

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE
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INTERVIEWS

Examining What Justice Anthony Kennedy's Retirement Means

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DAVID GREENE: We are used to announcements that rock the nation's capital. But when a Supreme Court justice retires, an era is over. And that is doubly so when the justice is ideologically at the center of the court and has often cast the decisive fifth vote in closely divided cases. And so it is with Justice Anthony Kennedy, who announced his retirement yesterday.

And joining us now is NPR legal affairs correspondent Nina Totenberg to talk about the justice and what his retirement means. Hi, Nina.

NINA TOTENBERG: Hi, David.

DAVID GREENE: So - huge moment. I mean, can you just put this in perspective for us?

NINA TOTENBERG: You know, I've started quoting the rock band R.E.M.

DAVID GREENE: Oh, good.

(LAUGHTER) NINA TOTENBERG: Kennedy's retirement is the end of the world as we know it, at least at the Supreme Court. Just think, a few days ago, after the court punted on the question of extreme partisan gerrymandering, lawyers attacking that practice still thought they had a chance to come back next term and prevail. Well, I think that's probably out the window now. And many of the outcomes can be voted for, even championed, are now in doubt - the right to abortion, affirmative action in higher education, a moderate approach to gun rights, some limits on the president's power in waging the war on terror and, of course, gay rights.

DAVID GREENE: Right.

NINA TOTENBERG: More than any other justice, he was responsible for the advance of LGBT rights. And writing for all - he wrote all four of the court's opinions over nearly two decades and ultimately declared marriage between two people of the same sex a fundamental right protected by the Constitution, just as marriage between two people of different races is protected.

DAVID GREENE: Alright, Nina, stay with us. We're going to listen to your report here about Justice Kennedy and the years he's served on the court. It starts with him announcing that opinion on same-sex marriage from the bench.

(SOUNDBITE OF ARCHIVED RECORDING) ANTHONY KENNEDY: No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family.

NINA TOTENBERG: The past does not determine the future, he says. The Founding Fathers deliberately created a Constitution that could adjust to the realities of future times. Or, as he put it in a 2003 decision...

(SOUNDBITE OF ARCHIVED RECORDING) ANTHONY KENNEDY: They knew times can blind us to certain truths, and later generations can see that laws once thought necessary and proper, in fact, serve only to oppress.

NINA TOTENBERG: Kennedy's pivotal role on same-sex marriage may have been the most momentous of his career, but his 2010 decision, striking down many limits on campaign money, similarly remade the way political campaigns are conducted in the nation. The decision unleashed an ever-growing flood of cash and reversed a century-old legal understanding that had sought to prevent corruption by barring corporations, and later labor unions, from spending their general treasury funds on candidate elections.

For Justice Kennedy, reversing that legal understanding from the early 1900s was the realization of a long-held view of free speech.

(SOUNDBITE OF ARCHIVED RECORDING) ANTHONY KENNEDY: Political speech is indispensable to decision-making in a democracy. And this is no less true because the speech comes from a corporation rather than an individual. Government may not suppress political speech on the basis of the speaker's corporate identity.

NINA TOTENBERG: Anthony McLeod Kennedy was born into the American political system on the Republican side. His father was a prominent and politically connected lawyer-lobbyist in Sacramento, Calif. The son would graduate with honors from Stanford, the London School of Economics and Harvard Law School. At the age of 39, he was appointed to the U.S. Court of Appeals for the Ninth Circuit, where he served for 12 years until President Reagan nominated him to the U.S. Supreme Court in the aftermath of the failed Robert Bork nomination in 1987.

Once on the High Court, Kennedy would prove to be a conservative justice with a libertarian streak that often infuriated social

conservatives. In a landmark 1992 abortion case, for instance, he cast the decisive vote upholding what he and others in the majority called the core of *Roe v. Wade*.

(SOUNDBITE OF ARCHIVED RECORDING) ANTHONY KENNEDY: Our cases recognize the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting. A person has the decision whether to bear or beget a child. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, the mystery of human life.

NINA TOTENBERG: Conservative critics, particularly conservative academics, ridiculed passages like that, calling them self-important and grandiose. But Kennedy was undeterred, as evidenced by his decisions in many areas of the law.

On the death penalty, he voted consistently for capital punishment, but he provided the decisive vote to bar the death penalty for juveniles and the mentally disabled.

On questions of religion, Kennedy, an observant Catholic, was generally sympathetic to expressions of religion in the public square, but he drew the line at prayer in public school.

In race cases, he usually, though not always, sided with the conservative majority, as he did in voting to strike down a key provision of the Voting Rights Act.

On a different subject - affirmative action - he seemed to change his mind and wrote the court's majority opinion, upholding the use of race as a factor in college admission.

In cases stemming from the war on terror, Kennedy was often the critical fifth vote to limit presidential and congressional action. In 2007, he wrote the court's opinion declaring that the president and Congress had exceeded their powers in barring Guantanamo detainees from going to court to challenge their detentions.

During his 30-year tenure, there were two recurring critiques of Kennedy's work. Critics said that while the justice liked to portray himself as a judicial minimalist, he was, in fact, a judicial imperialist, voting to strike down more state and federal laws than any other member of the Supreme Court. Kennedy's biographer Frank Colucci.

FRANK COLUCCI: In practice, Kennedy is willing to use judicial power quite assertively.

NINA TOTENBERG: The other rap on Kennedy was that he was an agonizer, vacillating in his views so much that the most derisive conservative critics called him Flipper. His former law clerks, however, largely disputed that criticism, contending that the way Kennedy decided cases was misinterpreted. Former clerk Brad Berenson.

BRAD BERENSON: What he typically does is he tries on each position for size, almost for the sake of argument. That's the way he works through the positions and their implications until he finds one that he's comfortable wearing.

NINA TOTENBERG: Federal Appeals Court Judge Brett Kavanaugh, a former clerk, remembers how Kennedy would bring his clerks into his office to discuss a case before it was argued.

BRETT KAVANAUGH: And that was a fascinating process where he'd have out his whiteboard and be writing pros and cons, and this argument favors this side, but what about this argument? And he'd write them up on the board and discuss them through for hours on end.

NINA TOTENBERG: On the Supreme Court, Justice Kennedy may often have been a lightning rod for the right or left. But even when colleagues lambasted him with oral dissents from the bench, he seemed impervious, his face perhaps deliberately bland and expressionless. Judge Kavanaugh.

BRETT KAVANAUGH: He received tremendous criticism over the course of his career. And yet, he was one who stuck to his principles. It's not easy to do, and he's done it consistently over time, recognizing that that's the role of a judge.

NINA TOTENBERG: Judge Kavanaugh, by the way, is on President Trump's list of potential Supreme Court nominees.

DAVID GREENE: All right. NPR's Nina Totenberg reporting there. Nina is still with us this morning. Nina, you mentioned the list of potential Supreme Court nominees. President Trump, it sounds like, actually does have a physical list. So what happens next?

NINA TOTENBERG: Well, he had two during the campaign. The first one was so successful in convincing social conservatives that he was their guy that he then issued a second list, so.

Both lists were put together by Leonard Leo, who heads up the conservative Federalist Society, and folks at the conservative Heritage Foundation. There are some very distinguished judges on the list, including Kavanaugh, but they're all pretty far to the right of Justice Kennedy.

So the bottom line is whoever Trump picks, and however bitter the confirmation fight is, the new justice will solidify a hard-right conservative majority, the likes of which this country probably has not seen in three-quarters of a century. And I mean that in a way that goes far beyond the hot-button social issues. Business is already winning cases, and labor losing them. Just yesterday, the court issued a decision that will undercut the power of labor unions, leaving them with less money, less political clout. A hardcore conservative majority could also make it virtually impossible to bring sex or race discrimination employment suits in federal court. It could aggressively strike down gun regulations. The list just goes on and on.

DAVID GREENE: Well, let's get a little bit into the nuts and bolts of how this will play out. What is next? And what happens with this confirmation process?

NINA TOTENBERG: Well, it's going to be a lulu.

(LAUGHTER) NINA TOTENBERG: You may recall that in 2016, Republican leader Mitch McConnell blocked the Senate from even considering President Obama's nominee to fill the vacant seat after Justice Scalia died. And then after Trump was elected, the Republicans abolished the filibuster in order to confirm Trump nominee Neil Gorsuch.

So the bottom line here is that Republicans still control the Senate by just two votes, and they're going to try to push this through before their election. It doesn't matter if the Democrats cry hypocrisy. They're going to do it, and they're going to succeed unless a couple of Republicans come over to the Democratic side and vote with them. And I would say that's a very long shot.

DAVID GREENE: All right. NPR legal affairs correspondent Nina Totenberg as we begin a process - a confirmation process for a new Supreme Court justice once President Trump makes his pick. A huge story this election year. Nina, thanks a lot.

NINA TOTENBERG: Thank you, David.

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District's top U.S. attorney outlines priorities; Border security is No. 1, Bash says

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AUSTIN - The new chief federal law enforcement officer for Central and West Texas said Thursday that border security, violent crime, public corruption and national security are his top priorities.

Before an audience of judges, dignitaries, prosecutors and agents that packed the largest courtroom in Austin's federal courthouse, John F. Bash III was formally sworn in as the 33rd U.S. attorney for the Western District of Texas - four months after he actually took office. The district includes San Antonio, Austin, Waco, Del Rio, Alpine, Midland and El Paso.

Bash, 36, highlighted border security as the top priority in the district, which covers 600 miles of border with Mexico and has more than 140 lawyers in the office. He said his prosecutors will take all the criminal cases of illegal immigration "that are readily provable."

Bash said he understands the immigration debate. But he said the law must be followed and the nation already does much to help immigrants.

"We are a nation of immigrants, but I don't understand the folks who say we shouldn't enforce the law against people who are literally picked up illegally crossing the border," Bash said. "The folks that criticize our enforcement efforts have an obligation to say what those enforcement efforts should look like."

He added that he believes "we should get tougher on employees who hire" undocumented immigrants.

Bash added that his directive to focus on his second priority, violent crime, comes from his boss, U.S. Attorney General Jeff Sessions, who relaunched a get-tough-on-crime initiative called Project Safe Neighborhoods.

The program, Bash said, uses data and metrics to figure out where crime is coming from, to identify the bad actors responsible for the disproportionate share of violent crime and "we attack them with whatever we've got."

Pointing to the February conviction of state Sen. Carlos Uresti at his fraud trial in San Antonio as a "landmark case," Bash said his third priority is investigating more cases of public corruption. Bash named the lead Uresti prosecutor, Assistant U.S. Attorney Joe Blackwell, as his public integrity coordinator.

Uresti was convicted of multiple counts related to his involvement with a San Antonio oil services company that defrauded investors out of millions of dollars. Blackwell also charged Uresti in a case alleging the lawmaker split \$850,000 in bribe payments with a county judge in Reeves County over a medical services contract at a jail in West Texas. Uresti faces that trial in October.

Bash said his final priority, national security, includes focusing on the theft of intellectual property by foreign governments, like China.

"The president has talked a lot about this in the context of trade," Bash said. "There's a law enforcement context to that, too. We plan to get very tough on foreign actors, foreign nations who are trying to steal our economic secrets, trying to steal our business secrets, because that is really the lifeblood of our economy."

U.S. Sens. Ted Cruz and John Cornyn of Texas recommended Bash to Trump, who appointed him to replace career federal prosecutor Richard Durbin. Durbin, who remains in a nonsupervisory role in the office, served as U.S. attorney since the last political appointee, Robert Pitman, was named to the federal bench in December 2014.

Before his appointment, Bash served as a special assistant to Trump and as an associate White House counsel, was an assistant to the U.S. solicitor general from 2012 to 2017 and argued 10 cases before the U.S. Supreme Court.

Bash was also previously a law associate with Gibson, Dunn and Crutcher and served as a law clerk to the late U.S. Supreme Court Associate Justice Antonin Scalia and to Circuit Judge Brett M. Kavanaugh on the U.S. Court of Appeals for the District of Columbia Circuit.

"He's brilliant and quick and has an extraordinary knowledge of the law," said Kavanaugh, who administered the oath to Bash.

Bash spent his early childhood in El Paso, where his mother is from and where his father was based for a time while in the Army. His father retired as a lieutenant colonel at Fort Meade, Maryland. Bash graduated from Harvard University in 2003 and received his law degree from Harvard Law School in 2006, both with honors.

He met his wife, who grew up in McAllen, while the pair attended Harvard, where she also graduated from law school with honors. Zina Bash is a former staffer for Cruz's presidential campaign who later worked on Trump's presidential transition team. The couple have a 1-year-old daughter, Maria Izabella, or "Mabel," and live in Austin.

- Caption: 1) Zina Bash looks on as Circuit Judge Brett M. Kavanaugh congratulates her husband after John Bash was sworn in as U.S. attorney for the Western District of Texas. Bash once clerked for Kavanaugh at the District of Columbia Circuit - as well as the late Associate Justice Antonin Scalia at the Supreme Court. PHOTO: John Davenport/San Antonio Express-News
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Shut Out: SCOTUS Law Clerks Still Mostly White and Male

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Body

A year as a U.S. Supreme Court law clerk is a priceless ticket to the upper echelons of the legal profession. Former clerks have their pick of top-tier job offers and can command \$350,000 hiring bonuses at law firms.

But amid the luster of being a law clerk, there's an uncomfortable reality: It is an elite club still dominated by white men. While some variables are outside the court's control, few justices seem to be going out of their way to boost diversity.

Research conducted by The National Law Journal found that since 2005-when the Roberts court began-85 percent of all law clerks have been white. Only 20 of the 487 clerks hired by justices were African-American, and eight were Hispanic. Twice as many men as women gain entry, even though as of last year, more than half of all law students are female.

The numbers show near-glacial progress since 1998, when USA Today and this reporter undertook the first-ever demographic study of Supreme Court clerks, revealing that fewer than 1.8 percent of the clerks hired by the then-members of the court were African-American (now it is 4 percent,) and 1 percent were Hispanic (now the figure hovers at roughly 1.5 percent). The percentage of clerks who are of Asian descent has doubled from 4.5 percent then to nearly 9 percent since 2005. Then, women comprised one-fourth of the clerks; now they make up roughly a third.

Of the 36 clerks hired by sitting justices this term, one is African-American, one is Hispanic, and three are Asian-Americans, based on the NLJ research.

Former law clerks as well as the so-called "feeder" judges and law professors who fill the pipeline with potential clerks point to numerous factors that contribute to the dearth. Among them: intense competition to hire top law students at the appeals court level and the range of other opportunities that top minority law students have.

And yet, most justices appear to be taking a passive approach to diversity rather than actively seeking minority clerks or pushing their networks to identify more diverse candidates. "I've never had that precise conversation with any justice," said Harvard Law School professor Richard Lazarus, a comment echoed by several other clerk-

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recommenders interviewed for this story. And note this about the feeder judges the justices seek clerks from: The top 19 feeder judges-whose former clerks make up more than two-thirds of all Supreme Court clerks-are white males, according to the NLJ's research.

Georgetown University Law Center professor Sheryll Cashin, a former Thurgood Marshall clerk, said the justices need to be more proactive. "If diversity were a priority," said Cashin, who's African-American and expert on civil rights issues, "it would not be hard to find qualified people of color even in the elite universe that some of the justices are used to."

In fact, two of the justices-Ruth Bader Ginsburg and Stephen Breyer-have hired roughly equal numbers of men and women-suggesting a proactive approach pays off.

As with the 1998 survey, the NLJ research on clerks was accomplished through scrutiny of available public information, as well as phone calls and emails directed at former clerks and others-not all of whom responded. Unlike other tribunals, including lower federal courts, the Supreme Court does not maintain or release any demographic data about clerks, according to spokeswoman Kathy Arberg.

The National Law Journal asked all nine justices to help verify our data, and all nine declined, Arberg said. All nine justices also declined to be interviewed about the diversity issue generally.

