

Chapter Eight

The Reliability of Judicial Appointments in the United States During the Presidencies of Ronald Reagan and George H. W. Bush

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Before I commence I would like to forewarn such an eminent audience that I do not have a law degree and the manner in which I approach this topic is merely as a humble, unknown political scientist in a field casually referred to as American political jurisprudence.

I have always been very curious about the vast power of judges of the United States Supreme Court and, in particular, the fact that they are appointed for life. To the American president with the power of making these rare and significant nominations, *in political terms*, this simply represents a very stark gamble. For me, the fundamental question has always been, from a crudely political perspective, how can the President of the United States be absolutely sure that the judicial nominee he has entrusted for life to reflect his ideological values on the Court be as reliable as he would expect? I use the term “reliable” in this context in the same way as the term “concordance” is applied in the existing literature regarding this subject matter. Concordance is used by Jeffrey Segal and others to explain the degree to which a judicial nominee adheres to the ideological and philosophical preferences of the nominating President. It is simply defined as, “the relative agreement between judicial behaviour and presidential policy preferences.”¹

Even today it is remarkable to think that my own personal hero, Justice Clarence Thomas, will celebrate his twentieth anniversary on the Supreme Court in October 2011 – yet he will only be 63 years old; based on recent departures he still has a twenty-year future determining the course of that country’s political culture and legal history. Imagine a situation in Australia, for instance, where Justice Ian Callinan would still be a delightful part of the High Court today having been appointed way back in 1998; or where Justice Dyson Heydon would continue to grow as the Court’s intellectual force during the next ten years instead of having his vocation so cruelly interrupted in the next eighteen months by a replacement from the Gillard-Brown government.

In looking more deeply at this concept of judicial reliability, I would like to do so in three parts: First, to recount the many classic instances of spectacular lack of reliability American Presidents have faced in the past with their choice of judicial nominee. Second, to share with you my own direct observations regarding the judicial reliability of a specific cohort of judges on the Supreme Court and the United States Court of Appeals for the Fourth Circuit. Finally, I would like to provide three reasons why it came about that certain judicial nominees in the example I use were not completely reliable choices.

A short history of judicial reliability in the United States

The opportunity to appoint men to lifetime positions throughout the appellate levels of the American federal judiciary is one of the most significant and enduring acts the President of that country can make. However, it can also be a perilous undertaking if that President wants to be assured of success.

It is broadly accepted that the American President possesses a deliberate political interest in the type of person he nominates to the courts. As John Maltese observes, “. . . (a) president’s Supreme Court appointments are among his most important (and most contentious). As a tool for influencing

judicial policy making, they are an important part of presidential power. Symbolically, they are a test of presidential strength.”² Harry Stumpf makes clear, “...the president, through his Supreme Court appointments, enjoys a unique opportunity to influence the course of judicial policy making for the nation far beyond his term of office, and few chief executives have been unmindful or careless in their use of this power.”³ Finally, Donald Songer and others have demonstrated that a President’s interest in judicial nominations can vary according to the importance placed on specific criteria. They declare:

. . . an administration can undertake a deliberative effort to appoint judges who will advance, through their decisions, the policy agenda of the president. Other administrations may utilise judicial appointments for partisan goals. In this respect, presidents view judicial appointments as vehicles for advancing their own political base or the stature of their parties. Some presidents, on occasion, use judicial appointments as opportunities for rewarding close friends who have been loyal throughout their political career. Selection processes also vary by administration in terms of the personal involvement of the president and the attention given to input by home state senators and others interested in the staffing of the bench.⁴

The desire of Presidents to take a personal interest in the philosophical outlook of their judicial nominees has long been a part of American presidential history. John Maltese records the significance that was placed on selecting the “right” judicial nominees under President Thomas Jefferson. He states:

After an unsuccessful attempt to remove Federalist Supreme Court justices through impeachment, the Democratic-Republicans slowly replaced justices through natural attrition. But their first opportunity did not come until 1804. Thomas Jefferson appointed three justices during his eight years in office, but appointing the justice who would give the Democratic-Republicans a majority on the Court fell to Jefferson’s successor, James Madison. ‘The death of (Justice William) Cushing is opportune,’ Jefferson wrote in a letter to Attorney General Caesar Rodney, ‘as it gives an opening for at last getting a Republican majority on the supreme bench . . . I trust the occasion will not be lost.’⁵

