How to Select a Justice for the U.S. Supreme Court

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Introduction

I began to write the early drafts of this essay in October 2005, when the U.S. Senate had recently confirmed John G. Roberts to replace Chief Justice Rehnquist and the U.S. Senate was currently considering the nomination of Harriet Miers[1] to replace Justice O'Connor. The conservative Christians who diligently organized and supported President George W. Bush's candidacy expected that Bush would appoint Justices to the U.S. Supreme Court who will overrule *Roe v. Wade* and similar cases that are anathema to them. Instead, President Bush twice chose to nominate Justices with absolutely no published views on abortion, then, in Nov 2005, Bush nominated Judge Alito[2] who had anti-abortion views.

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[1] See the history chronicled in my document at http://www.rbs0.com/miers.pdf (October 2005).

[2] Standler, History of the Nomination of Samuel Alito, http://www.rbs0.com/alito.pdf (Feb 2006).

This essay considers three things:

1. examines the history of the U.S. Supreme Court during 1900-1940 and concludes that most of the Justices were mediocre, who wrote few opinions that continue to be cited.
2. examines the recent history of U.S. Supreme Court Justices who were appointed by conservative presidents, but these Justices quickly aligned themselves with liberal positions.
3. makes two suggestions about how a president *should* find candidates for the U.S. Supreme Court

Requirements for a Justice

The U.S. Constitution requires that the President be a natural-born citizen of the USA who is at least 35 y old.[3] In contrast, there are no Constitutional requirements for Justices of the U.S. Supreme Court. The President nominates a Justice and the U.S. Senate either confirms or rejects that nominee by a majority vote.[4] There is no requirement that a Justice be either a citizen of the USA or a licensed attorney, but — by tradition — *all* Justices have been both a citizen and an attorney. I suggest that the lack of requirements in the Constitution reflects that the U.S. Supreme Court was not as important as the legislative and executive branches of government when the Constitution was written around 1790. Opinions of the Court were not readily available in published books until about 1830.[5] There are very few opinions of the Court before 1850 that are still cited by attorneys and law professors.

Mostly Mediocre

In looking at lists of Justices of the U.S. Supreme Court during the years 1900 to 1940, I am impressed that few of them wrote opinions that are still frequently cited by scholars in constitutional law. In my opinion, only two[6] Justices during 1900-1940 have left a lasting impression: Oliver Wendell Holmes and Louis D. Brandeis.

Indeed, the U.S. Supreme Court does not seem to have discovered the First Amendment to the U.S. Constitution — with its guarantees of freedom of speech and freedom of religion — until the 1950s. Nearly all of the First Amendment cases now cited by the Court were written after the

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[3] U.S. Constitution, Article II, § 1, cl. 5.

[4] U.S. Constitution, Article II, § 2, cl. 2.

[5] See the discussion of *Wheaton v. Peters* in Standler, No Copyright for Law in the USA, http://www.rbs2.com/cgovt.pdf (Jan 2009).

[6] Many attorneys would also include Benjamin Cardozo, who served on the U.S. Supreme Court for six years in the 1930s, but his prose is too florid for my taste, and I think Cardozo's better opinions were written earlier, when he was serving as judge of the highest court in New York state.

year 1950. I suggest that mediocre Justices simply ignored the First Amendment, and accepted whatever the U.S. Congress and the President wished to do.

A book review tersely mentions the poor quality of President Truman's appointments to the U.S. Supreme Court:

> ... in terms of intellectual ability, [Fred M. Vinson] paled in comparison to his contemporaries on the bench — Hugo Black, Felix Frankfurter, William O. Douglas, Robert H. Jackson or Wiley Rutledge. He is remembered primarily as a crony of Harry Truman, and he along with Truman's other appointments to the high court — Harold Burton, Tom Clark, and Sherman Minton — are generally considered to be among the least impressive people ever to sit on the Court.

Melvin I. Urofsky, "James E. St.Clair and Linda C. Gugin, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY," 45 AMERICAN JOURNAL OF LEGAL HISTORY 524, 524 (Oct 2001). Truman's appointments were part of a long tradition of Presidents nominating politicians who they knew, instead of nominating outstanding law professors, or instead of nominating excellent judges on the U.S. Court of Appeals. In this way, the Court and the legal system in the USA are denied the smartest legal minds in the USA.