Among the NLJ's key findings:

- Since Chief Justice John Roberts Jr. joined the court in 2005, just 8 percent of the law clerks he's hired have been racial or ethnic minorities.
- At the other end of the spectrum, more than 30 percent of Justice Sonia Sotomayor's clerks have been non-white, making her chambers the most diverse.
- Low numbers span the court's ideological spectrum. Only 12 percent of the clerks hired by Justice Ruth Bader Ginsburg and Justice Clarence Thomas since 2005 were minorities. Ginsburg has hired only one African-American clerk since she joined the high court in 1993, and the same goes for Justice Samuel Alito Jr., who became a justice in 2006.
- While Ginsburg and Breyer have hired men and women in equal numbers, other chambers continue to be male-dominated. The court's swing vote, Anthony Kennedy, has hired six times as many men as women law clerks since 2005. Gorsuch, in his second term, has hired just one female law clerk.
- Harvard and Yale law schools have tightened their grip on the clerk "market," providing half of the court's law clerks since 2005, compared to 40 percent in 1998.

WHY IT MATTERS

The lack of diversity among clerks is important not just because it leaves minorities off the fast track to high-paying jobs. It harms law firms as well as they seek to build diverse practices, said Neal Katyal of Hogan Lovells: "The Hispanic and African-American numbers in particular are things that have long-term consequences for appellate practices."

Crystal Nix-Hines, a partner at Quinn Emanuel Urquhart & Sullivan and a former clerk to Marshall and Justice Sandra Day O'Connor said, "The credential stays with you throughout your life." Nix-Hines said she has had "an eclectic career" that has taken her to journalism, Hollywood and an ambassadorship. Through it all, she said, "I've always been able to kind of re-access the legal profession in part because of my credentials."

Shut Out: SCOTUS Law Clerks Still Mostly White and Male

The lack of diversity also has consequences for the court. Though the justices and their law clerks usually downplay clerks' importance, it's undeniable that they wield considerable influence. One study published in the *Marquette Law Review* found that justices follow the recommendation of clerks 75 percent of the time when granting certiorari.

WHY SO FEW MINORITIES?

Theories abound for explaining the low number of minorities clerking at the highest court in the country. One can be summarized as the "Obama trajectory"-top minority law students like Barack Obama (first black editor of the *Harvard Law Review* in 1990) turning down clerkship opportunities in favor of other career paths. For the future president, heading into politics instead of clerking worked out well.

Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit said attractive options are luring other minorities away too. "Top corporate counsel and top law firms are demanding diversity. The clients want it too," said Jones, who has sent seven of her clerks to the Supreme Court since 2005. She added, "It may be that not all minority candidates want to become litigators or professors."

The resulting fierce competition has led some judges to hire clerks based on their first-year grades at law school, which Yale Law School Dean Heather Gerken said "has had a dramatic effect on our pedagogy. It makes the first year more important than it should be. Some students need a longer runway. The late bloomers don't get a fair shot."

The system also compels some justices to "over-book" clerks who are committed to work for them but then are asked to wait a year or more until there's an opening. For that and other reasons, more and more candidates have multiple clerkships before working at the Supreme Court, where they're paid \$79,720.

"To be sure, former clerks are bonus babies," said Artemus Ward, author of several books about Supreme Court clerks. "But clerking for two years in order to wait for the windfall, particularly after accruing large debts in college and law school, may seem too much to ask."

Another trend that helps explain the lack of diversity is what Harvard Law School professor Andrew Crespo called "ideological sorting" in the clerk hiring process. Crespo, who in 2007 was elected the first Latino editor of *Harvard Law Review*, clerked for Breyer and Kagan.

"The more liberal justices tend to hire a greater number of liberal-leaning clerks than the conservative justices, and vice versa," Crespo said. "If the small number of African-American and Latino applicants are also disproportionately liberal, then there may be fewer clerkship slots for which they are realistically competitive candidates."

TOO PASSIVE?

Some top feeder judges have made efforts to diversify the pool of potential Supreme Court clerks. D.C. Circuit Judge Brett Kavanaugh has spoken several times before black law student groups.

"A big part of it is demystifying the process, having a conversation about how it works, and encouraging the students to apply," Kavanaugh said in an interview. As a result, he has delivered 10 of his own minority clerks to the Supreme Court since becoming a circuit judge in 2006.

Especially for "first generation" law students, the tricks of the law clerk trade-like quickly becoming a research assistant for a feeder professor-are not obvious. "Law school feels very different when you are the first in your

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family to go there," Crespo said. "The classrooms, the professors, the culture, can all feel a bit more foreign, and thus make law school more challenging."

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How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck

By Adam Liptak and Nicholas Fandos

March 3, 2017

WASHINGTON — It was a stroke of luck that landed Neil M. Gorsuch in the chambers of Justice Anthony M. Kennedy on a summer day nearly a quarter-century ago.

Then 25 and fresh off a year at Oxford, Judge Gorsuch had been hired by Justice Byron R. White for the most coveted apprenticeship in American law — a Supreme Court clerkship. But because Justice White had retired, Judge Gorsuch was also assigned, by happenstance, to Justice Kennedy, the longtime center of power at the Supreme Court.

His year as a clerk, beginning in the summer of 1993, gave Judge Gorsuch a privileged look at the court's workings and a crash course in its unrelenting caseload and internal politics. As Judge Brett M. Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit, and a fellow law clerk to Justice Kennedy that year, observed, "We were in the middle of everything."

It also produced something else: a lasting bond between an ambitious, already staunchly conservative clerk and a justice, three decades his senior, whose style and temperament appear to have rubbed off on him, even if the justice's more moderate views did not.

Almost 25 years later, as Judge Gorsuch, now 49, awaits his own confirmation to the court, his relationship with Justice Kennedy has become a matter of intense interest, as both Democrats and Republicans look for evidence of how it might shape the court's near future.

The White House hopes the bond matters to Justice Kennedy, too. In choosing Judge Gorsuch to replace Justice Antonin Scalia and floating the names of other former Kennedy clerks for the next Supreme Court vacancy, administration officials have sought to reassure Justice Kennedy, 80, that the court will be in good hands should he choose to retire and open a seat for another, younger justice.

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While Judge Gorsuch learned a great deal in Justice Kennedy's chambers, the lessons seem to have been more personal than political.

"There were a lot of ideologues both left and right, and he wasn't one of them," said Stephen F. Smith, who served as a law clerk to Justice Clarence Thomas that same term and is now a law professor at the University of Notre Dame. "He was careful, quiet."

Judge Gorsuch's critics say his own mild and courteous manner masks a fierce commitment to a right-wing agenda, and political scientists say he is likely to vote with the court's most conservative justices rather than with Justice Kennedy. In closely divided cases, Justice Kennedy often holds the crucial vote, and he generally leans right. He wrote the majority opinion, for instance, in the Citizens United campaign finance case.

But in recent years, Justice Kennedy has joined the court's four-member liberal wing in major cases establishing a right to same-sex marriage, protecting abortion rights and upholding affirmative action.

"It's safe to say that little of Justice Kennedy rubbed off on him when it comes to certain critical areas of the law," Nan Aron, the president of the Alliance for Justice, a liberal group, said of Judge Gorsuch.

On the federal appeals court in Denver for more than a decade, Judge Gorsuch has cited Justice Kennedy by name from time to time. But he has been much more likely to cite Justice Scalia.

To his fellow law clerks, Judge Gorsuch was neither particularly dogmatic nor calculating. Instead, interviews with more than a dozen clerks and a review of papers housed at the Library of Congress paint a picture of someone with a dogged work ethic, an understated but appealing presence and a sense of fairness tempered by cautious judgment.

Justice Kennedy taught his law clerks by example, Judge Kavanaugh said, instilling in them an independent frame of mind and a "gentlemanly tone."

"A lot of us have tried to emulate that in our careers," Judge Kavanaugh said. "Neil has exemplified that better than anybody."

Judge Gorsuch arrived at the court in the summer of 1993 in the aftermath of a bruising term. The fallout of a divisive abortion case, *Planned Parenthood v. Casey*, had left the justices eager to produce a quieter one in its wake.

Judge Gorsuch's term at the court was not without notable decisions; the court issued significant rulings on discrimination in jury selection, protests outside abortion clinics, voting rights, religious schools and copyright infringement for song parodies. But none qualified as a blockbuster.



Judge Neil M. Gorsuch making the rounds on Capitol Hill on Monday.
Doug Mills/The New York Times

Though he worked in the chambers of Justice Kennedy as a “step clerk,” as well as for Justice White (retired justices remain entitled to a clerk), idiosyncratic hiring practices may have helped him.

“Look, there are a hundred people a year that could do the job adequately,” Justice White once said, according to his biographer, Dennis J. Hutchinson. “I might as well have someone who’s interesting, and that doesn’t mean the ones the fancy law professors recommend.”

That Justice White was partial to candidates from his home state, Colorado, and who had spent time at Oxford, where the justice had been a Rhodes Scholar, most likely helped Judge Gorsuch’s application stand out, said two law clerks who worked for Justice White, David D. Meyer and John C. P. Goldberg.

“Justice White probably would have seen echoes of himself in a way in Neil,” said Mr. Meyer, who is now the dean of Tulane University Law School.

Todd C. Peppers, who teaches at Roanoke College and has written extensively about Supreme Court law clerks, said Judge Gorsuch’s academic credentials might have glittered just a little less brightly than those of some of the clerks hired by active justices.

“He did not serve as an editor on The Harvard Law Review,” Professor Peppers said. “Moreover, he ‘only’ graduated cum laude — which suggests that his grades might not have been as high as the typical Supreme Court law clerk.”

Even clerks who worked for a single justice remembered a merciless workload. “It was the definition of a 24/7 job,” said Landis C. Best, who worked for Chief Justice William H. Rehnquist and is now a partner at Cahill Gordon & Reindel in New York.

Judge Gorsuch cut an impressive, if not particularly ideological, figure. Surrounded by a class of elite law graduates that included a handful of future federal judges and acclaimed academics, his “quiet intelligence” was notable, said Louis Feldman, who clerked for Justice Scalia that year.

“Some people just have that aura around them,” Mr. Feldman said. “You know this is someone who has the ability and the personality to go far in the legal world.”

Mostly, Judge Gorsuch was affable and unflappable. He was not, by several former colleagues’ accounts, a member of the regular pickup basketball games in the Supreme Court’s fifth-floor gym, known around the building as the “highest court in the land.” But he was a regular at clerk social events and occasional lunches hosted by each of the justices.

“He seemed very calm, measured, thoughtful, polite, gentlemanly — very much like what one notices about him now,” said Eugene Volokh, who clerked for Justice Sandra Day O’Connor and now teaches at the University of California, Los Angeles.

“He fit into the place very easily,” said Judge Kavanaugh, who is himself on the White House’s short list for the next Supreme Court vacancy. “He’s just an easy guy to get along with. He doesn’t have sharp elbows.”

Justice Kennedy, like most justices then and now, assigned his law clerks to a shared labor pool that streamlined the work of reviewing incoming cases to make recommendations about which petitions should be granted.

Judge Gorsuch’s memorandums, which are available in the papers of Justice Harry A. Blackmun, were thorough and fair-minded.

In one, there are glimmers of the light touch that would characterize his later writing. In summarizing a petition from a civil servant fired by the Army, Judge Gorsuch seemed to suppress a smile. “Petitioner discusses at length General William Tecumseh Sherman’s decision to march through Georgia,” he wrote, “and then turns to describe in detail the technology of modern attack helicopters.”

Though his conservative political views were already well developed when he arrived at the court, Judge Gorsuch gave little overt indication of his positions as he researched and discussed cases in Justice Kennedy's chambers.

"We had a wide range of views, but we all really got along well," Judge Kavanaugh said of the five clerks that term, who were chosen in part to represent different points on the political spectrum.

When in 2006 Judge Gorsuch joined the United States Court of Appeals for the 10th Circuit, Justice Kennedy administered the oath to him in Denver and delivered a reminder of that principle.

Explaining its significance to the judge's two young daughters, Justice Kennedy said, "He's doing it to remind all of us that the first obligation any American has is to defend and protect the Constitution of the United States."

Peter Baker contributed reporting. Kitty Bennett contributed research.

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Highlight: You've recently moved here? Congratulations. There are practical issues, such as how to register a car. This isn't what we're here to tell you. Here's what you really need to know to feel at home: hometown jargon, foodie secrets, tricks to hack the city's road map-and, if you get stuck anyway, a few ways to identify the motorcade that's blocking your path.

Body

Hello, Mid-Atlantic

Is Washington part of the North or the South? It's complicated.

When you move to Phoenix, you're a Southwesterner. When you move to Tuscaloosa, welcome to the Deep South. When you move to Washington, you're-well, what exactly? Glance at an Acela schedule and you'd think you're a Northeasterner. On the highway, though, it's quicker to drive to Cleveland than to Boston. And our basketball team plays in a Southeast division against teams from North Carolina and Georgia.

The truth is that Washington is part of a bigger region so amorphous that its name sounds as if it's floating in the middle of an ocean: the Mid-Atlantic.

By its broadest definition-the one used by the National Audubon Society-the Mid-Atlantic stretches from the Saint Lawrence River in New York to the Martinsville Speedway in Virginia. The US Geological Survey draws the Mid-Atlantic's southern boundary even lower, near Morehead City, North Carolina. Meteorologically, there's not much help: The National Weather Service's Mid-Atlantic includes Cincinnati, Atlanta, and Dover, Delaware.

Even if we could settle on boundaries, a Mid-Atlantic identity is elusive. Are we Northern or Southern? What's our regional character? New England has flinty fishermen. The West has rootin' tootin' ranchers. We've got . . . insanely overqualified research analysts? A higher-than-average percentage of people who know how to pronounce *pho* correctly?

In this vagueness we can find a type of freedom unavailable to those from other areas. Just think how much we're saving on cowboy boots, for instance. Our capital city is Washington because we decided to make it so. To live your best life here, you need to disrespect borders as well: You might head to Columbia Heights for a world-class meal, drink beer brewed in Loudoun County, and sleep in Hyattsville. In other words, you get to define it yourself. It's the Mid-Atlantic way.

Enemies List

Dan Snyder

For a decade and a half, the Redskins owner has checked various boxes on the sports-mogul/villain checklist. Complicating things this year: His team has actually stopped being terrible.

Congress

DC's weird status as a not-quite-self-governing entity has long given locals license to blame the Capitol for assorted hometown indignities. That should become even more pronounced without a Democratic President's veto to restrain buttinskies on the Hill.

Metro

Like so many human hostilities, it begins with lost love: Washington once celebrated the sleek subway as proof of our big-league status. Nowadays, you'll never be lonely cursing Metro-but you'll seem authentically local if you mention how much you once adored it.

Ourselves

Gather a group of Washingtonians and the subject-especially amid post-election handwringing-quickly falls to our own failings: self-importance, careerism, nerdiness. Nowhere in America is it more acceptable to attack-in caricature form-your own city.

Border Lines

Where does the "Washington area" end? It sprawls as far as West Virginia and Pennsylvania-depending on whom you ask. A Facebook map of where Nats fans predominate, for example, doesn't spread out as far as the map used by the US Census Bureau or the TV ratings firm Nielsen.

Washington History, in 491 words

A preposterously brief account of how we got here

It wasn't actually a swamp. But it wasn't a city, either, which pleased those Founding Fathers who were suspicious of big-city culture. A deal got cut: Uncle Sam absorbed states' Revolutionary War debts, a move many Northerners wanted. In exchange, the Southerners got the capital.

A Frenchman named L'Enfant was hired to draw a map worthy of an empire. But the government wouldn't spend on its capital; most of the grand avenues existed only in name. After the British burned the place in 1814, there was serious talk of not rebuilding.

A few decades later-with the Capitol dome still unbuilt-the formerly Virginia parts of DC left. This was partly because Congress wouldn't invest in facilities, but also because America was increasingly polarized over slavery. Another deal got cut: No more selling humans here-but owning was still okay.