The former Chairman of the Senate Judiciary Committee, Senator Orrin Hatch of Utah, has acknowledged that there is a risk in attempting to select judicial nominees who could meet the expectations of their nominating President throughout their entire time on the bench. The Senator concluded:

. . . trying to judge a person’s political views is a less than accurate science. Judicial appointments are for life. You may think you know what a person believes today, but there is no guarantee that these opinions will remain intact over the course of a career of perhaps several decades. David Souter, John Paul Stevens and Earl Warren, to name a few, all defied expectations.⁶

Here it is worth pointing out further examples of where American Presidents were convinced they were selecting “safe” and “known” candidates to the nation’s highest court only to be gravely disappointed as their nominees adopted an altogether different legal methodology once securely confirmed on the bench. John Maltese recounted:

. . . history books are full of pithy quotes of presidents spurned by their judicial nominees. Betrayed by Justice Tom Clark’s vote on important cases, Harry Truman called Clark’s

appointment his ‘biggest mistake.’ Truman had first named Clark as his attorney general and then elevated him to the Supreme Court. ‘I don’t know what got into me,’ Truman later said. ‘He was no damn good as Attorney General, and on the Supreme Court . . . it doesn’t seem possible, but he’s even worse. He hasn’t made one right decision that I can think of . . .’⁷

Well, Joseph Menez has also provided a wonderful summary of disappointed Presidents and their Supreme Court legacies:

Justice Blackmun . . . despite viewing himself as a centrist has travelled in thirteen years from the conservative to the liberal wing. Stanley Reed started out as a liberal New Dealer, became a ‘swing’ man and ultimately a conservative; and the Chief Justice Charles E. Hughes travelled the same road but in the opposite direction. A liberal president, Woodrow Wilson appointed McReynolds who became a reactionary member of the Four Horsemen . . . Thomas Jefferson urged President James Madison to appoint Joseph Story of Massachusetts, an intellectual great, to ‘neutralise’ Chief Justice John Marshall, only to see Story ‘captured’.⁸

Finally, Hodding Carter provided an interesting example as to how such candidates can fall well below presidential expectations – he uses the famous liberal Justice Hugo Black as a specific example:

Hugo Black took the judicial oath under a far more ominous cloud, the revelation that he had once been a member of the Ku Klux Klan, and had even received an award from that organisation. Yet Black persevered to become a great champion of civil rights and civil liberties and, in the estimates of some authorities, one of the great Justices in the Court’s history.⁹

An empirical example

I turn now to the second part of our exploration into the reliability of judicial nominees. Over some years I examined a core set of 50 criminal justice cases from the United States Supreme Court and a core set of 227 such cases from the United States Court of Appeals for the Fourth Circuit. As these core cases were heard by more than one judge a gross total of 648 criminal justice cases were examined. Of these, 242 cases were in the Supreme Court and 406 were decided in the Fourth Circuit. The timeframe for this analysis was between 1995 and 1999. There were five Reagan and Bush appointed judges from the Supreme Court in this dataset; and six Reagan and Bush appointed judges from the Fourth Circuit.

Of the thirteen circuit courts of appeal in the American federal judiciary, the Fourth Circuit was selected because back then it had a widely acknowledged reputation as the country’s leading conservative appellate court, particularly regarding criminal justice cases. Because of this court’s willingness to adopt a strongly conservative legal methodology towards criminal justice, the Fourth Circuit provided a model of concordance when it came to the policy preferences of Presidents Reagan and Bush. In many ways, but particularly with regards to criminal justice, the Fourth Circuit at the time was very much a living template of the type of court and the sorts of judges Presidents Reagan and Bush wanted to place throughout the federal judiciary.

To determine whether each of these eleven judges realised the expectations Presidents Reagan and Bush had of them, every judge’s vote in a criminal justice case was placed into two broad categories. Decisions in favour of the criminal defendant were coded as “liberal” while those against a criminal defendant were coded as “conservative.” These two broad categories were then separated further

into four dependent variables so that each judge's vote was coded as either "liberal," "partly liberal," "partly conservative" or "conservative." Because exercising a *less* tolerant position in criminal justice cases was necessary to conform to the expectations of Presidents Reagan and Bush, each decision was weighted according to how strongly each judge ruled *against* a criminal defendant.