It was a surprise to me, while preparing this essay in 2005, to look at lists of U.S. Supreme Court Justices since 1940 and see *un*familiar names like Byrnes and Whittaker, who had apparently never written anything significant on First Amendment law, privacy, or torts. A survey[7] of 65 law school deans and professor in June 1970 rated Byrnes, Whittaker, and six others as "failures" on the U.S. Supreme Court. Inquiring further, I looked at a biography[8] of the Justices and learned that:

- Byrnes had dropped out of school at age 14 y and attended neither college nor law school. Justice Byrnes was, however, a lawyer in South Carolina since 1903.[9]
- Whittaker dropped out of high school at age 16 y, never attended college, attended law school at night in Kansas City.[10]

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[7] Albert P. Blaustein and Roy M. Mersky, THE FIRST ONE HUNDRED JUSTICES, at p. 40 (1978); cited in Frank Easterbrook, "The Most Insignificant Justice: Further Evidence," 50 UNIVERSITY OF CHICAGO LAW REVIEW 481, 503 (Spring 1983).

[8] Leon Friedman and Fred L. Israel (editors), THE JUSTICES OF THE UNITED STATES SUPREME COURT (1995).

[9] Walter F. Murphy, Vol. 4, p. 1264 of THE JUSTICES OF THE UNITED STATES SUPREME COURT (1995).

[10] Leon Friedman, Vol. 4, p. 1424 of THE JUSTICES OF THE UNITED STATES SUPREME COURT (1995).

Fortunately, Byrnes only served one year on the Court, but Whittaker managed to botch the job for five years. Whittaker's biographer identified 41 cases in which Whittaker voted in a 5 to 4 majority to deny a civil right or civil liberty.[11] The biographer assessed Justice Whittaker's legacy:

> What is astonishing about so many of the five to four decisions noted above is how few of them lasted after Whittaker's departure from the Court and how out of date they now [1995] seem. **....** There was little Whittaker did in his five years on the Court to justify praise as either a judicial thinker or a legal technician. **...** he was not fitted intellectually or physically for the job. **...** he never offered any intellectual justification for his position.

Leon Friedman, Vol. 4, pp. 1431, 1433 of THE JUSTICES OF THE UNITED STATES SUPREME COURT (1995). In short, it is a disaster to nominate an *un*educated person to the U.S. Supreme Court.

In 1970, President Nixon nominated George Harrold Carswell to the U.S. Supreme Court. Carswell was characterized as mediocre. Roman Hruska, a U.S. Senator from Nebraska, famously said about Carswell: "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they? We can't have all Brandeises and Cardozos and Frankfurters and stuff like that." The answer is the Court *should not* be a place for mediocre people. Fortunately, the Senate rejected Carswell by a vote of 45 to 51.

A law review article that proposes an objective method for determining merit of judges on the U.S. Court of Appeals harshly — but accurately, in my opinion — states the problem with the current method of selecting a nominee for the U.S. Supreme Court:

> ... the discussion has been almost entirely political (focusing on litmus tests such as a candidate's likely position on abortion. Occasionally, a nominee's intellectual ability is mentioned, but this topic has time and time again been placed to the side in favor of a discussion of the nominee's political beliefs.
>
> We believe that the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame. **....**

Stephen Choi and Mitu Gulati, "A Tournament of Judges?" 92 CALIFORNIA LAW REVIEW 299, 300-301 (Jan 2004). Later, they say:

> The current selection criteria for the Supreme Court appear to be a set of political litmus tests on matters such as abortion, the death penalty, and affirmative action. These litmus tests provide some indication of how political hot-button cases will be decided, but not much else. Because hot-button cases make up but a small fraction of the Court's docket, these promotion criteria focus only on a small portion of what is required of a justice.

Ibid. at 305.

Obviously, the general public — who elects the President and Senators — is only aware of hot-button cases at the U.S. Supreme Court. I would be surprised if 1% of the adult population of the USA had actually read an entire opinion issued by the Supreme Court. Naturally, the political process focuses on what voters can understand, and *not* the technical legal issues (i.e., merit) that are actually important. While I do not deny that a nominee's views on hot-button issues are

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[11] Leon Friedman, Vol. 4, p. 1429 of THE JUSTICES OF THE UNITED STATES SUPREME COURT (1995).

important, the legal requirement of judicial impartiality *demands* that a nominee not express a public opinion on issues that are likely to come before the Court.[12] Furthermore, even if a nominee's view on an issue is known, that view may change with time.[13] Ultimately, it is futile to choose nominees and confirm them on the basis of their political views.