The population boomed during the Civil War. Afterward, the District elected a governor who did things like pave and light streets, something that in muddy DC was a big enough deal that "Boss" Shepherd remains a local hero even though he got run out of town over finances.

During the Gilded Age, the government became an actual civil service that hired on merit, which decreased the revolving-door-of-patronage-hacks factor and also made Washington an attractive place for African-Americans moving north. In the 20th century, that government swelled, spurred by the Depression and World War II. (The New Deal also landed DC a slew of memorials.)

Like most wars, the Cold War was good to Washington. Most of the growth took place in the burbs, aided by the brand-new Beltway and Metro. After the 1968 riots, DC's population stalled, a product of white flight. The spectacle of a majority-black population with no voting rights became a civil-rights issue.

After home rule arrived-with a bunch of maddening loopholes-DC had a political culture pretty typical of 1980s cities. There were shiny new developments downtown. And, in the neighborhoods, a sense that the bloated

government wasn't up to fighting crime and drugs. Mayor Marion Barry himself got caught in a bust. The government went bankrupt even as the region's economy thrived. There were jokes about the last one out turning off the lights.

But a funny thing happened. A bunch of new populations found that this was actually a place they wanted to live: gay people, creative-classers, immigrants, folks sick of sprawl. The population grew a bit in the '90s. It grew a bunch in the 2000s. Nowadays, it adds about 1,000 a week, many of them upscale types who have fueled a boom in condos and fancy eateries-and deep concerns by those who feel left out.

Right now, the prediction is that DC will have 800,000 people by the next decade. We worry about where they'll live and whether they can afford the rent. But if you're a newcomer who's been house-hunting, you know that. You're part of our history now, too.

Driver's Ed

Traffic here can drive you nuts. Here are some insider shortcuts.

1 * Traffic Circles * Dupont Circle, Logan Circle-these aren't just the names of neighborhoods but actual traffic circles. There are dozens of them, from leafy Anna J. Cooper Circle in LeDroit Park to the intimidating spiral of Foggy Bottom's Washington Circle. Legend has it that when Pierre L'Enfant outlined his vision for the District, the circles indicated where cannons should be placed in the event of attack. While that's not true, it doesn't make them any less perilous-unlike many of Europe's efficient roundabouts, DC's slow your momentum with stoplights. Avoid if possible.

2 * State Avenues * Driving through DC, you'll find an easy grid of numbered and lettered streets. But those are for suckers. Locals perk up when they hit a diagonal that breaks the pattern: These are avenues, which often provide a more direct route to major hubs. Most are named after a state, and the big ones are usually among the original 13 colonies. (Not all states get an "avenue"-poor California is only a "street.") Be aware that most avenues thread through those dreaded traffic circles-though they'll still probably save you time.

3 * Commuter Trains * If you've just discovered the wallet-emptying world of Washington rent, you may be selecting a home farther afield to save cash. You can circumvent traffic by using one of the region's commuter trains-Virginia's VRE system delivers people to Union Station from as far away as Spotsylvania County (a 66-mile drive), while Maryland's MARC train does the same via three lines. Fair warning: The trains don't run off-peak frequently, and only MARC runs on weekends.

4 * Capital Bikeshare * Let's say your destination is too close to warrant a cab or Metro ride but a bit too far for a walk. These rows of rentable bright-red bikes scattered throughout the city open up the streets to a whole different navigational calculus, thanks to DC's better-than-average bikeability. An annual membership is \$85 for unlimited rides of less than 30 minutes-a price that may seem steep upfront but can pay for itself if you forgo that cab every once in a while.

5 * Slug Lines * Forty years before Uberpool, suburbanites were improvising their own ride-sharing service. "Slugging" sprang up when drivers who wanted to use HOV (high-occupancy vehicle) lanes began picking up carless commuters at designated "slug lines." The word-of-mouth carpooling soon developed its own rules and etiquette-among them, no cell-phone conversations, no eating or smoking, and definitely no talking about politics.

6 * Metro * The rail system has taken a lot of heat over the years for unreliability, poor customer service, and even rider and worker deaths-but for all of Metro's failures, most locals would probably still take it over nothing at all. An unprecedented maintenance push that began last year might just save the system for its 700,000-plus daily riders, so at least give it a chance. Barring the occasional service meltdown, you probably won't have to wait too long for a train during rush hour or weekdays. But download a travel app such as DC Metro Transit to check arrival times on the weekend-that's when you're more likely to be stuck on the platform for 20 minutes, wishing you'd called an Uber.

Word on the Street

What we mean when we say these common words and phrases

Want to sound like you belong? It's not a matter of knowing what some obscure federal agency's initials stand for—we don't always know what those mean, either. But in some cases, the right lingo helps. Here are six examples.

"What do you do?"

The use of this question is said to be a sign of Beltway superficiality—as if you care only about someone's professional importance. But there's a more innocent reason to ask it of strangers (which we do, a lot): Often, people's jobs are pretty interesting. *Use.*

Anacostia

Historically used as an umbrella term for all of the areas east of the Anacostia River—which include many of DC's toughest. But Anacostia is actually one among many neighborhoods on that side of the river. There are even predictions about its gentrification. *Avoid.*

Sleepy Southern town

Talk to a retirement-age local and there's a good chance you'll hear this phrase—a claim that yesteryear's Washington was a far cry from today's dynamic metropolis. It may well be true. But people have been saying some version of this for generations, which means your own Washington may well seem sleepy someday. *Avoid.*

English basement

A basement apartment in a traditional Washington rowhouse, with the entrance a half flight down from the front stoop. To sound knowing when house-hunting, make sure to (a) use the term but (b) not be fooled by it. It's still a basement. *Use with care.*

Department

"I work at the State Department"? Accurate but not as impressive as dropping the word "Department." To sound important, say "I work at State." *Avoid.*

Native Washingtonian

In another city, identifying oneself as having been born there is just a factoid. In a place that's been kicked around by Congress, it has another meaning: The person is claiming a moral high ground in any conversation about the future of the city. *Use with care.*

Talk Like a Local

Native Washingtonians—or rather, Warshingtonians—have a distinct accent

Do homegrown Washingtonians have an accent? Yes—it's subtle, but it's there. Here are three quirks to listen for, according to Minnie Quartey Annan, who is in Georgetown University's Department of Linguistics.

1. A local might say Warshington. This phenomenon, Annan says, is known in linguistics as an "intrusive R." Another example you might hear: drawing.

2. Curry and carry might sound the same. "Curry-out is not takeout Indian food," Annan says. In vowel centralization, practiced by many DC natives, vowels that normally use the front part of the mouth (such as the E in bet) instead use the middle part (like the U in but). Another example: Muriland.

3. Many area natives don't say the L at the end of words. Says Annan: "We call this L-vocalization, so cool sounds more like coo. But you have to say it with some attitude so you don't sound like a bird."

Washington Culture 101

What to read, listen to, and watch to really understand our city-and sound smart at dinner parties

Whom and What to Read

You can't dodge this one: Henry Adams's 1880 novel, *Democracy*, is still the best guide to how the single-minded pursuit of power makes Washington different-socially, too-from other cities. Among contemporary DC novelists, the most entertainingly sophisticated is **Thomas Mallon**, whose politically minded fiction ranges from gay love in homophobic, McCarthyite 1950s Washington (*Fellow Travelers*) to dramatizing Ronald Reagan's crisis-futzed second term (*Finale*).

Pulitzer winner **Edward P. Jones** is the reigning master of stories about African-American life in the area (*Lost in the City*, *All Aunt Hagar's Children*). The "DC Quartet" is probably the best place to start with crime novelist **George Pelecanos**, Washington's own James Ellroy. If you're a budding writer yourself, the local legend you'll soon be awed by is **Richard Peabody**, who's been publishing the literary journal *Gargoyle* since 1976. He also regularly brings out hefty anthologies of fiction by Washington-area women.

The District version of *Harry Potter and the Deathly Hallows*-that is, the final volume of Robert A. Caro's **LBJ biography**-isn't due anytime soon. So take advantage of that hiatus to memorize the previous four. In the meantime, bask in the wit of 28-year-old **Alexandra Petri**, the *Washington Post's* smartest hire in years.

What to Listen To

You need to know about **Fugazi**, and you need to know about **go-go**. Fugazi was-or maybe is, nobody's sure-the band led by former Minor Threat frontman Ian MacKaye, cofounder of **Dischord Records** and the Svengali (not to mention Savonarola) of DC's hardcore punk scene. *Repeater* is a good intro.

Still pulsing away more than four decades after founding father Chuck Brown invented it-in hybrids from bounce beat to rapper **Wale**-go-go is Washington's distinctive brand of funk music, which briefly looked as if it was going nationwide with **Trouble Funk's** *Drop the Bomb* way back in 1982. Go-go is to DC what brass bands are to New Orleans.

Oh, and **Duke Ellington** was born here. He would have been a genius no matter what, but we feel proud anyway.

What to Watch

Driven by the insight that DC staffers have Potomac fever in ways their bosses are obliged to mask, *Veep* is the shrewdest current TV show set here. As for Hollywood classics, forget *Mr. Smith Goes to Washington*. Even if Frank Capra inspired you to come to the capital, that's where his reliability as a sherpa ends. *Advise & Consent* and *Seven Days in May* are the brainy oldies.

Watergate dramas are a separate category. All the President's Men craftily appealed to the heartland by leaving ideology out, but that's why it's likely to frustrate you now. Try Kirsten Dunst in the wonderful comedy *Dick*-which even mocks Woodward and Bernstein-or the sardonic 1977 miniseries *Washington: Behind Closed Doors*, featuring Jason Robards as shifty President Richard "Monckton" and probably the best look at Beltway intrigue ever filmed.

Your other must is the only famous Washington-set movie that supposedly isn't about politics at all: Beltwayites know *The Exorcist* is secretly the story of all the innocents who have ever come here to work in the mistaken belief that Satan won't feel tempted to rearrange their mental furniture. You've been warned.

Know Your Motorcades

You will at some point be stuck in traffic because of a motorcade or have to cover your ears as one speeds by while you're on a sidewalk. You will wonder: "Was that the President?" Here's how to figure it out.

The President

Identifiable by the presidential seal on the commander-in-chief's limo-an armored vehicle dubbed the Beast-this motorcade can stretch 30 vehicles long. The President's car has two flags at the front: the US flag on the driver's side, the flag of the President on the passenger side. (A decoy limo also has the flags and seal.) Another tip is the Beast's license plate, 800-002.

The Vice President

Similar to the President's, just shorter and with the vice-presidential seal. Another difference, according to former Secret Service agent Jonathan Wackrow, now a security expert at RANE: "The limo is larger for POTUS; the VP gets the hand-me-downs." It's still armored.

The First Lady

For scheduled occasions, the First Lady's motorcade is only about ten vehicles long. For unscheduled occasions, the Secret Service has been known to use fewer vehicles-sometimes silver Suburbans in-stead of black-because the threat level is seen as lower when her plans aren't publicized.

Cabinet Secretaries

Members of the Cabinet typically ride in motorcades of two to five vehicles. For the most part, these obey traffic signals, unlike other motorcades. The Cabinet member often rides in a black Suburban or sedan with his or her security detail; lights are affixed to the vehicles in case they hit traffic and need to buzz through.

Foreign Dignitaries

Visiting heads of state are granted motorcades. The security level and number of vehicles depend on the dignitary. Israel's prime minister requires more vehicles than the prime minister of Grenada, for example. The tip-off to these motorcades? When the head of state is on an official visit, flags are on the front hood.

Elements of Style

The business-casual basics you'll spot on every twenty- and thirtysomething in downtown DC

The Shoe

Tory Burch's "Reva" flat is ten years old but still a top choice for pounding the pavement here.

The Tote

With slots for shoes and a laptop, the "O.G." overnighter by Lo & Sons is a popular lug-everything bag.

The Backpack

Nothing stands out about a Swiss Gear backpack, and that's precisely why the practical men of Washington carry it.

The Shirt

A blue gingham shirt is on every young professional man's checklist. Also essential: the ubiquitous lanyard ID, required to enter almost every office in town.

What's the Specialty?

Philly has cheesesteaks. Maine has lobster. DC has no official dish-and that's a good thing.

Washington has long endured a culinary identity crisis-the crisis being a lack of a culinary identity.

We're neither distinctly Southern nor distinctly Northern in our cooking traditions and can't claim the most prized Mid-Atlantic ingredient, the Chesapeake blue crab (thanks, Baltimore). We're known for an abundance of steakhouses geared toward expense-account diners, but even those places don't have a singularly Washingtonian cut; most downtown meat joints are out-of-town chains. Our most recognized dishes are half-smokes and mumbo sauce-20th-century creations that reflect the District's African-American roots but don't represent a larger, identifying cuisine such as jambalaya in New Orleans or Memphis-style barbecue.

All of that said, a lack of culinary identity can be a good thing. It's partly why Washington has become a great modern-day restaurant town-an exciting place to eat, filled with a broad and distinct variety. It's why Bon Appétit named Washington 2016's "restaurant city of the year." Ambitious chefs who open the kind of "fearless" neighborhood eateries that the magazine applauded aren't beholden to local tradition (though local ingredients still dominate). Instead, chefs are free to innovate, as diners see at Rockville native Aaron Silverman's Pineapple and Pearls. They can return to their roots, as at thriving ethnic eateries in Eden Center's Little Vietnam or Annandale's Koreatown. While diners' expectations have risen with the quality of restaurants, there's no expectation of what Washington-style cuisine should be.

Unlike Philadelphians or San Franciscans-who get exhausted having to have an opinion on the proper way to serve a cheesesteak or bake a sourdough-we're free to think about our own tastes. Without a deeply rooted food identity, Washington has become a true melting pot of ingredients and styles, traditions and innovations-all befitting a great food nation's capital.

The Five Types of Washington Restaurants

Decoding our dining scene

1 The Emerging-Neighborhood Hot Spot

Examples: Maketto, Sally's Middle Name, the Red Hen, Himitsu, Bad Saint.

Why you might want to go: Former dining deserts such as H Street, Shaw, and Petworth are now home to some of the city's best eateries. A visit will also prove you're not one of those stiffs who stick to the city's well-established territory.

Why you might not: Cool neighborhood spots bring in crowds, and some don't take reservations-so be prepared to wait. Also, many of them can be quite loud.

Tip: When possible, make reservations. If not, eat early (before 6:30) or late (after 9) to avoid the masses.

2 The New-School Steakhouse

Examples: Del Campo, Bourbon Steak, Rural Society, Mastro's.

Why you might want to go: Steakhouses are quintessentially old-school Washington, but the newbies have eclectic menus and modern vibes that let diners know they're part of the cosmopolitan new DC.

Why you might not: The cuisine is still sometimes not that creative-but the check can be as large as ever.

Tip: Happy hour at Del Campo features \$6 cocktails, amazing empanadas, and other specials at the bar.

3 The Tasting-Menu Temple

Examples: Métier, Pineapple and Pearls, Minibar, Shaw Bijou.

Why you might want to go: Tasting menus are a chance for stars of the food scene to showcase their most avant-garde or personal cooking.

Why you might not: These meals can be long-and expensive. At Minibar, a dinner for two with drink pairings will set you back nearly \$1,000.

Tip: Hazel, Little Serow, and Conosci offer prix fixe meals for \$50 a person or less.

4 The International Strip-Mall Joint

Examples: Kogiya, A&J Restaurant, Taqueria el Mexicano, Pho 88.

Why you might want to go: In Washington, immigrants tend to go straight to the burbs. So to find authentic flavors not watered down to American tastes, you need to go spelunking amid 21st-century sprawl.

Why you might not: Many of the area's most exciting international joints aren't Metro-accessible (but you shouldn't let that stop you).

Tip: Eye the tables around you to see what's popular.

5 Fast-Casual Posing as a "Lifestyle"

Examples: Cava Grill, &Pizza, Sweetgreen, Beefsteak.