The results revealed that on average the Fourth Circuit judges displayed concordance with their respective nominating President in more than nine in every ten criminal justice cases. The Supreme Court judges displayed the same degree of concordance in just over seven in every ten criminal justice cases heard during this same period. More specifically, the results that were generated showed that every one of the Reagan and Bush appointed Fourth Circuit judges displayed a greater degree of concordance than even the most conservative of the Supreme Court appointees (that is, Justices Scalia and Thomas).

The underlying question then became: why did the Supreme Court judges appointed by Reagan and Bush display less concordance with their nominating President's expectations than those on the Fourth Circuit? Conversely, why did those Fourth Circuit judges appointed by Reagan and Bush show a much greater adherence to their expectations than their brethren on the Supreme Court? There are three possible reasons.

The Fourth Circuit: the power of American senators

The first explanation focuses on the judges of the Fourth Circuit and relates not to the Republican President's power but rather the influence of the Republican senators who actually guided the nominees through to their appointment. It so happened that the two senators of relevance here were two ex-Democrats – the legendary Strom Thurmond of South Carolina and Jesse Helms of North Carolina. Strom Thurmond was the arch conservative famous for speaking against the *Civil Rights Act* of 1957 for 24 hours and 18 minutes without stopping, and who remained a serving senator at the age of 100; Jesse Helms was a five-term Republican senator also famous for his arch conservative views on divisive social issues.

The foundation for the involvement of these two senators in the process of judicial selection is written directly into the American Constitution. Under Article II, Section 2, paragraph 2, it is declared: "[The President] shall have Power, by and with the Advice and Consent of the Senate . . . [to amongst other things] . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ."¹⁰

These two senators had strong, uncompromising attitudes towards criminal justice. In particular, they were both committed advocates of the death penalty and of very strict sentencing practices. Strom Thurmond, for example, had personally handed down four death sentences whilst serving briefly as a judge on a State circuit within South Carolina even before he became a United States senator.

But there were several key variables in particular that strengthened the ability of these two men to influence the judicial appointment process and to ensure that hardline, "law and order" type judges were selected to the circuit covering their respective home States. One of the most important was that all of the six Fourth Circuit judges I examined were appointed during a twelve year period by a President who belonged to the same political party as both of these two senators. This supports the findings of others who found that "home state" senators possessed considerable power over nominees when the President belonged to the same political party.¹¹

Another aspect to the power these two senators brought to the process came from what is known as the "blue slip" convention. The "blue slip" is best described by the current chairman of the Senate Judiciary Committee, Senator Patrick Leahy of Vermont. Leahy said: "These pieces of blue paper are what the Chairman [of the Senate Judiciary Committee] uses to solicit the opinion of home-state Senators about the President's nominees. Simply stated, the blue slip practice is the enforcement mechanism for the consultation that the Constitution calls for."¹²

More particularly, Senator Thurmond, for example, had an intimate and decisive influence in the selection of many of the nominations to judicial positions throughout South Carolina and beyond that, to the District Courts and the Fourth Circuit.

Richard Hardin, writing in *The Richmond Times Despatch*, a prominent South Carolinian newspaper, makes clear that Senator Thurmond's power over this process was strengthened further when he assumed the chairmanship of the Senate Judiciary Committee:

Thurmond took the helm of the Judiciary Committee from Sen. Edward M. Kennedy ... when factors converged to bring Thurmond extra clout. Ronald Reagan won the White House in 1980 after pledging to name conservative federal judges. The Republican Party platform had supported selection of judges who believed in 'decentralization of the federal government.' And the Senate, which confirms judges, was in Republican hands for the first time in 25 years. With federal courts resembling 'a ship listing to the left,' Thurmond 'was trying to rebalance the court from an ideological direction he didn't agree with . . .'¹³

Another key reason for Senator Thurmond's success was the interdependence that existed between the White House and Thurmond's ability to use his role as chairman of a key Senate committee to extract benefits for his extensive power base. Hardin stated:

Thurmond always looked out for his state. A story circulated in Washington that he often would come up with a name of a possible nominee from South Carolina even before a newly deceased judge was buried. And the White House needed him. Because of the array of bills before Thurmond's committee, it helped Reagan's White House to help the South Carolina senator . . .¹⁴

A further account of Senator Thurmond's influence throughout the States within the jurisdiction of the Fourth Circuit comes from Chris Weston, writing in South Carolina's *Greenville News*. He quoted the former Chief Justice of the Fourth Circuit, Judge William W. Wilkins Jr, noting that Wilkins, "... a long-time Thurmond aide, protege and friend, said every living federal judge in the five states carried Thurmond's stamp of approval."¹⁵

All of this is important to establish because it is necessary to understand the philosophy and values these two senators were injecting into the selection and confirmation of candidates for the Fourth Circuit.