When the challenge to the Communications Decency Act (a federal statute censoring the whole Internet, allegedly to protect children) came before the U.S. Supreme Court, in *ACLU v. Reno,* 521 U.S. 844 (1997), journalists reported that *none* of the nine Justices were Internet users.

While mediocre candidates were being nominated by the president and confirmed by the U.S. Senate, some truly outstanding candidates have been ignored:

- Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit, an outstanding judge during the 1930s and 1940s, whose opinions are still frequently cited.
- Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, who was a professor of law for 12 years at the University of Chicago before being appointed to the U.S. Court of Appeals, the author of many books on law, and one of the most intellectual judges in U.S. history.
- numerous law professors (e.g., Ronald Rotunda, John Nowak, Kathleen Sullivan, Cass Sunstein, Lawrence Tribe, etc.) who have written legal treatises on constitutional law.

I suspect that these intellectuals were ignored at least partly because they held "wrong" political opinions, according to the presidents who were looking for a nominee.

Conservatives Become Liberals

In 1953, President Eisenhower, a moderate Republican, appointed Earl Warren as Chief Justice of the U.S. Supreme Court. Warren was the author of *Brown v. Board of Education,* the landmark case that desegregated public schools. While *Brown* is no longer controversial, it was followed by widespread outrage for more than twenty years, and not just in the southeastern USA.

In 1956, President Eisenhower, a moderate Republican, appointed William J. Brennan to be a Justice of the U.S. Supreme Court. Brennan became one of the most liberal Justices in the history of the Court, much to the consternation of Eisenhower and other conservatives.

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[12] See my discussion of discuss the legal obligation of impartiality, and quotation of the judicial oath, federal statute, U.S. Supreme Court cases that hold that an impartial judge is a constitutional requirement of due process, and the federal judicial code of conduct: http://www.rbs0.com/sotomayor.pdf (May 2009).

[13] See page 5, below.

In 1970, President Nixon, a conservative Republican, appointed Harry A. Blackmun to be a Justice of the U.S. Supreme Court. Blackmun was the author of *Roe v. Wade,* the landmark case that legalized abortion during the first three months of pregnancy. *Roe v. Wade* continues to be the one case that most annoys conservative Christians in the USA.

In 1975, President Ford, a moderate Republican, appointed John Paul Stevens to be a Justice of the U.S. Supreme Court (to replace Justice Douglas, who retired). By the late 1990s and early 2000s, Stevens was the most liberal Justice on the Court.

In 1988, President Reagan, a conservative Republican, appointed Anthony M. Kennedy to be a Justice of the U.S. Supreme Court. Kennedy became a moderately liberal Justice.

In 1990, President Bush, a conservative Republican, appointed David H. Souter to be a Justice of the U.S. Supreme Court (to replace Justice Brennan, who retired). Souter became a liberal Justice.

Words like "conservative" and "liberal" have multiple definitions. Conservatives in the tradition of Barry Goldwater believed in small government and maximum freedom for individuals, including supporting a woman's right to an abortion and supporting equal rights for homosexuals, which are generally considered "liberal" political positions since approximately 1980. Because of my interest in constitutional privacy law,[14] I tend to use the term "liberal Justice" to refer to a Justice who believes in expansion of constitutional privacy rights. Similarly, many conservative Christians use agreement with *Roe v. Wade* as a litmus test of whether a Justice is liberal. Nonetheless, labels like "liberal" and "conservative" — regardless of what they mean — divide people into opposing groups and make it more difficult to find common ground for a consensus solution to a real problem.

I can think of only one liberal who changed to a conservative while on the U.S. Supreme Court. In 1962, President Kennedy, a liberal democrat, appointed Byron White to the U.S. Supreme Court. Justice White was one of two Justices to dissent in *Roe v. Wade.* Justice White later wrote the majority opinion in *Bowers v. Hardwick,* which was overruled 17 years later.

The conventional view from politicians is that Justices who changed their philosophy after being appointed to the U.S. Supreme Court were perfidious weasels. <*grin*> I suggest that these changes in philosophy are proof that the Court is genuinely independent of the other two branches of government.

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[14] Ronald B. Standler, *Fundamental Rights Under Privacy in the USA,* at http://www.rbs2.com/priv2.pdf (Aug 1998).