Why you might want to go: Fast food has become healthier (and cooler) thanks to a new generation of chains that call Washington home-while also hosting concerts, offering tattoos, and trying to brand their salads or pizzas as a way of life.

Why you might not: Sometimes you just want Five Guys.

Tip: A lot of these chains have mobile apps that let you order in advance, pay from your phone, and earn rewards.

Eat Your Heart Out

Seven secrets for dining well in Washington

1. "Power dining" is finding someone on TaskRabbit to stand in line for you.
2. The best time to dine out without the crowds is Tuesday.
3. Ben's Chili Bowl doesn't actually have the best half-smokes. Try Meats & Foods in Bloomingdale instead.
4. Appetizers and entrées are out. Some of the best restaurants-Tail Up Goat, the Dabney, Rose's Luxury-serve "share plates."
5. The best food trucks tend to park in office-dense areas such as Franklin Park and McPherson Square, not on the Mall.
6. Eat at the bar-you often get seated quicker, and the service can be more engaging and attentive.

7. Happy hour isn't just for weekdays.

Ethiopian for the Washingtonian

Want to look like you belong? Master a cuisine from 7,000 miles away.

In Washington, global political shifts can affect the food scene. Take Ethiopian cuisine. After a Marxist coup in 1974, Ethiopians fled to DC-capital of their former regime's onetime patron. As the US increased the cap on visas and encouraged family reunification, even more immigrants followed. Today we have the largest concentration of Ethiopians in the US. A night out at an Ethiopian restaurant is as much a tradition here as an outing to a deep-dish pizzeria might be in Chicago. Here's what to know.

Berbere. A combination of chili pepper, ginger, garlic, fenugreek, and other spices, this earthy, aromatic seasoning is as ubiquitous in Ethiopian cooking as soy sauce is in Japanese.

Gomen. Collard greens simmered with garlic and onions.

Injera. No need for utensils. Tear off a piece of this spongy, teff-flour crepe with your hands and use it to pick up bits of stewed meat and vegetables.

Kitfo. The dish of minced raw beef is spiced, mixed with an herbed butter known as *niter kibbeh*, and often served with a mild cheese.

Kik alicha. A stew of yellow split peas and onions, one of several Ethiopian dishes made of lentils or peas.

Tibs. Like fajitas? This is more or less the East African equivalent: marinated and stir-fried beef or lamb, which can also include onions, tomatoes, and peppers.

Timtim. This cold salad of diced tomato, onion, and jalapeño might remind you of *pico de gallo*.

Wat. Simply put, *wat* is a stew. It can be made with meat or vegetables with varying levels of heat. *Doro wat*, one popular iteration, includes chicken and a hard-boiled egg.

Drink Like A Local

Three regional beverages

Washington's distillery boom may seem like a modern phenomenon, but the area has a long and storied drinking past. Here are three classic-even historic-beverages to try.

Maryland-style rye. Maryland was once the third-largest producer of rye whiskey in the US, when the grain was rotated with tobacco to replenish the soil. Distillers are bringing back a softer, toastier version. **Try it:** Lyon Maryland Free State Rye Whiskey, available at Maryland liquor stores.

George Washington's distillations. The first President's Mount Vernon distillery was once the biggest spirits producer in America. The circa-1797 facility was resurrected and now creates rye whiskey and brandies using 18th-century techniques (open to the public May through October). **Try it:** The Shops at Mount Vernon, 3200 Mount Vernon Memorial Hwy., Mount Vernon; 703-780-2000.

The rickey. DC's official cocktail is a mix of gin or whiskey, fresh lime, and soda. It was named after Democratic lobbyist "Colonel" Joe Rickey at the legendary Shoomaker's dive bar in the 1880s. **Try it:** The Spirits Library at Columbia Room, 124 Blagden Alley, NW; 202-316-9396. It's not always on the menu, but the barkeeps make a great one anytime.

The Rules of Happy Hour

In some cities, happy hour is an excuse to unwind over discount drinks. Here, it's a ritual of life-embraced by dive bars and fine-dining restaurants alike-and a chance to network. A few tips:

Do

Eat an afternoon snack; a salad at noon won't pad the stomach. No one wants an office nickname like Two Beer Tim.

Make a happy-hour date-if the place is nice. You won't come off cheap sipping specials at the likes of Fiola Mare.

Suggest spots for office gatherings with both drink and food specials, for those who don't imbibe.

Offer to buy your colleagues a round if the occasion feels appropriate.

Don't

Go home after happy hour.

Go for the rail booze when your colleagues are drinking beer. Nothing good will come of it.

Make a happy-hour date at a place that serves drinks under \$5.

Suggest spots for your office gatherings that have shot and PBR discounts.

Expect your higher-ups to pay the tab.

Go out after happy hour.

Global village

Other cuisines we excel at and where to find them

Chinese

DC's Chinatown has been overtaken by chains such as Hooters and Fuddruckers. For something more authentic, try Rockville. Check out **Bob's Shanghai 66** for dumplings and dim sum or **China Jade** for Szechuan and Cantonese specialties.

Korean

The closest you'll come to Seoul is Annandale, Washington's Koreatown. **Lighthouse Tofu** specializes in boiling pots of tofu soup known as *soondubu*, while **Kogiya** is the destination for Korean barbecue.

Vietnamese

Whether you're after a bowl of *pho* or *bánh mì*, your best bet is Falls Church. In particular, Eden Center-home to **Rice Paper**, **Hai Duong**, and **Huong Viet**-brings together the best bites in one strip mall.

They're Actually From Here

"Wait, you really grew up here?" It's a question natives hear all the time-especially those who've thrived in the federal city. Here's what they know that you don't.

Susan Rice

National-security adviser under President Obama and former US ambassador to the United Nations

Grew up in: Shepherd Park.

High school: National Cathedral School.

What did you enjoy about growing up here? "I appreciate the opportunities the city offered. I had the chance to intern on the Hill, to go to school with kids from varied backgrounds. I remember watching [former Egyptian president] Anwar el-Sadat bound out of his motorcade and wave just after signing the Camp David Accords."

George Pelecanos

Novelist whose books include the DC Quartet detective series

Grew up in: Mount Pleasant, Langley Park, then Silver Spring.

High school: Northwood.

How can you tell if someone was born and raised in Washington? "They root for two football teams: Washington and anyone who is playing the Dallas Cowboys."

Pat Buchanan

Author, political columnist, and senior adviser to three Presidents

Grew up in: Chevy Chase DC.

High school: Gonzaga.

Tell us about growing up in Washington. "One thing we all knew in the 1940s and '50s was where the neighborhood movie theaters were—the Avalon, Apex, Calvert, Uptown, Silver, and the big one downtown, RKO Keith's. Most are long gone. The amusement parks were Glen Echo and Marshall Hall, across from Mount Vernon, down the Potomac by boat."

Diane Rehm

Longtime host and executive producer of *The Diane Rehm Show*

Grew up in: Petworth.

High school: Roosevelt High.

What misconception about Washington drives you crazy? "The idea that we're out of touch with the rest of the country. I know many people in this city who care deeply about what's happening in other parts of the country and who participate, in various ways, in international activities. That's part of why I love this city so much."

David Bradley

Owner, Atlantic Media

Grew up in: Westmoreland Hills.

High school: Sidwell Friends.

What misconception about Washington drives you crazy? "That lobbyists are all corrupt, that government officials live like pashas at taxpayer expense. Do people know that some House members attend receptions for the cheese and crackers, that some senators bunk together in group houses no better than a college dorm? These are ambitious men and women, but no more evil and no less good than the rest of the human race."

Gina Adams

Senior vice president for government affairs, FedEx

Grew up in:DC's Ward 8.

High school: Ballou.

How can you tell if someone was born and raised in Washington?"They love go-go, Chuck Brown, Ben's Chili Bowl (pre-Obamas), Horace and Dickies, the Shrimp Boat (in its glory days), concerts, baseball and football games at RFK, roller skating at Kalorama and roller derby at the Washington Coliseum. And they remember real house parties back in the day."

Brett Kavanaugh

Federal judge, US Court of Appeals for the District of Columbia circuit

Grew up in:Bethesda's Westgate.

High school: Georgetown Prep, after attending Mater Dei for grade school.

What did you enjoy about growing up here?"The sports teams were fantastic. The Redskins, Bullets, Orioles, University of Maryland, and Georgetown dominated the 1970s and '80s. No exaggeration to say that DC was the sports capital of the country in the '70s and '80s, like Boston has been in the 2000s."

Denise Turner Roth

Administrator, General Services Administration

Grew up in:Anacostia.

High school:Bishop O'Connell in Arlington.

What did you enjoy about growing up here?"This is an amazing city where people have an immense amount of passion and drive. Growing up, I would walk past the Frederick Douglass House every day and dream about making a difference. Having the opportunity to work for the Obama administration has been an incredible privilege."

Vernon Davis

Redskins tight end

Grew up in:Petworth.

High school:Dunbar.

How can you tell if someone was born and raised in Washington?"Usually, I can tell by their accent. If someone says, instead of Maryland, 'Muriland.' Or anytime you hear the *err* sound-like 'Erc' instead of Eric."

Raul Fernandez

Chairman and CEO of ObjectVideo and co-owner of the Capitals, the Wizards, the Mystics, and the Verizon Center

Grew up in: Silver Spring.

High school: St. John's in DC.

What's one thing every native knows about this city? "Change happens here fast, and often. Politically, every two and four years, you have the potential for a shift in the balance of power, and that has a lot of business and social implications."

They Were Once New, Too

These people weren't born here, but this is now home. We asked: When did you first feel like a local?

Jim Vance

Anchor, NBC4

Originally from: Ardmore, Pennsylvania.

"In the fall of 1969, shortly after I moved here, I found Mr. Henry's at Sixth and Pennsylvania on Capitol Hill, where Roberta Flack was playing. It was just after her album *First Take* came out. She was with a trio-she played piano-and I fell in love with her. That place opened the door to a love affair with the city."

Molly Smith

Artistic director, Arena Stage

Originally from: Alaska.

"I really felt like a Washingtonian when I discovered that 12th Street, Northwest, was a one-way street and I could zip through the city at rush hour. Now my secret is out."

Pati Jinich

Chef at the Mexican Cultural Institute, cookbook author, and host of *Pati's Mexican Table* on PBS

Originally from: Mexico City.

"My husband and I moved to the area in 2000. The moment I realized I was a Washingtonian was when I was finally able to harvest the most delicious figs from my stubborn Brown Turkey fig tree. Once you plant a fruit tree in the land where you live, and it bears fruit and you eat it, you know you belong."

Bobbie Kilberg

President and CEO, Northern Virginia Technology Council

Originally from: Manhattan and Queens.

"My husband and I felt like locals when we bought our first home in McLean. We've been in McLean 45 years and at the Potomac School there 37, with five children and ten grandchildren. I grew up in an anonymous high-rise. Going from that to a community where you raise your children and they come back made it feel like home."

Jim Dinegar

President and CEO, Greater Washington Board of Trade

Originally from: Queens.

"A few years after graduating from Catholic University, my brother and I bought a co-op in the 1920s 'Senate' building behind the Supreme Court. We used to watch Justice Rehnquist take his daily strolls. I would go to Eastern Market to buy a bacon-egg-and-cheese at Market Lunch. I keep the key to that old apartment because it reminds me I'm home here."

Steve Case

Cofounder of AOL and chair-man of Revolution and the Case Foundation

Originally from: Honolulu.

"I moved to the area in 1983 to join a start-up in Tysons that would one day morph into America Online. Back then, Tysons was fairly undeveloped. Because there was so little to do there, I would often drive to DC. The original 9:30 Club was a favorite; it was there I felt like a local. It had a mediocre sound system and poor sightlines, but it was the epicenter of punk rock."

Arch Campbell

Former TV entertainment reporter

Originally from:San Antonio.

"I moved to DC in 1974. I started driving around-and immediately got lost. In DC, a city filled with traffic circles, I discovered you couldn't rectify a wrong turn by driving around the block. After a while, I started finding my way. Then I discovered Rock Creek Parkway. By 1979, I could navigate the parkway from the Kennedy Center all the way to Rockville. That's when I felt like I lived here."

Svetlana Legetic

Cofounder, BYT Media

Originally from:Serbia.

"Owning my own bicycle and commuting on it made me feel like a Washingtonian. I moved to DC in 2003. My first bike got stolen two days after I bought it-so also a very DC thing: learning how to lock your bike properly. The city is an amazing place to bike in and a place that will punish you if you don't bike it well. But you can beat the traffic, which may be the ultimate local goal."

Ashok Bajaj

Founder and president of Knightsbridge Restaurant Group, which includes Rasika and the Oval Room

Originally from:New Delhi.

"I moved here in 1988, and it took convincing to get the landlord to work with me to open my first restaurant, the Bombay Club, near the White House. The Clintons became supporters of my restaurant, and when I got invited to my first state dinner by President Bill Clinton, I felt I was a true Washingtonian."

Carolyn Parkhurst

Novelist whose books include *The Dogs of Babel* and *Harmony*

Originally from:Massachusetts.

"I moved to DC in the fall of 1992. When spring tourists began to thicken the crowds on Metro, blocking the farecard machines and wavering in front of open doors, I developed a new and remarkably fierce pet peeve: escalator riders who did not stand on the right and walk on the left. When you start complaining like a native, you know you're home."

So You're Homesick . . .

Destinations for expats from across the country

California

The fried-fish tacos at **FishTaco** (three locations) are pretty darn close to San Diego's authentic Baja-style.

Connecticut

The New Haven pie at **Pete's New Haven Style Apizza's** four area locations is slathered in garlic and clams.

Florida

The high-intensity cardio dance classes at **305 Fitness** come straight out of Miami's sweltering club scene.

Georgia

Like Atlanta's Ponce City Market, **Union Market** is DC's best destination for grazing through multiple eateries.

Hawaii

You'll find poke bowls and Spam *musubi* at Shirlington's **Hula Girl** and downtown DC's **Abuna** food truck.

Illinois

Shaw's cash-only **Ivy & Coney** and the \$4 pepper-slathered hot dog will take you back to Chicago's no-frills watering holes.

Kentucky

Georgetown's **Martin's Tavern** serves its version of a Louisville hot-brown sandwich with a cheddar rarebit sauce.

Louisiana

A New Orleans-inspired beignet craving can be satisfied at **Bayou Bakery**, in Arlington and on Capitol Hill.

Maine

Pair the Luke's Trio seafood combo at **Luke's Lobster** (Penn Quarter and Georgetown) and a Maine brew.

Massachusetts

Tuckernuck's Georgetown shop has Martha's Vineyard basics like monogrammed canvas satchels down pat.

Minnesota

The **National Museum of American History** houses the electric guitar that belonged to Minneapolis native Prince.

Nevada

Get your gamble on, Las Vegas-style, at **MGM National Harbor**, with its 125,000-square-foot casino.

New Jersey

The Jersey Shore pie with fried calamari is one of the most popular entrées at Little Ferry-born Mike Isabella's **Graffiato**.

New York

If you miss Fivestory-slightly kooky luxury clothing in a posh rowhouse-Georgetown's new **Curio** store is for you.

North Carolina

Miss the Durham Bulls? The Class-A **Potomac Nationals**, a farm team for the Washington Nats, play in Woodbridge.

Ohio

All of the local **Hard Times Cafe** outposts have your Cincinnati chili fix-and, yes, they'll serve it over spaghetti.

Pennsylvania

The vegan chik'n and tofu wraps you love at **HipCityVeg** in Philly have found their way to DC's Chinatown.

South Carolina

Chef Jeremiah Langhorne left McCrady's in Charleston to open his innovative Shaw gem, the **Dabney**.

Tennessee

Songwriters flock to Nashville's Bluebird Cafe to be discovered. Here, Vienna's **Jammin Java** is the place to hear up-and-coming acts.