In summary, the appointments to the Fourth Circuit displayed a greater degree of concordance with their nominating Presidents in criminal justice cases, compared to those on the Supreme Court, because of the direct influence of Senators Thurmond and Helms in ensuring their own strongly held conservative values had weight in each judge's selection. The seniority of these two senators, the influential roles they played in their respective Senate committees, their well-established friendships with Presidents Reagan and Bush *and* with many of the individual nominees themselves, as well as the wide-ranging senatorial courtesy accorded to them, ensured they had crucial input in ascertaining that these nominees were very conservative from the outset.

The Supreme Court: political compromises in judicial selection

The second explanation I provide focuses on the *lesser* concordance exhibited by three of the Reagan and Bush appointments to the Supreme Court. Those appointments were Justices Sandra Day O'Connor, Anthony Kennedy and David Souter – all of whom were products of significant political and ideological compromises at the point of their selection and during their confirmation to the Supreme Court.

President Reagan's first appointment to the Supreme Court, Sandra Day O'Connor, was more the product of political and electoral expediency than any real determination to seek a judge who would demonstrate strong concordance with his administration's ideological agenda. Well known Reagan biographer, Lou Cannon, provided the following account of the expediency surrounding O'Connor's appointment:

Though [Reagan] had promised on October 14, 1980, to name a woman to 'one of the first Supreme Court vacancies in my administration,' both the wording and the timing of this commitment were suspect. The idea had originated as a political proposal in a discussion with Stu Spencer during a low point in the Reagan campaign. Its timing reflected the obstacles Reagan then faced with women voters both on the peace issue and Equal Rights Act. The political nature of the promise was underscored by Reagan's record as Governor of California, where all three of his appointments to the state Supreme Court had been male.¹⁶

Lee Epstein and Jeffrey Segal also provide evidence to support the view that O'Connor's nomination was based on gender rather than the necessity of seeking a judge who would represent the President's philosophy on the bench. They have stated:

When Ronald Reagan nominated Sandra Day O'Connor to the Supreme Court in 1981, he was not appointing a crony; he had met her only once, and that was six days before he nominated her. Rather, Reagan was seeking to fulfil a campaign promise to appoint a woman to the Court – a promise he no doubt felt would further his and his party's chances of attracting female voters.¹⁷

The nomination of a judge from the United States Court of Appeals for the Ninth Circuit, Anthony Kennedy, to the Supreme Court was likewise the product of ideological compromise. On this occasion it was not for more immediate electoral gains but to avoid further political embarrassment which the Reagan administration had been encountering from the process of judicial selection at the time. The failed nominations of D.C. Circuit judges Robert Bork, for allegedly having extreme views, and Douglas Ginsburg, for previously smoking marijuana, acted as a pressing political constraint when yet a third nominee was needed to replace them in filling this vacancy.

John Massaro best described President Reagan's view of Kennedy's nomination and identified the judge's moderately conservative judicial philosophy and bi-partisan appeal as his key selling points:

[Reagan] also expressed the hope that Kennedy would be confirmed 'in the spirit of cooperation and bipartisanship.' And rather than emphasizing the nominee's generally conservative ideology, the president noted that Kennedy 'seems to be popular with many senators of varying political persuasions.' In selecting Kennedy, the president also conveyed a willingness to compromise in regard to ideology.¹⁸

Robert Katzmann also argued that the success of Kennedy's nomination was largely based on his more moderate judicial philosophy:

Kennedy may have escaped intense questioning partly because his writings were less sweeping and provocative than Bork's. Kennedy was aided by the conciliatory tone in which the White House advanced his nomination and by the disinclination of a weary Senate to take on another time consuming confirmation battle.¹⁹

The ramifications that flowed from the Bork saga also played a significant role in the emergence of David Souter as a presidential nominee to the Supreme Court and the consequent trend of nominating “stealth” candidates. Former Senator Paul Simon of Illinois provided the following account of Souter’s nomination with a particular emphasis on the nominee’s lack of a contentious judicial record:

... he [Souter] had shown little inclination to put ideas on paper . . . As a New Hampshire Supreme Court Justice seven years, and then on the U.S. Court of Appeals, he had not defined himself clearly and had written remarkably few opinions . . . The only article he ever wrote was a tribute to another New Hampshire Supreme Court Justice. He probably represented as blank a slate as anyone ever offered by a President for a seat on the Court. That was his strength and his weakness, and Senators of all political philosophies felt some unease as we proceeded to vote.²⁰

Mark Silverstein best described the political dynamics that underpinned Justice Souter’s successful nomination.