How to Find Good Candidates

Many presidents seem content to pick a crony (e.g., President George W. Bush's selection of his personal attorney, Harriet Miers), a politician, or a friend of some adviser. This is a haphazard way of finding good judicial appointments, and a bad way to find an outstanding candidate. Appointments to the U.S. Supreme Court are extraordinarily important. I suggest the following two groups of worthy candidates for the U.S. Supreme Court:

1. current judges on the U.S. Courts of Appeals
2. professors in law schools who are experts on constitutional law (e.g., written many papers published in law reviews, written books on constitutional law, etc.)

The first group, current judges on the U.S. Courts of Appeals, is the most obvious source of people to be nominated to the U.S. Supreme Court. The U.S. Courts of Appeal are federal appellate courts, one level below the U.S. Supreme Court, and one level above federal trial courts. To nominate a judge on a U.S. Court of Appeal and confirm him/her as a Justice is essentially a promotion in reward of outstanding service.

The second group, law professors with expertise in constitutional law, contains scholars who have personally read hundreds of opinions of the U.S. Supreme Court and have written many scholarly articles explaining and criticizing these opinions. William O. Douglas, a very liberal Justice of the U.S. Supreme Court during 1939-1975, was previously a professor of law at Yale for eight years.[15] Felix Frankfurter, who was a Justice of the U.S. Supreme Court during 1939-62, was previously a professor of law at Harvard for approximately twenty years. Anthony Kennedy was a professor of constitutional law for 10 years, before being appointed to the U.S. Court of Appeals. Stephen Breyer was a professor of law at Harvard for 27 years. Ruth Bader Ginsburg was a professor of law for 17 years, first at Rutgers then at Columbia University, before being appointed to the U.S. Court of Appeals in 1980 and the U.S. Supreme Court in 1993.

The members of the first and second groups comprise most of the people in the USA who have a deep understanding of constitutional law. If the president truly wants to appoint an outstanding candidate, the first two groups represent an abundant pool of knowledge and experience. Because there are 179 judges sitting on the U.S. Courts of Appeals,[16] and because there are many dozens of nationally recognized law professors with expertise in constitutional law, there is really no need to consider other pools of possible nominees.

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[15] Immediately prior to his appointment to the U.S. Supreme Court, Douglas has was a member of the Securities and Exchange Commission, part of the executive branch of the U.S. government.

[16] 28 U.S.C. § 44 (current 14 Oct 2005).

However, history shows that some outstanding Justices had previous experience as a judge in a state supreme court: Oliver Wendell Holmes was a Justice of the Massachusetts Supreme Court for twenty years, William Brennan served on the New Jersey Supreme Court for four years, David Souter served on the New Hampshire Supreme Court for seven years. Nonetheless, matters in state courts include topics like divorce,[17] child custody, probate, and land disputes for which federal courts have no jurisdiction. Furthermore, most controversies involving the Bill of Rights are heard in federal courts, *not* state courts.

The president, naturally, wants to appoint Justice(s) who have a similar social and political philosophy to the president's philosophy. By nominating only judges on the U.S. Courts of Appeal who have written many opinions on constitutional law or law professors who have written many scholarly publications about constitutional law, the president can read a public, written record of the candidates' views. Given this abundant supply of judges and law professors with experience in constitutional law, I see no reason to experiment with the risky possibility that someone —in the process of learning constitutional law — might develop a judicial philosophy that is different than that desired by the president. On the other hand, there is nothing similar to the power of being a Justice of the U.S. Supreme Court, so prior experience as a judge in a lower court, law professor, or appellate litigator does *not* reliably indicate what one would do *after* becoming a Justice of the Court. Because it is important that the Court be independent of the two political branches of government, I would be more concerned with the nominee's knowledge of constitutional law, wisdom, integrity, etc., and less concerned about how that nominee might decide a specific case.

Where *not* to find nominees for U.S. Supreme Court

I have some concern about a former U.S. Attorney General or a former U.S. Solicitor General[18] serving as a Justice of the U.S. Supreme Court. The government is a frequent litigant, and a former attorney for the government would appear to have a conflict of interest. The same concern arises for an attorney who represents other frequent litigants, such as nonprofit groups that do public interest law.

I suggest *not* nominating politicians (or former politicians) to the judiciary. Politicians are successful because they do what the majority of voters want them to do, while the judiciary often needs to have the integrity to oppose popular sentiments and protect minorities.[19] Politics is

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[17] Ronald B. Standler, *Federal Court Jurisdiction in the USA in Family Law Cases,* http://www.rbs2.com/dfederal.pdf (May 2004).

[18] The Solicitor General is a member of the U.S. Department of Justice who argues cases before the U.S. Supreme Court, representing the U.S. government.