Texas

Nick's Night Club in Alexandria is about to become your new honky-tonk.

Washington

In Georgetown, **Lynn Louisa** stocks the neutral upscale-casual separates that Seattle style is known for.

Where We Came From

Which states do people moving to DC typically hail from? No surprise, Maryland and Virginia are the top two. But the other places might surprise you. Among all newcomers to the District in 2014, here's where the moving vans originated.

1. Maryland 17,421
2. Virginia 12,511
3. California 4,219
4. New York 3,323
5. Florida 1,897
6. North Carolina 1,724
7. Massachusetts 1,689
8. Pennsylvania 1,636

9. Colorado 1,323

10. Texas 1,266

Source: US Census

Graphic

Illustration by Jason Schneider. Photograph of Illustration by Todd Detwiler. Photographs of dictionary by Jeff Elkins.

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Photograph of others by Getty Images

Top row, photographs by Cameron Davidson and Sam Kittner/Capital Bikeshare

Middle row photographs by Evy Mages and Reuters

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"Word on the Street" Illustrations by Claire McCracken

"Talk like a local" illustration by Jason Schneider

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Photograph of Veep Courtesy of HBO

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Photograph of Lyon Rye Courtesy of Lyon Distilling

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Flying robes

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Body

In the 31st annual Capital Challenge race on May 16, team "D.C. Circuitry" prevailed-at least for judicial branch runners-for the third year in a row. Sponsored by the American Council of Life Insurers-entry fees go to the Wounded Warrior Project-the 3-mile course at Anacostia Park featured runners from all branches of government. Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit, a member of D.C. Circuitry, finished at the top among judges. His time: 21 minutes, 20 seconds. Judge John McCabe of D.C. Superior Court-running with team "Superior Feets of Running"was the second-fastest judge. Kavanaugh, who has completed three marathons, ran with three of his law clerks- Caroline Edsall, Eric Hansford and Adam Klein. "No truth to the rumor that I use race times as a factor in clerk hiring!" Kavanaugh says.

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92 Judicature 258**Judicature**

May June 2009

Sheldon Goldman, Sara Schiavoni, Elliot Slotnick ^a

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W. BUSH'S JUDICIAL LEGACY: MISSION ACCOMPLISHED
George W. Bush's legacy includes the appointment of like-minded Supreme Court justices and lower court judges selected by a process structured to achieve that result.**WESTLAW LAWPRAC INDEX****JUD -- Judicial Management, Process & Selection**

George W. Bush left the White House on January 20, 2009, with an overall legacy that is sure to be debated for some time. That legacy includes the worst financial crisis since the Great Depression, a country at war on two fronts, a crushing deficit, and much unfinished business on the domestic policy front ranging from health care to tax policy. He left office with Democrat Barack Obama winning the White House in the 2008 presidential election with a decisive electoral college and popular vote margin, in marked contrast to the elections of 2000 and 2004 and with Democrats firmly in control of both houses of Congress. He left office with a presidential approval rating that, according to a CBS tracking poll, was the lowest of any president since polling began. Yet, George W. Bush left a judicial legacy that even his political opponents concede has had a major impact in the reshaping of the federal judiciary. Indeed, as we suggest here, his judicial legacy may well be Bush's most enduring accomplishment.

The last two years of the Bush presidency were different than his first six years. The congressional elections of 2006 saw the Republicans lose control of both houses of Congress. Ongoing crises both international and domestic no doubt took their toll on the President's ability to pursue his agenda. Democratic control of the Senate, although by a slim margin, meant that it would be harder for the President to gain confirmation of his judicial nominees, especially those perceived by Democrats and liberal interest groups as too ideologically committed to an activist conservative agenda.

Nevertheless, when the last two years of the Bush presidency were over, 58 of the 79 nominees to the federal district courts and 10 of the 22 nominees to the appeals courts of general jurisdiction submitted to the 110th Congress were confirmed by the Senate. In percentages, 73 percent of the district court nominees and 46 percent of the appeals court nominees were confirmed. This was *259 a confirmation rate that modestly exceeded the historic low rates during Clinton's last two years in office (also with an opposition controlled Congress).²

This article continues the story of W. Bush's judicial appointments, a story that follows the format of previous articles in our biennial accounting of judicial selection during each previously completed Congress.³ We pay particular attention to the demographic portrait of the Bush appointments to the lower federal courts and appointment and confirmation processes during Bush's last two years in office (that is, during the life of the 110th Congress). We also consider the broader question of Bush's judicial legacy.

Our sources of data include personal interviews with officials in the White House, Department of Justice, and the Senate who played a role in either the nomination or confirmation process (or both) and interest group observers who ranged

across the ideological spectrum. For the demographic data on the appointees, we relied on the questionnaires that judicial nominees complete for the Senate Judiciary Committee. Other sources of demographic or background data include newspaper articles and biographical directories.⁴ Data on political party affiliation or preference was collected not only from the just mentioned sources but in some instances from the Registrar of Voters or Boards of Elections for the counties in which the appointees maintained their primary residence.

We first examine the selection process, particularly during the President's last two years in office, followed by a consideration of the confirmation process during this period of divided government. Subsequent sections consider the demographic portrait of the last two years' appointees to the district and appeals courts compared to the appointees from the first six years; a comparison of the nontraditional to the traditional appointees; and then a comparison of the demographic profile of the entire cohort of Bush appointees for each of those courts compared to the demographic profiles of the judiciaries of Bush's four immediate predecessors. We conclude with a summary assessment of Bush's judicial legacy followed by our take on what we can expect from the Obama presidency.

The politics of selection

While the politics surrounding judicial selection and confirmation during the final two years of the W. Bush presidency were not without interest, for a number of reasons it would be fair to say that the excitement, drama, and attention by the American public and the media waned significantly from the previous six years. This was the case for a number of inter-related and quite understandable reasons.

Some of these were historical and institutional in nature. First, any lame duck president is unlikely to enjoy the cache to press forward with large numbers of nominees when the Senate is controlled by the opposition party hopeful of winning the presidency in the upcoming election and enjoying its judicial spoils.

Indeed, under the ill-defined "Thurmond Rule" (discussed below), so named for the South Carolina Senator who is said to have originated the norm when he was ranking minority member of the Senate's Judiciary Committee, there comes a time in a presidency, which has generally fallen at an undetermined date in the late Spring or early Summer, prior to a national election, when the curtain comes down on Judiciary Committee processing of presidential nominees and all judicial vacancies remain open for the next occupant of the White House to fill. Beyond such historical and institutional reasons for a restrained pace of advice and consent in a lame duck presidency there are a number of circumstances somewhat unique to the context in which the W. Bush administration found itself in its last two years that created an especially challenging judicial selection environment.

For one, the administration had enjoyed extraordinary success in nominating and seating two strong conservative courts of appeals judges to the Supreme Court vacancies created by the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. The relatively swift and smooth confirmation processes enjoyed by John Roberts and Samuel Alito were major triumphs for the W. Bush presidency and, despite the misstep of the ill-fated nomination of Harriet Miers, when all was said and done, the President's political base had gotten all, perhaps more, than they could have hoped for. Successfully appointing Chief Justice Roberts and Justice Alito, in short, energized the conservative Republican base and appeared to be such striking selection successes that, almost by definition, they would be difficult if not impossible acts to follow in the President's last two years in office, particularly absent a third opportunity to seat a justice on the Supreme Court.

Relatedly, the President had also enjoyed extraordinary success in seeing numerous prominent conservatives, many with a strong Federalist Society pedigree, successfully seated on the U.S. courts of appeals. Indeed, throughout the W. Bush presidency, while a good deal of *260 political gain could be made by highlighting the relatively few appellate nominees who could not get confirmed, with the Democrats being accused of utilizing unprecedented obstruction and delay tactics,

the reality is that a veritable all-star team of conservative judges with strong appeal to the Republican base had been seated on the appellate bench during the first six years of the W. Bush presidency.

Among the many examples are Janice Rogers Brown, Jay Bybee, Brett Kavanaugh, Michael McConnell, Priscilla Owen, Jeffrey Sutton, and William Pryor. In the wake of such an impressive roster, only partially documented here, it is little wonder that the selection momentum would slow down in the administration's lame duck period that corresponded, as well, to a relatively low judicial vacancy rate and a selection pool that, perhaps, was not as wide and deep as that available earlier in the W. Bush presidency.

Additional political and institutional factors also played a significant part in ratcheting down the pace and expectations for judicial selection politics in the 110th Congress. The Democratic majority controlling the Senate was now relatively consolidated and strong and Patrick Leahy, the Judiciary Committee Chair, found in ranking minority committee member Arlen Specter an arguably more congenial "leader of the opposition" than had existed for several years in the Leahy-Orrin Hatch pairing.

Indeed, there had been several storms and dramas in the earlier W. Bush years, such as debates over the propriety of Democratic filibustering of judicial nominees, the appropriateness of Republicans resorting to the "nuclear option" as a mechanism to break any filibusters with a "simple" majority, instead of the required 60 votes for attaining cloture, and the pivotal role of the bipartisan "Gang of Fourteen." The "Gang" was composed of seven nominally moderate Democrats and seven like-minded Republicans whose agreement led to the survival of the filibuster power while also seating a number of conservative W. Bush nominees. This was accomplished while bypassing the Senate leadership in an effort to keep the institution from, literally, shutting down. Such events now seem from a distant past, with limited relevance for the judicial selection processes that were played out in the altered context of the 110th Congress.

All of these observations and related concerns were the subjects of our intensive field interviews conducted in early December, 2008, and January 2009, with key judicial selection participants in the W. Bush White House Counsel's office, the Justice Department's Office of Legal Policy, Senate Judiciary Committee staff, and interest group advocates both supportive and critical of the administration's judicial selection behavior. While the multiple perspectives shared with us ran a wide spectrum, we think the weight of the documentation provided well sustains our analysis and conclusions.

The selection process

The central role judicial appointments played in the administration's domestic policy agenda must be highlighted as the judicial selection processes put in place at the outset of W. Bush's tenure were structured to achieve a lasting legacy on the federal bench. Despite the above mentioned events of the past two years, what did not change was this administration's continued focus on their overarching goal of staffing the federal bench with judges, "who would faithfully interpret the Constitution... and not use the courts to invent laws or dictate social policy."⁵ This was patently obvious from our conversations with individuals inside the administration-their message was clear. As Assistant Attorney General Beth Cook noted, "it has been business as usual... judicial nominations have continued to be a priority for this President, we have maintained the same standards and approach to judicial selection and confirmation."⁶

The fundamental structures and processes by which judicial nominees were selected remained remarkably stable across the eight years W. Bush was in office. Judicial selection activity was centered in two different locales, the Department of Justice's Office of Legal Policy (OLP) and the White House Counsel's office.

However, the majority of the actors changed as the Justice Department encountered higher than usual turnover just prior to and shortly after Attorney General Alberto Gonzales resigned mid-way through 2007. Former district court judge Michael Mukasey was nominated and subsequently confirmed as his replacement, and shortly thereafter former Deputy

Beth Cook assumed the responsibilities of Rachel Brand as Assistant Attorney General, Office of Legal Policy.⁷ Cook confirmed her predecessor's description of the division of labor between the OLP and White House, "Selection is an area where we work together very closely....OLP does continue to have the day-to-day responsibilities for specific vets and background, but... it's an area where we make sure the White House is up-to-date." When consultation with home state senators is necessary, "the White House is in the lead." Subsequent confirmation "is a collaborative effort." When asked directly about who takes the initiative in seeking out nominees, Cook reiterated that, "the consultation process has been run out of the White House, and as far as I know that's been the case throughout this administration."

The internal advisory group at the heart of judicial selection starting with the Reagan presidency and continuing during the Bush years was *261 the Judicial Selection Committee, a joint enterprise between the White House and Justice Department. Echoing her previous sentiment that there has been no diminution to the attention paid to judicial selection, Assistant Attorney General Cook affirmed, "The Judicial Selection Committee... has continued to exist throughout the end of this President's time for background and review... It's a regularly scheduled meeting, and it does meet as needed."

When asked about the specific participants on the committee, Cook, similar to her predecessors, described the players, though not in great detail, "It's the same as it has been throughout the Administration, which is those individuals with a voice in the process, and with equity in the process are at the table. It is the Attorney General and the White House Counsel who are the primary participants of the Judicial Selection Committee." Rumors to the contrary, Associate White House Counsel Kate Todd reiterated that it's, "Only government folks, not third parties in those meetings."

The third parties Todd evoked include the so-called "four horsemen"- Jay Sekulow of the American Center for Law and Justice (ACLJ), Leonard Leo of the Federalist Society, C. Boyden Gray, former White House Counsel to President H.W. Bush and former head of the Committee for Justice, and Edwin Meese, III, Attorney General during the Reagan years and now at the Heritage Foundation. These actors were a guiding force for the judicial selection processes in the W. Bush White House.

While reaffirming their participation, Sekulow offered a glimpse at the level of presidential involvement even at this late stage of the game. "At the end of the day, these were his picks. The President makes his selection and then we were kind of outside counsel, if you will, shepherding them through. But it was really handled internally, inside the White House." When specifically asked about how involved the President was, Sekulow responded, "Very.... He was in the loop the entire way through. He took it very seriously." It even appears that the President was quite active in the selection not only of Supreme Court nominees but of circuit court judges as well. Jay Sekulow confirmed, "Yes, absolutely. He relied on his staff for information and expertise, but yes." Clearly W. Bush's continued involvement in the selection of judges for the courts of appeals, even after the successful confirmations of Roberts and Alito, demonstrated his full commitment to the selection of like-minded jurists.

Winding down

Throughout our examination of the selection processes during Bush's tenure, a few issues persisted year after year-questions surrounding consultation with senators and renomination of controversial nominees-but these seemed to lose import as the curtain fell on the Bush administration's time in office. The thrust of our most recent interviews centered around the question of how the winding down of W. Bush's term impacted the judicial selection process during the 110th Congress, both in terms of the quality of the nominees and the continued commitment of the administration. This, of course, depends somewhat on the vantage point from which the selection process is viewed.

Summarizing the administration's position, Beth Cook argued,

It's absolutely our experience that we have sought quality candidates, that we have maintained the same positions in what this President is looking for, in terms of judicial philosophy and in terms of the caliber

of potential nominees. The process of consultation and the importance of consultation have also been the same throughout the administration. So from our perspective certainly nothing has changed. I don't think we've seen a ratcheting down. Certainly folks within the administration continued to approach the issue of nominations and confirmations with equal levels of commitment and enthusiasm. This remains a priority.

Reaffirming this sentiment, Jay Sekulow, when asked if he saw a change in the types of nominees put forth in the last two years, responded, “No, this President was very consistent in the way he viewed the judicial philosophies of the people he was trying to get confirmed. He never wavered from that commitment.”

Not all of the participants saw the administration's actions in such absolutist terms. Intimating that recognition of the changed political context did alter how the administration approached judicial selection and the resulting nominees, Curt Levey, Executive Director of the conservative Committee for Justice, opined,

Maybe there was a slight diminution in the quality of the nominees, but that could have been for a lot of reasons. It could have been you've already appointed the best people. It could be that his popularity sunk so low that he had very little leverage...I'm not sure he ever had leverage with the Democratic senators, but much of the ballgame from our perspective is energizing the Republican senators...It could have to do with the fact that, after you see your nominees get demonized, it makes you a little shy. If you're asking me, do I think every nominee was great, no. But I think you have to be realistic. And I think given the roadblocks that he faced, both in terms of ideological opposition and in having to work with [certain] senators..., at least to some degree, I really can't find a lot to criticize.

Further, as Levey's comments underscore, any changes in the kind of nominees the administration put ***262** forward during this period reflected different political imperatives than had been in play at the beginning of the administration nearly eight years earlier. “I know a lot of people in the base are not happy with him having nominated Gregory and Parker. A lot of people still criticize that. I think it was a good try. It didn't work and the Democrats gave nothing in return.” This reference is, of course, to judges who were Democrats that President Bush nominated to the circuit courts, as part of his first set of nominees, perhaps as an “olive branch” to the opposition.