Everyone was equally in the dark regarding Judge Souter. Liberals, however, were quietly assured by Senator Warren Rudman, the respected Republican of New Hampshire and a close friend of the nominee, that Souter was as good as they could possibly hope to get from the Bush administration. Conservatives were eventually forced to trust the promises of the president and the judgement of the Department of Justice. Armed with a quiet, restrained style and doggedly refusing to engage members of the Senate Judiciary Committee in a substantive discussion of his judicial philosophy, Souter (quickly dubbed the ‘stealth nominee’) was easily confirmed.²¹

So, to summarise, each of these three individual Supreme Court judges was selected against a background of varying degrees of political expediency and compromise – and for their capacity to assist these two presidents to avoid the bitter confirmation process that could have quickly erupted again in the post-Bork era of judicial selection. Even before the appointments of these three particular judges to the Supreme Court were confirmed they were compromise candidates. To both nominating presidents at the time, political circumstances dictated that the strength of each nominee’s judicial philosophy was not as important as each nominee’s political saleability and acceptance. Consequently, the judicial behaviour of these three Supreme Court judges was not one of committed conservative judicial ideology but of varying degrees of moderation, compromise and concession.

The Supreme Court: can personalities have an impact?

The last potential explanation I provide regarding the reliability of this prestigious little cohort of Supreme Court judges is contentious given the secretive nature of the Court’s inner workings. For it focuses on the personality and character of just one judge – the legendary conservative intellectual, Justice Antonin Scalia, and the tempering influence he had on the judicial behaviour of Justices O’Connor, Kennedy and Souter. This presumptuous explanation relies on the work of the esteemed political scientist, Walter Murphy, and his concept of strategic voting amongst Supreme Court judges; and also on the contemporary works of Christopher Smith and Jeffrey Rosen which are aimed more specifically at the impact of Justice Scalia’s personality and character.²² As Rosen outlined it: “The ideal of the justices as impersonal oracles, of course, is something of a myth. Like any small group, the Court is a deeply human institution, where quirks of personality and temperament can mean as much as ideology in shaping the law”.²³

In his work, *Elements of Judicial Strategy*, Murphy introduced the reader to the psychological processes a judge undergoes when he first moves on to the Supreme Court:

. . . the freshman Justice, even if he has been a state or lower federal court judge, moves into a strange and shadowy world. An occasional helping hand – a word of advice about procedure and protocol, a warning about personal idiosyncrasies of colleagues or the trustworthiness of counsel – can be helpful and appreciated . . . The new Justice may also feel it necessary to establish warm social relations with his brethren.²⁴

Murphy illustrated how the personality of former Supreme Court judge, James McReynolds, influenced the judicial decisions of his colleagues on the Court under Chief Justice William Howard Taft. Regarding a then newcomer, Justice Harlan Stone, Murphy recounted the following example of a situation where personalities can influence a judge's shift into the "conservative" or "liberal" camps of judicial philosophy. The following example may well resonate when thinking about a similar shift by Justice Souter:

When Stone first came to the Court, he was, as Taft thought, fundamentally a conservative. Within a very few years, however, Stone had joined Holmes and Brandeis in what the Chief Justice considered "radical" constitutional opinions. In part this change reflected Stone's capacity for intellectual growth, but the warm and stimulating companionship of Holmes and to a lesser extent Brandeis may also have been a decisive factor. As Thomas Reed Powell, a long time confidant of Stone, commented, it was 'respect and liking for Holmes and Brandeis that turned him from his earlier attitudes.' On the other hand, Stone probably had slight intellectual respect for Taft. This fact, coupled with McReynolds' bigoted attitude toward Brandeis as well as his continual carping at Stone's opinions, did little to keep the new Justice in the conservative camp.²⁵

Murphy explored further the intra-court dynamics of the Taft Court and, in particular, the personality of Justice McReynolds. In some distant, yet similar ways the McReynolds character in Murphy's account replicates the Scalia character in Christopher Smith's work. Murphy observed:

