Chairman Joseph Biden warned of a bitter confirmation battle.[63]

Similarly, President Johnson failed to recognize the political attacks on Abe Fortas, whom he nominated to be Chief Justice, or the cronyism attacks on Judge Homer Thornberry, whom he nominated to take Fortas's Associate Justice seat.[64] President Nixon, overly complacent with his advisors' assurances that Haynesworth would be confirmed, failed to anticipate the determined attacks of the opposition which, combined with disclosures of background problems, defeated Haynesworth's nomination.[65] The new President should use advisors with keen political acumen to accurately assess the prospects that the Senate will consent to his nomination.

The new President would be well advised to seek advice from all quarters: Senators from a nominee's home state, Judiciary Committee Senators from both parties, and the leaders of the majority and minority parties. The tradition of Senatorial courtesy—consulting with the Senators from the

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63. *See id.* at 159-60.

64. *See id.* at 93 (stating that advisors warned Johnson that charges of cronyism could derail the Fortas and Thornberry nominations).

65. *See id.* at 107-08 (discussing the concerted efforts of the AFL-CIO to defeat Haynesworth and the conflict of interest problems that helped defeat the nomination).

candidate's home state—dates back to George Washington's presidency and should not be overlooked.[66] The new President should approach these Senators with a list of candidates early in the process. Because certain factions outside Senate leadership may lead opposition to a candidate, the new President may also wish to float trial balloons on potential nominees.

Moreover, the new President's advisors should anticipate the extraordinary lengths to which an opposition party in the Senate is willing to go to defeat a nominee. The vicious personal attacks against then-Justice William Rehnquist and then-Judge Clarence Thomas during their confirmations battles are instructive. Detractors personally attacked Justice Rehnquist at his confirmation hearing for chief justice on issues of race.[67] These thin charges were partially based on an unenforceable restrictive covenant in a deed to Rehnquist's vacation home that had been drafted by an earlier owner.[68] Anita Hill personally attacked Judge Thomas at his confirmation hearing for Associate Justice with allegations of decade-old sexual harassment, yet the charge was contradicted by both her own voluntary actions of leaving a civil-service protected job to follow Thomas on his rise up the government career ladder[69] and testimony of numerous women who

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66. *See* ABRAHAM, *supra* note 1, at 27.

67. *See, e.g.*, Ronald J. Ostrow, *Sharp Rhetoric Marks First Day of Rehnquist Hearings*, L.A. TIMES, July 30, 1986, at 1 (discussing attacks on the chief justice nominee as being "too extreme on race, women's rights, freedom of speech and separation of church and state to be the nation's 16th chief justice" and reporting Senator Hatch's calls for an end to "character assassination" of judicial nominees).

68. *See Justice Knew of Deed in '74*, N.Y. TIMES, Aug. 6, 1986, at A13 (stating that Rehnquist disclosed to Senators that a deed to a vacation home he had purchased years before contained a restrictive covenant against Jews and that he found the covenant obnoxious and would try to have it removed).

69. Senator DeConcini explained:

> Professor Hill alleges that Clarence Thomas's sexual harassment commenced at the Office of Civil Rights for the Department of Education during the winter of 1981. In 1983, Clarence Thomas became the Chairman of the Equal Employment Opportunity Commission [EEOC]. Shortly thereafter, Anita Hill followed him to the EEOC. Professor Hill testified that after being subjected to his verbal assaults at the Office of Civil Rights she never sought alternative employment. Moreover, she asserted that when he left the Department of Education to become the Chairman of the EEOC that she would not have a job. Therefore, she had no recourse but to follow him to his new place of employment.
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> However, Mr. Berry, a personnel specialist at the Office of Civil Rights testified that as a "schedule A" employee Anita Hill had job security and

worked with Thomas and attested that they had never seen him engage in such conduct toward Hill or any other woman.[70] Thankfully for both the country and the institutional integrity of the Senate, disqualification by deeds to vacation homes or decade-old, unsubstantiated accusation was not adopted as the rule. Had it been, extremist elements on either side of the ideological aisle could block any but the blandest and most inexperienced nominee.

During the last several years, when significant problems with a nominee have been substantiated and deemed serious, the nominee has been allowed to withdraw or his nomination has not moved through Committee. Chairman Orrin Hatch has greatly elevated the content of public debate in confirmation hearings and protected nominees and their families from vindictive personal attacks. Hopefully, this manner of administering hearings will continue.

Nonetheless, the new President should be prepared for vindictive personal attacks on his nominees. Accordingly, the new President's staff should be ready with a coordinated media campaign for each high-profile nominee to counter anticipated attacks. Friendly special interest groups should be approached to express a wealth of public support for a candidate. Personal profiles of the nominee could be given to newspapers and magazines. Statements recommending the nominee's character by distinguished lawyers, community groups, Congressmen and Senators would also be helpful. In the end, the new President will have to demonstrate the courage of his convictions to hold together a coalition once a nomination is announced and a fight begins.

IV. CONCLUSION

In sum, I recommend that the new President's staff conduct exceptionally thorough background checks on judicial candidates, have legal experts assess their legal philosophy, and have political experts assess their confirmability. The new

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was informed of her employment rights when she assumed the position. 137 CONG. REC. S14951 - S14952 (1991) (statement of Sen. DeConcini).

70. *See Defenders of Hill and Defenders of Thomas; The Thomas Hearings*, BOSTON GLOBE, Oct. 14, 1991, at 3 (reporting the testimony of Nancy Fitch, Diane Holt, and Phillis Berry Meyers, all of whom worked with Thomas, that Thomas had not engaged in any inappropriate conduct).

President's judicial selections will determine whether the Constitution will be interpreted by the textualist school or the nontextualist school of jurisprudential thought for the next quarter century, and thus whether social policy will be set by the federal judiciary or by federal and state executives and legislatures. The new President's judicial selections will also more immediately impact whether the promise of his legislative agenda is fulfilled or whether it forms the basis for his opponent's campaign in 2004.