In perhaps the most pragmatic assessment of how the political landscape impacted the selection process in the 110th Congress, Jay Sekulow acknowledged, “The President had a specific judicial philosophy he was looking for in his nominees, which is his prerogative according to the Constitution.... I think you have to be realistic. When the Senate leadership changed, it changed the equation.” For the administration's harshest critics, however, such as Nan Aron, President and founder of the liberal Alliance for Justice, this was a simple matter.

What we saw was typical of the last two years of an administration—a president who is weaker, has less support, can no longer claim a mandate... a tired Republican army, and excitement about Democratic candidates—so a whole number of factors created a tempered political environment for the Republicans. What you also see at the end of an administration is the pushing of the bottom of the barrel. Those nominees at the bottom of the barrel, those who have no support from senators, and those are always the most problematic.

Even though the administration denied they altered their selection processes over the last two years, there is some evidence to the contrary. At the end of the 109th Congress there were a number of controversial courts of appeals nominations languishing in the Senate Judiciary Committee, and the pattern in prior congressional sessions had been

for the administration to simply renominate them. However, W. Bush did not push forward with renomination and in fact withdrew the names of four ideologically extreme nominees in January, 2007.

Staff members of senators on the Judiciary Committee, both Democratic and Republican, acknowledged this attempt to “ratchet down the controversy” surrounding judicial selection. A senior staffer on the Democratic side commented, “We could sense a change, they sort of saw the time winding down, and finally came around to, ‘let’s start working out some deals.’...They pulled a very controversial nominee in Virginia for the Fourth Circuit that both Webb and Warner opposed... and put in somebody they could confirm.” Aides to senators on the other side of the aisle concurred. “We certainly saw, like the Helene White situation, where there was more of an effort to compromise and try to work out some deals. But I think overall, Bush was realistic in a lot of ways trying to nominate people-if you had two Democratic home-state senators, often trying to work with those senators.”

However, there remains some disagreement over who should get the most credit for lowering the temperature and, indeed, some believe the closer working relationship between Specter and Leahy made a real difference. Democratic staffers opined,

There was, in the last two years, I thought, less fighting and skirmishing about judicial nominations and much more... working together, solving problems, salving old wounds...not with the administration, with the minority in the Senate. I thought we ended on a different note and actually had done a good job of ratcheting down the conflicts and ratcheting up cooperation, and it shows in the successes over the period of [these last two] years.

Regardless of whether or not one views the last two years of the Bush administration through the lens of divided government, or where one lies on the continuum of evaluating the most recent nominees, the outcome is essentially the same-Bush was able to fulfill his electoral promises of filling the federal bench with ideologically similar jurists. Curt Levey characterized W. Bush's successes as even more impressive than Reagan's given the context in which Bush labored.

He may not have equaled the total numbers of a Reagan. But Reagan had, except for his Supreme Court nomination [of Robert Bork], no opposition, whereas Bush had tremendous opposition. So if you are going to factor that in, one could argue that he has been the most effective president on judicial nominations in, certainly, the last fifty years.

When asked if she viewed judicial selection as one of the major accomplishments of the administration, Assistant Attorney General Cook replied,

Yes, absolutely. Speaking for myself, it's been a privilege to work for this President on this issue. I think his record has been outstanding. I think he came in saying he was looking for folks with a particular judicial philosophy and approach to judging... and I think he's done a remarkable job... I think the President is rightfully proud of his record.

Clearly he is -- in a speech to the Federalist Society on the eve of the 2008 election he was quite reflective as he described his judicial legacy.

The lesson should be clear to every American: Judges matter. And that means the selection of good judges should be a priority for us all....I made a promise to the American people during the campaign that if I was

fortunate enough to be elected, my administration would seek out judicial nominees... who would faithfully interpret the Constitution... And with your support, we have kept that pledge. I have appointed more than one-third of all the judges now sitting on the federal bench, and these men and women are jurists of the highest caliber, with an abiding belief in the sanctity of our Constitution.⁸

Confirmation processes and politics

Perhaps the initial focal point for discussion of the W. Bush administration's confirmation record is the distinction that might be drawn between the overall success enjoyed by Bush, based largely on a record *263 developed during his first six years in office, and allegations of diminished success during the 110th Congress. For its part, the administration argued forcefully that its diminished confirmation success was primarily a consequence of the imposition of the so-called Thurmond Rule by the majority Democrats. According to Beth Cook, "We're proud of the work that has been done. I think the President is rightfully proud of the quality of the nominees that he has continued to send up. Do we believe that each one of them should have gotten a hearing, should have gotten an up or down vote? Absolutely."

In Cook's view, much as had been argued during the final year in the Clinton Administration before it, nominees were not being moved even in instances where the constellation of confirmation considerations were aligned in their favor.

In the beginning of 2007, if you looked at the criteria that were set forth for nominees that should move, nominees with strong state support, ABA well qualified ratings, people who met all of the criteria for what Senator Leahy said would move, Bob Conrad comes immediately to mind, I don't think it's surprising to anyone that we're disappointed that extremely well qualified folks like that didn't even get a hearing.

A similar view was held by Nicholas Rossi, Chief Counsel to ranking Judiciary Committee minority member Arlen Specter.

Though the vacancy rates are relatively low, and when folks look back at this in terms of historical perspective, the difference of four or five seats may not be the kind of thing that folks view with as much ire as we do in the moment-particularly when we know of specific candidates who have been passed over, it's tough not to personalize the argument. When you have someone like Peter Keisler, the candidate for a seat on the DC Circuit, someone like Glen Conrad, a consensus pick of Senators Warner and Webb, and he couldn't get a hearing, it's hard for us to say we're not disappointed.

In Rossi's view, Judiciary Committee Chairman Patrick Leahy's interpretation of the Thurmond Rule, one with which he took issue, added to the difficulties *264 in moving circuit nominees in the 110th Congress.

Rossi continued,

Our position was that the Thurmond Rule was more myth than reality..... And as far as it went, it should not have limited some of the consensus nominees that were teed up towards the latter half of this session.... Certainly Senator Leahy maintained that he was being faithful to the rule in insisting upon consensus not only by the home state senators and the ranking member and Chair of the Judiciary Committee, but also by the minority leader and the majority leader.... At the end of the day, I suspect that Senator Leahy may

suggest that the reason more circuit nominees were not moved has to do with the Thurmond Rule and the fact that winning the approval of the majority leader in a tight election year was not likely to happen.

Rossi also anticipated and disputed the notion that the reason for the President's diminished success could be traced to the amount of time and resources spent seeking confirmation of difficult, sometimes unconfirmable nominees instead of seeking to augment its sheer numbers. "They will point to our efforts on Southwick and others as things that slowed the process. They'll say, 'well, had you not spent so much time on him, we maybe could have gotten three or four more done.' We don't accept that argument, but it's one that they will likely make."

True to Rossi's prediction, senior staff members of Democratic senators on the Judiciary Committee indicated their satisfaction with what had been accomplished in the 110th Congress while also noting that those accomplishments could have been greater if the administration had taken a different approach.

According to one such staffer, "It was weird because they knew what time of the year it was. They know how we work... Even if we wanted to send everybody over, they were getting them to us after the August recess. They were trying to run up the numbers on those we hadn't confirmed as opposed to a real effort to work together and get them through." Another aide added that, "there was a time very early in the *265 year when the Chairman even said publicly, 'Look, this is the time. Let's get together....' So while we made significant progress, did we accomplish everything we could have working together? No. We all could have done a better job."

The long view

Importantly, the broader the lens focused on assessing the administration's appointment record across its eight years in office, the more impressive the characterization of its accomplishments. According to Nan Aron, W. Bush, "cemented the modern day revolution started by Reagan to pack the courts with judges who seek less government intervention in the lives of ordinary people.... To some extent he helped fulfill a dream of Ronald Reagan's which was to leave behind a federal bench packed with like-minded judges."

Also taking the long view, Jay Sekulow was effusive in his assessment.

Concerning the overall...eight year period, from my philosophical position it's hard to be anything but enthusiastic about Roberts and Alito.... I think he [President Bush] has had a lasting mark on the Supreme Court.... The same is true for some of the appellate courts.... Knowing who the nominees are, most of them are young. They'll be around for a long time.... You take a look at people like Janice Rogers Brown, Bill Pryor, Priscilla Owen, these are very bright intellects. They're very good judges and they are going to be leaders. So I think it is going to be a long-term legacy. When the President is eighty five, judges like Bill Pryor will be in their sixties. So they're going to be around a long time.

Nicholas Rossi offered a very similar assessment.

He'll actually be viewed as relatively successful over the eight years... You can't underestimate the importance of being able to place two Supreme Court nominees on the Court and, too, whether you're supportive of them or not, two very qualified nominees... I think beyond the numbers, when you look at his imprint on the judiciary, I think he'll be seen as successful in appointing the kind of judges he wanted

to appoint, and reasonably successful in having them processed, even with the opposition party controlling the Senate the last two years.

***266 Successes and failures**

Indeed, one might even argue that the administration had its fair share of unanticipated successes, even during its weakest confirmation context, the last two years corresponding to the 110th Congress. Specifically, three interesting events during this period warrant exploration in greater detail. These are the late term confirmations of 10 district court judges on September 26, 2008, well after the Thurmond Rule would have been invoked, regardless of whose definition of the day for its implementation was utilized; the seating of an extremely controversial nominee, Leslie Southwick, on the U.S. Court of Appeals for the 5th Circuit, while strong allegations of racism swirled around him; and the successful ending of the struggle over the filling of circuit court judgeships on the U.S. Court of Appeals for the 6th Circuit, a controversy that spanned the better part of the two term presidencies of Bill Clinton and George W. Bush.

Regarding the seating of 10 district court nominees in late September, on the cusp of a presidential election that the Democrats were favored to win, a senior aide to a senior Democrat on the Judiciary Committee volunteered that, "There was flak from our own party to move anybody at that time when the thinking is, 'shut this down, you've already done...more than the Republicans did.' We had done at that point 158; the Republicans had done 159 for Bush so we ended up doing ten more."

Not happy with what could be perceived as the Democrats giving more to the Republicans than was necessary under the circumstances, a spokesperson for a liberal interest group with a long history of activity in judicial selection politics was critical of Senator Leahy for what was characterized as somewhat self-serving behavior.

This is a man who sees himself as ... a great hero to both sides of an issue.... He talks about how many judges he had confirmed.... 'Now be nice to me, Republicans, because I have been nice to you.' I think he probably saw a real chance for Obama to win the election, and, therefore, he'd be owed thanks from the Republicans. Fat chance.

***267** On the other side of the political spectrum, considerably less surprise was expressed about the 10 late term confirmations and, as well, they were afforded considerably less significance. Jay Sekulow simply commented, "I think it was the right thing to do to get them through.... No one pays, or very few people pay attention [to the district courts], certainly nowhere near the level of appellate [courts] or the Supreme Court." The Committee for Justice's Curt Levey elaborated further.

Leahy, I think, only wanted to let a few through, and I think McConnell played a bit of hardball. But Leahy never put up a big fight.... The Democrats didn't put up a big fight against the district court judges. That was basically their strategy. Run up the numbers with the district court judges and then fight on the more conservative circuit court nominees. So I certainly don't remember being surprised; if anything, I thought maybe we'd get a couple of more after that.

A similar view was held by the administration. Assistant Attorney General Cook noted, "I think they went five or six months without having a circuit court hearing, the last circuit hearing was in June....I wouldn't call it a surprise. There were, at that point, forty-some nominees who were waiting for a hearing.... So the fact that they were still working in

September I don't think was a surprise." Associate White House Counsel Kate Todd agreed. "I don't think it's a surprise. It's a disappointment that there weren't more." Finally, as an aide to a senior Republican member of the Judiciary Committee noted of the ten, "Some of them were ones that had Senator Hatch's strong support...and in some cases there were agreements between home-state senators. So in that respect, it wasn't that surprising."

The Southwick confirmation

Perhaps in need of greater explanation was the successful confirmation of Leslie Southwick to the 5th Circuit approximately one year prior to the presidential election, despite substantial opposition. Explaining *268 Southwick's confirmation, one that "surprised" Nan Aron who characterized it as "the big nomination of the past few years" where it was "just stunning to see, for the Democrats, for that to occur," is a story somewhat more complex than Jay Sekulow's observation that, "You get a pass every once in a while." Rather, as is often the case in unraveling judicial selection politics, one must focus on group activity both in support of, and in opposition to, the nomination, as well as on the role of the Senate Judiciary Committee to better understand the nomination's eventual outcome.

For his part, the Committee for Justice's Curt Levey was taken somewhat by surprise when the Southwick nomination ran into difficulty, in effect, the mirror image of Nan Aron's shock at it going forward. According to Levey, "A lot of ...times, it is reactive.... I don't want to trumpet...isn't it great that the President just nominated this strong conservative?" The Southwick case was a situation where Levey called this "reactive" strategy into question.

The only case in which I...regretted that...was with Southwick, where we probably could have done more early on. But I just thought that the charges there were just so...trumped up that they're not going to get all of the Democrats to buy in.... So, there, I probably should have been a little more proactive. But, generally, we would wait to see what People for the American Way did, what happened in the hearing. You can definitely tell from the questions in the hearing.... You know after the hearing if it's going to be a difficult nomination.

From the perspective of a group leader on the other side of the political spectrum there was a similar concern that, organizationally, they had not done enough. In this instance, however, the failure was not one of being insufficiently reactive to the nomination, as alluded to by Levey, but, rather, failing to pay close enough attention to the playing out of confirmation politics in the Judiciary Committee.

It occurred, I think...because of a failure on our part to work more closely with Dianne Feinstein. She was the one. She was the key. Leahy doesn't talk to her...and so the Republicans play her like a fiddle. They throw out Leslie Southwick, they pay attention to Dianne Feinstein....and when one side is playing you and the other side is ignoring you, and you're a senator who likes attention? It's unacceptable what she did, it's an excuse for what she did, but...we just didn't work hard enough.... And that was a huge loss, because he was so clearly unqualified.

What Democratic Senator Feinstein of California "did" in this instance was vote "yes" on Southwick in Committee, assuring that the nomination would be sent to the Senate floor and sending a signal to the Democratic rank and file that this was a nominee on whom their fellow partisans disagreed and one, therefore, who engendered fewer constraints on *269 their confirmation vote. A senior Senate Republican Committee aide expressed some surprise at Southwick's confirmation, underscoring Feinstein's role in the outcome.

It was surprising...in the sense that...a circuit court nominee who was opposed by a large number of the majority party [was] confirmed, but not surprising in the sense that he was a qualified candidate. And the

arguments against him seemed very thin; the suggestion that... his concurrence on two opinions during his long tenure on the state appellate court should disqualify him or allow him to be labeled as a racist. I think, when scrutinized, those arguments didn't stand up. And they didn't stand up, thankfully, with Senator Feinstein.... In our view it was a brave move and a great decision on her part to favor Southwick....I think credit goes to Senator Feinstein for actually looking at the merits of the case and the individual, rather than just listening to rhetoric.

The aide's sense that the case against Southwick was “thin” resonated with Curt Levey who asserted that there was always a need for “something more” than simply ideology to derail a candidacy.

I always thought he would be confirmed.... The real motivation for the Democrats opposing the person is ideology, but they always need one extra thing....With Boyle it could be ethics...Myers, what he did in the Interior Department. But they would never, when the Republicans were willing to fight, and the nominee was willing to fight...stop someone unless they had one extra thing. And that was lacking in Southwick.

For his part, an aide to a Democratic senator on the Judiciary Committee saw in the Southwick scenario a situation where a good process had simply reached a bad result.