[19] Ronald B. Standler, *Freedom from the Majority,* http://www.rbs2.com/majority.pdf (Oct 2005).

largely about propaganda and opinion polls. Politics has little to do with scholarly writing that is typical of good appellate court opinions. And politicians have *not* spent the time to read many opinions of the U.S. Supreme Court and learn constitutional law.

I suggest *not* nominating attorneys in private practice, because the process of advocacy for a client is very different from judicial duties of deciding a case. Furthermore, attorneys in private practice (with the exception of the few attorneys who specialize in appellate litigation) generally are mostly concerned with advising clients and trial preparation (e.g., collecting evidence), so these practicing attorneys do not have the time to read many opinions of the U.S. Supreme Court.

Sometimes one hears a politician urge that the president go outside the traditional sources of Justices (e.g., judges on U.S. Court of Appeals, state supreme courts, and law professors) and appoint someone with a different background, in order to increase the diversity of the U.S. Supreme Court. This seems strange to me. First, being an appellate judge is a learned profession, involving specialized knowledge in constitutional law that is only gained from reading many hundreds of opinions of the U.S. Supreme Court. One does *not* hear people advocating selecting physicians who have no surgical experience to be a surgeon, in order to increase the diversity of the surgical profession. Second, appellate courts are *not* representative bodies — every Justice should be there because he/she *understands* constitutional law *before* being appointed. With only nine Justices on the U.S. Supreme Court, it is impossible to represent every religious and ethnic group on the Court. Nonetheless, the nine Justices should *not* all be white, Christian, and male.

Confirmation by the U.S. Senate

In the late 1800s, it appears it was common for the U.S. Senate to confirm a Justice of the U.S. Supreme Court within a few weeks of the date that the president nominated him, and without any hearings in the Senate.

A terse history of confirmation of nominees to the U.S. Supreme Court has three points:[20]

1. The first hearings in the Judiciary Committee were held in 1916, for the appointment of Justice Brandeis. Mr. Brandeis did not appear before the Committee.
2. Harland Fiske Stone in 1925 was the first nominee to appear before the Committee during hearings.
3. Beginning with the 1955 nomination of John Harland, every nominee has appeared before the Committee.

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[20] Denis Steven Rutkus and Maureen Bearden, "Supreme Court Nominations, 1789 - 2005: Actions by the Senate, the Judiciary Committee, and the President," Report RL33225, at pp. 6-7, *Congressional Research Service,* (5 Jan 2006) http://assets.opencrs.com/rpts/RL33225_20060105.pdf ; Arlen Specter, Chairman of the Judiciary Committee, Introductory Remarks at Executive Session of the U.S. Senate, *Congressional Record,* S10398-99 (26 Sep 2005).

It is possible that the more thorough hearings since 1955 have reduced the number of mediocre Justices.

However, Canon 3 of the Code of Conduct for United States Judges[21] prohibits a judge from making any public statement that might give the impression of lack of impartiality on a matter pending before the court, or which is expected to come before the court. A judge who was *not* impartial might be a violation of due process. In practice, this means that a nominee to become a Justice of the U.S. Supreme Court can *not* answer questions from Senators about expected topics of future litigation, such as abortion rights. And it would be highly improper for a nominee to tell Senators how he/she would vote on a specific issue (e.g., overturn *Roe v. Wade*), as such a statement not only shows bias and prejudice, but would also impair the independence of the judiciary from the two political branches of government. Such bias and prejudice could be cured if the Justice later disqualified himself/herself from hearing such cases,[22] but then the assurances given to the Senators would be meaningless.

In January 2006, two professors at Yale Law School proposed to limit Senators questions about specific issues to asking the nominee how he/she would have voted on past U.S. Supreme Court cases.[23] Answering such questions would not constitute bias or prejudice on hearing future cases, because answering such questions is no different from writing law review article(s) on a case or group of cases, and no different from a law professor criticizing cases during class. However, I am still concerned about the independence of the judiciary when nominees are interrogated about their views on specific cases or issues by the Senate Judiciary Committee.

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[21] http://www.uscourts.gov/guide/vol2/ch1.html This Code of Conduct is similar to the American Bar Association's Model Code of Judicial Conduct (1990), which has a separate prohibition on candidates that is not found in the federal Code. The 1990 ABA Model Code of Judicial Conduct prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court ...." Canon 5(A)(3)(d)(ii). The ABA Canon *may* be an *un*constitutional restriction on freedom of speech. *Republican Party of Minnesota v. White,* 536 U.S. 765, 773, n. 5 (2002).