McReynolds expressed his displeasure over Justice Clarke's votes and opinions in a more systematically unpleasant fashion. When he was Attorney General, McReynolds had been instrumental in getting Clarke appointed to the district bench; and when Clarke was promoted to the Supreme Court, McReynolds thought the new Justice should follow his benefactor's ultra-conservative constitutional philosophy. Clarke, however, went his own individual and sometimes erratic way; but, in his first few years on the Court, he tended to side more with Holmes and Brandeis than with McReynolds on constitutional cases. As a result, McReynolds cut off all pleasant social relations with Clarke, meting out only curt sarcasm to him.²⁶

Joseph Menez concurred in the observation that judges on the same court can have an impact on each other. He stated: "Switching is not unusual and it has not infrequently occurred that Justices, on the basis of dissents, have changed sides. The Court is a collegial body and, of course, the justices influence one another. No Justice starts out from an absolutely fixed position."²⁷

The central element of Christopher Smith's argument relating directly to this broad explanation is outlined by him in the following manner:

Legal scholars may examine Justice Scalia's role on the Supreme Court by focusing solely on his strident opinions, but a more comprehensive assessment of Scalia must include

analysis of his colleagues' reactions to those opinions and to the other aspects of Scalia's behaviour on the Court.²⁸

Smith located more specifically those key aspects of Scalia's personality that may have acted as a source of potential conflict amongst some of his colleagues:

. . . Scalia has strongly held views about the proper approach to constitutional and statutory interpretation – views that sometimes clash with those of his usual allies among the Court's conservatives. In addition, the strength of Scalia's belief in the rightness of his views and the professorial style of lecturing his colleagues diminish his ability to participate effectively in the Court's interactive process. If Scalia merely disagreed with his colleagues about specific cases, he might be able to persuade justices about other issues and otherwise perform effectively within the Court's collegial decision-making environment. However, the tone of Scalia's opinions and his style as a participant in the Court's decision making processes have reduced his effectiveness by actually deterring like minded colleagues from joining his opinions.²⁹

In referring to the importance of "judicial temperament," Rosen argued that Scalia's lack of this quality was the main determinant underlying his approach towards his colleagues:

. . . perhaps the main reason that Scalia was never as influential as Rehnquist involved not intellectual inconsistency but judicial temperament. Although his jurisprudential premises were unobjectionable, Scalia seemed, like Thomas Jefferson, to view every disagreement as a form of apostasy. As a result he had no volume knob. Every dissenting opinion predicted the apocalypse and every colleague who disagreed with him was denounced as a politician or a fool.³⁰

Rosen concluded with an analysis of what qualities he believed prove to be the most valuable in influencing the legal methodology of one's judicial colleagues. In emphasising the importance of "temperament", Rosen stated:

The brilliant academic is less appealing, over time, than the collegial pragmatist. The self centred loner is less effective than the convivial team player . . . The narcissist wields judicial power less sure-handedly than the judge who shows personal as well as judicial humility. The loose cannons shoot themselves in the foot, while those who know when to hold their tongues appear more judicious. (On the Court, a justice often achieves more by saying less).³¹

So, briefly, in conclusion, determining the lifetime "reliability" of a judicial nominee can be a delicate matter for a President to contend with. It is a high stakes gamble for such positions are powerful prizes – yet judges are only human and their judicial philosophy is susceptible to change over time – often to be very different from what it was when the nominee was first appointed.

In this paper I have outlined a number of factors that can affect the reliability of a judicial nominee – from the power and connections of the home State senators to the broader political pressures that existed at the point of their selection. There are other factors I have not canvassed for reasons of time. In the end, regardless of how much effort is made or the confidence one has that a judicial nominee will exhibit the reliability expected – it can all simply be undone by that judge's individual judicial temperament, especially in reaction to the approach of his colleagues and the manner by which he adjusts to the personality and thinking of his peers.

Endnotes

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22. See Walter Murphy, *Elements of Judicial Strategy*, Chicago; The University of Chicago Press, 1964, Christopher Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Movement*, New York; Praeger, 1993; and Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America*, New York: Henry Holt and Company, 2006.
23. Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America*, New York; Henry Holt and Company, 2006, 6.
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29. *Ibid.*, 61.
30. Rosen, *op. cit.*, 6.
31. *Ibid.*, 237.