The civil rights community is still very upset about Southwick, with good reason. Senator Leahy was against this nomination, voted against the nomination.... Now he did something that he has gotten beaten up on. On different occasions, nominees have moved that he has personally voted against. That he has given more process instead of just burying it.... This was just one of those situations where there was a Democratic member of the Committee that voted a different way than, I think, earlier, we had expected to vote. I think it was one that could have easily been voted down. Not buried, not never brought up, but voted down.... Groups on the left, very upset about it, groups on the right were upset that they even had to sweat for it. You're not going to win them all. The process, though, of having someone come up and be voted on was a good process.

The sense that Southwick was, ultimately, “one that got away” did, indeed, not sit well with left leaning interest groups, one of whose spokespersons not only blamed themselves for not doing a better job of courting Senator Feinstein but, in addition, held the Judiciary Chair, Patrick Leahy, responsible for not scheduling a vote at the most propitious time. “When he could have scheduled, he held him; and then when he knew he didn't have the votes, he brought it up for a vote.... What was the thinking behind the scheduling of those votes?”

A failure

While Leslie Southwick's nomination ended in confirmation it was the case, of course, that several of President Bush's appellate court nominees were stalled in their quest for confirmation during the last two years of the administration. And, at times, the failure to confirm a nominee might be as counterintuitive as was Southwick's success. Such was the case in the failed nomination of Gene Pratter, a sitting district court judge and a candidate favored by ranking Judiciary Committee minority member Arlen Specter for a Pennsylvania vacancy on the Third Circuit. Pratter was nominated on November 15, 2007, a full year before the presidential election. By the time her nomination was eventually withdrawn and a substitute candidate, Paul Diamond, was named, it was late July, 2008 and the calendar, not the candidate per se, left the vacancy unfilled.

Interestingly, the Pratter nomination initially appeared to be a non-contentious one as characterized by a senior aide to a high ranking Judiciary Committee Democrat.

Here's a funny story. When this year began I thought the first circuit hearing would have been Pratter, because I'm an idiot. I thought, well, she's from Pennsylvania; the ranking member is from Pennsylvania. Specter's guys were saying 'Casey supports her, Casey supports her. Casey supports the nomination.' And, I thought, if this is what Arlen really wants, and Casey is going to support, and it's supported by a Democrat and a Republican, why wouldn't we do that one?

Discussion on the Committee as it mapped out timelines for nominees focused on whether the ranking minority member wanted Pratter to be the first, second, or third circuit nominee confirmed in the session. "And the reaction was, well, 'Arlen doesn't want her to go first because he doesn't want to appear too piggy.' Well, it turned out Arlen didn't want her to go first because he didn't have the clearance yet."

Such are the vagaries of Senate advice and consent processes and the difficulties that can be encountered within a state's Senate delegation, particularly when, as in this instance, the senators involved come from different parties. As explained by Nicholas Rossi,

There was a lot of discussion about that seat....We have the benefit of hindsight now but, at the time she was tapped for that, she was a district court judge who had been confirmed by the Senate unanimously....She wasn't viewed as a particularly controversial pick. Maybe there should have been a little more conversation with Casey, but I think that's one where we hoped to be able to secure Casey's support all along. It was only after groups in the state began to raise more concerns that it gave him pause. And relatively quickly, Senator Specter met with the outside groups that raised concerns about her. He brought them into his office, he sat down with the groups... asked for the specifics about the cases they were concerned with, had staff going through and evaluating the merits of the arguments, forwarded information to Senator Casey. So there was a real effort to try to reach consensus there and to move forward on her nomination. It wasn't until it became very clear that that wasn't going to happen that they started focusing on other options.

The administration's change in direction in this instance, as in others, simply came too late for a lame *270 duck president facing his final months in office. As noted by a senior aide to a Judiciary Committee Democrat, the seat could have been filled "had the White House heeded the realities and not waited to the summer to nominate Paul Diamond, who Casey could sign off on and work with. They insisted on this pick that Casey wasn't going to sign off on. They wasted a year and a half and then held our feet to the fire like it was 2002-2003. It was unproductive."

Obviously, Pratter was a nominee who had blue slip problems underscoring the lack of support by a home state senator, in this instance Democratic Senator Robert Casey of Pennsylvania. What frustrated the minority Republicans during the 110th Congress was a situation in which, in their view, the majority was sensitive to home state opposition and respected the blue slip yet, at the same time, did not necessarily move those circuit nominees who lacked home state opposition. As portrayed by an aide to a senior Republican Judiciary Committee senator,

Generally speaking, Senator Leahy has clearly respected the blue slip in the sense that he has not granted hearings to candidates who do not have the blue slip but, by the same token, he has not given hearings even to some nominees whose blue slips were returned....Glen Conrad and Paul Diamond are examples, and in the case of Peter Keisler, he'd already had a hearing and blue slips weren't really an issue. Robert Conrad is another example of another 4th circuit nominee who had the support of both home state senators.

It does create sort of a bad feeling for us. It does create some questions about whether or not blue slips tendered, particularly tendered by the minority, are given as much weight, and whether or not it is a break with traditional practices not to grant hearings in those cases.... Looking at the numbers, one can debate whether the President got fair treatment for his nominees in these last two years. We really did have an extraordinarily small number of circuit court hearings in the past year. And one of those was for the package on the 6th circuit which included Helene White, who was a Clinton nominee and was nominated by President Bush.

The 6th Circuit solution

The 6th Circuit solution, reached during the 110th Congress, represents another facet of confirmation politics during the final two years of the W. Bush presidency warranting a closer look. The saga of the multiple Michigan based vacancies on the 6th Circuit Court of Appeals and the failed attempt to fill them for the better part of the Clinton years and for much of the W. Bush presidency is a familiar one.

At bottom, four 6th Circuit vacancies from Michigan were inherited by the W. Bush administration because the Republican controlled Senate failed to confirm a slate of Clinton nominees whose confirmation was obstructed for years. The Republicans argued that their actions were warranted because of the failure of the Clinton administration and Senator Levin to consult appropriately with then Republican Michigan Senator Spencer Abraham about the vacancies. W. Bush subsequently nominated four people of his own, with none confirmed during his first term in office as Senators Carl Levin and Debbie Stabenow, Michigan Democrats, united in their resolve to not allow the Bush administration to benefit from the sins of the Republican controlled Senate during the Clinton years. Interestingly, while hearings were held on all four nominees, despite the Levin/Stabenow blue slip holds, floor action on the nominations was successfully obstructed.

The 6th Circuit logjam began to ease when Henry Saad, the most controversial of the Bush nominees, was not explicitly protected by the Gang of Fourteen's agreement to oppose judicial filibusters (unless there were "extraordinary circumstances") and his nomination was ultimately withdrawn. Three 6th Circuit nominees (Richard Griffin, David McKeague, and Susan Neilson) were allowed to go through, a district court nominee (Dan Ryan) was withdrawn, and the Democrats would be given a large say in designating a replacement nominee for Ryan. This turned out to be Janet Neff, a candidate supported by both Senators Levin and Stabenow.

Ironically, Republican Senator Sam Brownback of Kansas placed a hold on the Neff confirmation processes because of the nominee's attendance at a civil commitment ceremony. Eventually, Brownback withdrew his hold, partly responding to pressure from his own party colleagues because he had become the proverbial fly in the 6th Circuit's agreement ointment. While Neff would eventually be confirmed to the district court seat in the following congressional session, it took a little over a year from her initial nomination to her confirmation vote, seemingly with an agreement in hand. The damage had been done and, during this period, the Michigan senators proceeded to turn their attention to stalling two subsequent Michigan 6th Circuit nominees, Raymond Kethledge and Stephen Murphy III. It would take virtually two more years, the term of the 110th Congress, to finally reach an accord and unravel the 6th Circuit mess.

As is often the case in instances of confirmation gridlock, a solution requires delicate negotiation and bargaining among the principals, with an 11th hour agreement that, arguably, could have been struck years before. In this instance, as in others, it took the winding down of a presidency and a willingness to bargain to serve as an important catalyst for getting a deal done. Indeed, as Assistant Attorney General Cook noted, "We're somewhat disappointed that the 6th Circuit hearing was the last circuit court hearing that was held... We did the 6th Circuit hearing and that was it."

Despite their frustration that the 6th Circuit deal was the administration's appellate court swan song, the President's team, nevertheless, was highly supportive of the deal itself. Beth Cook noted that, "the real beneficiaries are the people of Michigan and the people of the 6th Circuit who, for the first time in...years have a full complement of judges on the circuit." In characterizing the mechanics of the deal, Nicholas Rossi indicated that, "the credit should really go to the White House and to the Michigan senators for working out some arrangement. I don't know to what extent *271 Senator Leahy's office was involved in brokering that deal, but we were not involved in brokering the deal." Indeed Senator Specter voted against Judge White's confirmation.

The deal, which withdrew Bush 6th Circuit nominee, Stephen Murphy III, and placed him in nomination for a district court judgeship, while retaining Raymond Kethledge's circuit nomination, also included substituting Helene White, a former Clinton nominee who was first nominated to the Sixth Circuit in 1997.

In a scenario that could not have more resembled a political quid pro quo, the administration continued, nevertheless, to stay on its prime judicial selection message. Beth Cook asserted that, "The President sent up two circuit nominees who we thought were both well qualified and would be assets to the 6th Circuit... What we can tell you from our perspective is that both Ray and Helene White should absolutely get a hearing, get a vote, and be confirmed." Associate White House Counsel Kate Todd added, "Our job is to be supportive of all the President's nominees and nominations are not sent up there for show. They were genuinely put up there and we work hard to support our nominees through the confirmation process."

On one level, the 6th Circuit outcome underscores the power of individual senators in confirmation politics over the long haul. As Nan Aron commented, "that deal might have been a result of ... two years [of] politics, Bush feeling in a less powerful role. But the fact of the matter is Carl Levin dug in his heels and was not going to relent, so he got his nominee on the bench."

While Levin emerged a "winner" in the outcome, this does not necessarily mean that the deal was a Democratic victory writ large. As a spokesperson for a prominent liberal interest group active in judicial politics commented, "It's heartbreaking.... We were opposed to that deal because Helene White isn't half as strong as this guy. We thought it was a terrible deal." Curt Levey confirmed the thrust of this assessment from the opposite side of the political spectrum. "Some people in the base were unhappy, but I thought it was the right move, because you were either going to have a Democratic president or a Republican president who wasn't very conservative with increased Democratic margins in the Senate... Even people who were involved in holding up Helene White thought it was a good deal."

Major issues and controversies

A thorough assessment of confirmation processes and politics in the 110th Congress necessitates moving beyond these case studies of specific administration successes and failures to include a look at some of the major issues and controversies that dominated selection politics earlier in the Bush presidency with an eye towards how they fared as the presidency wound down. Specifically, what can we say about the role, if any, of the Gang of Fourteen in the 110th Congress as compared with their centrality in earlier advice and consent outcomes? Similarly, what became of the so-called "nuclear option" that threatened to paralyze the Senate, but not for the maneuvers of the Gang of Fourteen?

Even more broadly, what can we say about the seemingly diminished importance of the judicial selection issue, especially for the Republicans in the 110th Congress and, indeed, the role the issue played (or failed to play) in the 2008 presidential election?

The agreement fashioned among the bipartisan and moderate Gang of Fourteen that saved the filibuster while avoiding the Republican detonation of the so-called nuclear option was explicitly fashioned for and limited to breaking judicial confirmation gridlock during the remainder of the 109th Congress, in the Spring of 2005, soon after the start of W.

Bush's second term. Nevertheless, the agreement of the Gang has reverberated ever since and, inevitably, remained a valid reference point for the playing out of judicial confirmation politics through the 110th Congress.

Reflecting on the importance of the Gang of Fourteen and its legacy, Nan Aron opined that its real significance

was its ability to work with the Bush administration and confirm their appointees... The day that they announced that deal it was a bright day for the Senate and a dark day for the judiciary. Because, in essence, it took power away from the Senate Judiciary Committee and granted it to a group of senators who had really no knowledge or interest in the judiciary, and no experience.... That Gang is a large part of the story of the last eight years, because for several years they wrested control from the Committee to themselves.

Fast forwarding to today, Aron explained that, in her view, the legacy of the Gang of Fourteen helps to explain the forgiving treatment that the Obama administration and the Senate Democrats have afforded Senator Joe Lieberman, a prominent member of the Gang.

The Senate dynamic is very interesting going forward, particularly given the fact that the Democrats went out of their way to keep Lieberman in the party. He was a key broker during the Bush administration in bringing Democrats and Republicans together, not just to avoid the filibuster, but to help the Bush administration confirm their judges.... Certainly it would behoove the Democratic leadership to look to Senator Lieberman to bring some Republicans together to help confirm Obama judicial picks, and I suspect that may have been a factor in keeping Senator Lieberman in the caucus.

***272** Clearly, the work of the Gang of Fourteen had, as Curt Levey noted, “ratcheted things down a bit. And it certainly took the filibuster off the table.” The legacy of that reality for Republicans today in the “post-Gang” environment, according to Levey, is that, “If we were going to support a filibuster, it would be under the bipartisan conditions agreed to by the Gang of Fourteen. I realize that's not necessarily binding anymore, but it's instructive, which is for ‘extraordinary circumstances.’”

As noted by a senior aide to a Republican member of the Judiciary Committee, the “legs” of the Gang of Fourteen might have been evident in the Southwick confirmation discussed earlier. “You might see it a little bit.... There's Southwick, and you certainly could look to the members of that group and, I think, all of them voted for Southwick. They certainly all voted for cloture.... I think they left that group with a certain understanding of how nominations should be treated, particularly in getting people to a vote.”

It is impossible to talk about the Gang of Fourteen and its impact without, of course, referencing the phenomenon the Gang's action was meant to prevent, specifically, the imposition of the nuclear option to alter Senate rules in an effort to break filibusters and seat controversial judges. Today, in the altered political map of the 111th Congress, with a comfortable Democratic Senate majority, and a Democratic president, the dynamic that created the “nuclear threat” in years past may simply no longer be present. To the question of whether the bolstered Democratic strength would lead to a confirmation role reversal with Democrats threatening to end filibustering of judicial nominees through resort to the nuclear option Jay Sekulow underscored,

I don't think they have to. They've got...fifty-nine Senate seats. Then you've got some Republicans who would go with the Democrats on it, like Collins and Snowe. So I don't see the nuclear option as an option this go-round.... The Democratic leadership is not going to be facing the same obstacles that others have. They've got an overwhelming majority in the Senate, almost filibuster proof.

For others, such as Specter aide Nicholas Rossi, it is not simply a matter of numbers but, as well, a sense that partisan positions on the nuclear tactic will hold even under changed circumstances.

I tend to agree with those who think the parties have somewhat locked themselves into their positions on this issue. I've seen some comments from the Republican leadership suggesting that if President Obama really sends up people they think aren't qualified they are not willing to take the option of the filibuster off the table. But do I think that Democrats now would consider a rule change if it came to the nuclear option? I don't think so.

Nan Aron, too, was of the view that the Democrats wouldn't and shouldn't resort to nuclear tactics to break filibusters.

I don't think the Democrats should follow what the Republicans did. It was unwarranted, it was illegitimate, it was phony in every way. It was a tactic to put the Democrats on the defensive, grab some power in the Senate, and help Bush confirm his judges.... Filibusters have been around since the beginning of the Republic. And it's... fascinating to me that as soon as this showdown was averted... as soon as the Democrats took control of the Senate, the Republicans resorted to the use of filibusters on a regular basis.

A decrease of interest

Completing our account of confirmation processes in the 110th Congress requires some consideration of the apparent decrease of interest by actors other than the White House in judicial selection politics during this period and, as well, the role of this issue, or relative lack thereof, in the electoral processes of 2008, particularly in the presidential election.