[22] 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

[23] Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE LAW JOURNAL (The Pocket Part), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html

My criticism of Constitutional procedure

I have two criticisms of the U.S. Constitution procedure for selection and confirmation of the federal judiciary.

1. Allowing the president to nominate candidates gives the president too much power by making many lifetime appointments that history shows are likely to be confirmed by the Senate,[24] especially if the president's political party holds a strong majority in the Senate. Furthermore, most presidents do *not* have personal familiarity with good candidates among the judiciary and law faculty.

2. The U.S. Senate currently can confirm a Justice, or federal judge, with as little as 51 votes. If a candidate is so marginal that he/she can only get 51 votes, I believe it would be safer to reject them than to confirm them. As stated earlier in this essay, there are many dozens of possible good candidates, so there is no shortage of good candidates.

If I were designing the Constitution,[25] I would use a different process for selecting Justices:

1. I suggest letting judges on a U.S. Court of Appeals[26] nominate perhaps three candidates for one vacant seat on the U.S. Supreme Court. At least two of the candidates should be judges on the U.S. Court of Appeals who have written more than 150 majority opinions, while one candidate could be a law professor who has written many scholarly articles on constitutional law and who has personally either (a) argued at least one case before the U.S. Supreme Court or (b) clerked for a Justice of that Court. The Senate Judiciary Committee could then evaluate each candidate and recommend one candidate to the full Senate.

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[24] From 1789 to 2006, 77% of the president's nominees to the Supreme Court were confirmed by the Senate. During recent history from 1971 to 2008, only one nominee (Bork) was rejected by the Senate and only one nominee (Miers) withdrew from consideration, which means that 88% of the president's nominees to the Supreme Court have been confirmed by the Senate. See, e.g., Denis Steven Rutkus and Maureen Bearden, "Supreme Court Nominations, 1789 - 2005: Actions by the Senate, the Judiciary Committee, and the President," Report RL33225, *Congressional Research Service,* (5 Jan 2006) http://assets.opencrs.com/rpts/RL33225_20060105.pdf .

[25] I am opposed to opening a Pandora's Box by frequently amending the Constitution. My suggestions are purely theoretical.

[26] Allowing Justices of the U.S. Supreme Court to nominate their own new member would tend to perpetuate the political makeup of the Court, since most people tend to select people like themselves.

2. I suggest requiring at least 75 votes in the Senate for the confirmation of any Justice to the U.S. Supreme Court.[27] This change in procedure would help assure confirmation of only mainstream nominees and would make filibusters unnecessary.

3. Because requiring a super-majority could result in a stalemate in which any group of Senators with at least 25 votes can block a nominee because of opposition to him/her on some hot topic (e.g., abortion, same-gender marriage, etc.), the Senate needs to be *required* to confirm one of the nominees within 90 days of the arrival of the nominations.

4. I suggest term limits[28] for Supreme Court Justices of 20 years service or until age 80 y,[29] whichever comes first. The term limit ensures regular turnover of the membership of the Court; an age limit removes senile Justices.

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[27] In considering the nine Justices on the U.S. Supreme Court in April 2009, all of them had more than 75 votes in the Senate, except Thomas (52 votes) and Alito (58 votes). Therefore, my proposal would affect only 2/9 of the current Justices.

[28] Term limits for Justices would require an amendment to the U.S. Constitution, because Article III, § 1 says that judges and justices "shall hold their Offices during good Behaviour," which grants them lifetime tenure.

[29] I take the suggested 80 y age limit from 28 U.S.C. § 371(c), where a judge in a U.S. District Court or U.S. Court of Appeals is eligible for "senior status" at age 80 y, even with zero years of active service on the court.

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Links

http://www.fjc.gov/public/home.nsf/hisj Brief biographies of all judges in the federal courts since the year 1789.

http://www.supremecourtus.gov/about/biographiescurrent.pdf Official biographies of the current Justices of the U.S. Supreme Court.

http://www.loc.gov/law/find/court-nominations.php Library of Congress main webpage on U.S. Supreme Court nominations, beginning with Chief Justice Roberts in 2005.

http://www.loc.gov/law/find/court-confirmed.php U.S. Senate documents from confirmation process for new Justices to the U.S. Supreme Court, beginning with Justice Rehnquist in 1971.

http://www.loc.gov/law/find/court-withdrawn.php U.S. Senate documents on nominees to the Court who were *not* confirmed, beginning with Thornberry in 1968.

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