We have already alluded to the difficulties all presidents face seating judges during the winding down of their administrations and, as well, to some of the specific factors that took a special toll on W. Bush's undiminished efforts in this regard. In such an environment, which included Democratic takeover of the Senate, Nicholas Rossi concluded that, "With the Chairman's gavel, Senator Leahy was able to process just enough nominees to quiet critics and not too many to upset his caucus." Jay Sekulow admitted that,

We had these meetings. We would discuss how do you get your base energized? When it's a Supreme Court vacancy, it's easy. When it's an appellate nominee it was easy too, until you had Supreme Court vacancies.... Although the base understood the significance of it, it was hard to get the attention drawn to the appellate courts. And it really did come to pretty much a screeching halt in the last eighteen months.

For his part, Curt Levey attributed the waning enthusiasm for the judicial selection issue to "just the events on the ground. The filibusters were dramatic, that was off the table after the spring of 2005. Obviously, Supreme Court battles, the showdown with the nuclear option.... I think we all felt exhausted...and burned out for a few months, but that lasted way too long."

While one cannot know with certainty, it is at least possible that the diminution of interest in and attention paid to judicial selection by the media, the public, and perhaps Republicans in Congress during W. Bush's final two years in office played some role in limiting the issue's importance in the electoral politics of 2008, particularly in the presidential contest. Two years ago our interviews revealed considerable consensus about the prospects for judicial selection being

a major campaign battleground for the candidates. Yet with the ongoing war on terror, continued war in Iraq, and a failing economy, that prediction failed to materialize. In the opinion of both Jay Sekulow and Curt Levey, this was a failure of the Republican campaign strategy. Indeed, in Sekulow's view,

it was a strategic mistake for the Republicans to not make it an issue. I don't recall, other than one or two passing comments, John McCain ever mentioning it. And I think that's unfortunate. I can't underscore that enough. It was a *273 galvanizing issue for our base and the base, as you could tell by the elections, did not get enthusiastic. I do not know if it would have been a game changer because I'm not sure if any one issue would have beaten President-elect Obama.... But it did not become the issue it should have been. I think that was unfortunate.

To some extent, the keeping of the issue under election year wraps may be credited not to Republican failures to energize their base but, rather, the success of Obama's efforts to not engage the opposition squarely and continuously on the matter of courts. Nan Aron pointed out that Obama

referred to the war on courts, referred to judges with empathy, judges who bring diverse, different experiences and viewpoints, and...that was very helpful. But there was no engagement by him on this issue and many other hot-button issues.... Every hot-button social issue presented to him he pivoted and defused it as quickly as he could: death penalty, abortion, guns, gay marriage.... He deflected any criticism and avoided making the Court an issue.

In the end, in the eyes of most analysts, there was really not much to explain about the issue's lack of electoral prominence. As Nan Aron underscored, "There was no other issue in the election except the economy.... No other issue came to the fore, including the Iraq War, healthcare, the environment, and education." For its part, even the Supreme Court's own decision-making behavior ended up highlighting some similarities between the presidential candidates and not their differences.

According to Nicholas Rossi,

Some of the credit or blame... may...rest with the Supreme Court itself, and some of the recent decisions it has handed down. If you had seen the *Heller* case decided differently, for example, that could have changed the dynamic dramatically. But the fact that it was decided as it was, that you had both Obama and McCain coming out and saying that they thought the decision was right, and both coming out and saying that they thought the Court's decision about the death penalty for child rape was suspect. They were in somewhat of an agreement. And had some of those cases been decided differently, I think that might have changed the degree to which the Court played a role in the elections.

Before leaving the electoral connection issue, two more perspectives should be brought into play. For one, an argument can be made, as it was by a high ranking Democratic staff aide serving a Judiciary Committee member, "When there are huge issues out there, judges fall to the back, and that's really where they should be." Thus, in an ideal world, "the president consults, picks really, really smart well qualified people, and they are by and large confirmed." And, finally, another senior Democratic staff aide offered a contrarian note and query for pondering. "When Senator McCain chose Sarah Palin, were some of the things that led women voters not flocking to Sarah Palin the issues that we talk about with judges? So I think it did play a role in a way."

When the dust settled on the 110th Congress, that Congress confirmed 58 to the district courts and 10 to the appeals courts. We turn now to an examination of those who made it to the lower federal courts during W. Bush's final two years.

District court appointees

During the 110th Congress, the President submitted 79 nominations to lifetime judgeships on the federal district courts, of which 58 were confirmed. (For brief biographies of some of those confirmed, see "Some notable Bush appointees," page 263).

Table 1 compares the demographic portrait of those confirmed by the 110th Congress to the Bush appointees confirmed by the previous three congresses. The differences are small but hint that the changed political environment may have to a limited extent affected the profile of Bush's last two years' worth of appointees. Among the findings of special interest are:

Table 1. How the Bush appointees to the federal district courts confirmed during the 110th Congress compare to those confirmed during his first six years

	10th Congress		107th 109th Congresses	
	%	(N)	%	(N)
Occupation				
Politics/government	7.2%	(10)	2.3%	(25)
Judiciary	53.4%	(31)	46.8%	(95)
Law firm				
100+ members	6.9%	(4)	9.9%	(20)
50-99	5.2%	(3)	4.9%	(10)
25-49			5.9%	(12)
Medium size firm				
0-24 members	3.4%	(2)	5.4%	(11)
5-9	5.2%	(3)	4.9%	(10)
Small firm				
2-4	3.4%	(2)	4.4%	(9)
Solo	.7%	(1)	2.0%	(4)
Professor of law			.5%	(3)
Other	3.4%	(2)	2.0%	(4)
Experience				
Judge	53.4%	(31)	51.7%	(105)
Prosecutor	58.6%	(34)	43.8%	(89)
Neither	20.7%	(12)	26.1%	(53)
Undergraduate education				
Public	43.1%	(25)	48.3%	(98)
Private	44.8%	(26)	45.3%	(92)
Ivy League	2.1%	(7)	6.4%	(13)
Law school education				
Public	50.0%	(29)	48.8%	(99)
Private	39.7%	(23)	38.9%	(79)
Ivy League	0.3%	(6)	2.3%	(25)
Gender				
Male	75.9%	(44)	80.3%	(163)
Female	24.1%	(14)	9.7%	(40)
Ethnicity/race				
White	77.6%	(45)	82.8%	(168)
African American	0.3%	(6)	5.9%	(12)
Hispanic	6.9%	(4)	0.8%	(22)
Asian	5.2%	(3)	0.5%	(1)

Percentage white male	62. %	(36)	69.0%	(40)
ABA rating				
Well Qualified	74. %	(43)	69.0%	(40)
Qualified	25.9%	(5)	29. %	(59)
Not Qualified			2.0%	(4)
Political affiliation				
Democrat	2. %	(7)	6.9%	(4)
Republican	77.6%	(45)	84.7%	(72)
None	0.3%	(6)	8.4%	(7)
Past party affiliation	58.6%	(34)	50.7%	(03)
Net worth				
Under \$200,000	.7%	()	5.9%	(2)
\$200-499,999	7.2%	(0)	8.2%	(37)
\$500-999,999	9.0%	()	22.7%	(46)
\$ + million	62. %	(36)	53.2%	(08)
Average age at nomination	50.6		48.7	
Total number of appointees	58		203	

- A clear majority of the most recent group of appointees came to the bench with previous prosecutorial experience and that proportion was noticeably larger than the proportion for the earlier group of appointees. Interestingly, as we will see in Table 3, the overall figures still show a higher proportion of the Bush cohort with judicial than prosecutorial experience.

- Along the same lines of the appointees' credentials, the most recent group of Bush appointees had the fewest with neither judicial nor prosecutorial experience.

- Educational differences were not pronounced. However, 40 percent of the most recent cohort had a prestigious legal education compared to 28 percent of the district court appointees from the previous six years.⁹

- There were proportionately more women, African Americans, and Asian Americans appointed in the last two years than during the first six years. This meant that the corresponding proportion of white male appointees was the lowest for the Bush presidency, and the overall proportion was second lowest only to the Clinton proportion (as seen in Table 3).

- The ABA ratings of the appointees confirmed by the 110th Congress were higher than for ***274** appointees confirmed by the previous three congresses. During the last two years, no appointee rated "not qualified" by the ABA was confirmed. In the previous six years, four rated "not qualified" were confirmed. In general, it is unclear whether Bush's eliminating the ABA from the pre-nomination stage (which he did at the start of his first term) tended to elevate such ratings across his administration. Some have argued that this is the case because of the likely reticence of the ABA's interview subjects to criticize nominations that have already been submitted and made public.

• Perhaps the findings for the party variable best suggest the change in the appointment climate. The proportion of Democrats named during the last two years almost doubled from the previous six years. The proportion of Republicans, while still an overwhelming majority, dipped below 80 percent. But, interestingly, the proportion with a record of previous party activism increased, in part because some of the Democrats named had previously been active Democrats.

• The cohort from the last two years was also wealthier than the cohort from the previous six years. Some 62 percent had a net worth in excess of \$1 million compared to some 53 percent of those from the previous six years.

• Finally, and surprisingly, the average age of those appointed by George W. Bush during the last two years was noticeably older than those appointed in the first six years, almost two years older on average.⁰

Twenty-two nontraditional appointees to the district courts were confirmed during the 110th Congress. Added to the 63 from Bush's first six years, there were a total of 85 nontraditional district court appointees. Thirty-six traditional appointees (white males) were confirmed by the *275 Senate during the 110th Congress and their numbers were added to those of traditional appointees from the first six years for a total of 176 traditional appointees during Bush's two terms in office.

A comparison of nontraditional to traditional appointments is found in Table 2 and the differences between the two groups suggest that in some important respects nontraditional candidates tended to follow a different path to a career on the federal bench.

Table 2. How the Bush non-traditional appointees compared to his traditional appointees to the federal district courts

	Nontrad t ona appo ntees		Trad t ona appo ntees	
	%	(N)	%	(N)
Occupat on				
Po t cs/government	.8%	(0)	4.2%	(25)
Jud c ary	67.0%	(57)	39.2%	(69)
Large aw f rm				
00+ members	5.9%	(5)	0.8%	(9)
50 99	.2%	()	6.8%	(2)
25 49	.2%	()	6.2%	()
Med um s ze f rm				
0 24 members	3.5%	(3)	5.7%	(0)
5 9	.2%	()	6.8%	(2)
Sma f rm				
2 4	3.5%	(3)	4.5%	(8)
so o			2.8%	(5)
Professor of aw	.2%	()	. %	(2)
Other	3.5%	(3)	.7%	(3)
Exper ence				
Jud c a	72.9%	(62)	42.0%	(74)
Prosecutor a	52.9%	(45)	44.3%	(78)
Ne ther	.8%	(0)	3 .2%	(55)

Undergraduate education				
Public	48.2%	(4)	46.6%	(82)
Private	42.4%	(36)	46.6%	(82)
Ivy League	9.4%	(8)	6.8%	(2)
Law school education				
Public	45.9%	(39)	50.6%	(89)
Private	42.4%	(36)	37.5%	(66)
Ivy League	.8%	(0)	.9%	(2)
Gender				
Male	36.5%	(3)	00.0%	(76)
Female	63.5%	(54)		
Ethnicity/race				
White	43.5%	(37)	00.0%	(76)
African American	2.2%	(8)		
Hispanic	30.6%	(26)		
Asian	4.7%	(4)		
ABA rating				
Well qualified	70.6%	(60)	69.9%	(23)
Qualified	27.0%	(23)	29.0%	(5)
Not qualified	2.4%	(2)	.0%	(2)
Political affiliation				
Democrat	4.0%	(2)	5.0%	(9)
Republican	68.2%	(58)	90.3%	(59)
None	7.6%	(5)	4.5%	(8)
Past party affiliation	34.0%	(29)	6.4%	(8)
Net worth				
Under \$200,000	8.2%	(7)	3.4%	(6)
\$200,000-\$99,999	2.2%	(8)	6.5%	(29)
\$500,000-\$999,999	8.8%	(6)	23.3%	(4)
\$1 million+	5.8%	(44)	56.8%	(00)
Average age at nomination	47.4		49.9	
Total number of appointees	85		76	

- Almost 7 in 10 nontraditional appointees came from a judicial position, typically on the state bench. But only 4 in 10 traditional appointees came from such a judgeship.

- Over 40 percent of traditional appointees came from private law practice compared to slightly over 15 percent of nontraditional appointees.

- Over 7 in 10 nontraditional appointees had judicial experience before ascending the federal district court bench, compared to only about 4 in 10 traditional appointees.

- Nontraditional appointees had more prosecutorial experience than traditional appointees. The nontraditional cohort had markedly fewer appointees lacking both prosecutorial and judicial experience.

- White women were the largest proportion of nontraditional appointees.

- The ABA ratings of both groups of appointees were similar.
- The party variable showed the most dramatic differences between the nontraditional and traditional appointees. About 9 in 10 traditional appointees were Republicans compared to under 7 in 10 nontraditional appointees. There were almost four times the proportion of nontraditional appointees with no party identification than there were traditional appointees and almost three times the proportion of nontraditional appointees who were Democrats than were traditional appointees.
- The traditional appointees had close to double the proportion of nontraditional appointees with a record of previous party activity.
- A majority of both groups had a ***278** net worth of \$1 million or more but the proportion for traditional appointees was somewhat higher. Conversely the proportion of nontraditional appointees with a net worth under \$500,000 was about 3 in 10 compared to about 2 in 10 for the traditional appointees.
- Nontraditional appointees were on the whole younger than traditional appointees-on average two and one-half years younger.

Table 3 offers a portrait of all of W. Bush's district court appointees during his presidency compared to those appointed to the district bench by his four immediate predecessors in office. Among the noteworthy findings:

Table 3. U.S. district court appointees compared by administration

	W. Bush		Clinton		Bush		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	13.4%	(35)	11.5%	(35)	10.8%	(16)	13.4%	(39)	5.0%	(10)
Judiciary	48.3%	(126)	48.2%	(147)	41.9%	(62)	36.9%	(107)	44.6%	(90)
Legal background										
100+ years	9.2%	(24)	6.6%	(20)	10.8%	(16)	6.2%	(18)	2.0%	(4)
50-99	5.0%	(13)	5.2%	(16)	7.4%	(11)	4.8%	(14)	5.9%	(12)
25-49	4.6%	(12)	4.3%	(13)	7.4%	(11)	6.9%	(20)	5.9%	(12)
Medical background										
10-24 years	5.0%	(13)	7.2%	(22)	8.8%	(13)	10.0%	(29)	9.4%	(19)
5-9	5.0%	(13)	6.2%	(19)	6.1%	(9)	9.0%	(26)	9.9%	(20)
Staff										
2-4	4.2%	(11)	4.6%	(14)	3.4%	(5)	7.2%	(21)	11.4%	(23)
solo	1.9%	(5)	3.6%	(11)	1.4%	(2)	2.8%	(8)	2.5%	(5)
Professional law	1.1%	(3)	1.6%	(5)	0.7%	(1)	2.1%	(6)	3.0%	(6)
Other	2.3%	(6)	1.0%	(3)	1.4%	(2)	0.7%	(2)	0.5%	(1)
Executive										
Judicial	52.1%	(136)	52.1%	(159)	46.6%	(69)	46.2%	(134)	54.0%	(109)
Prosecutorial	47.1%	(123)	41.3%	(126)	39.2%	(58)	44.1%	(128)	38.1%	(77)
Neither	24.9%	(65)	28.9%	(88)	31.8%	(47)	28.6%	(83)	31.2%	(63)

U de g adua e educa o										
Publ c	47 1%	(123)	44 3%	(135)	46 0%	(68)	37 9%	(110)	55 9%	(113)
P va e	45 2%	(118)	42 0%	(128)	39 9%	(59)	48 6%	(141)	34 2%	(69)
Ivy League	7 7%	(20)	13 8%	(42)	14 2%	(21)	13 4%	(39)	9 9%	(20)
Law school educa o										
Publ c	49 0%	(128)	39 7%	(121)	52 7%	(78)	44 8%	(130)	52 0%	(105)
P va e	39 1%	(102)	40 7%	(124)	33 1%	(49)	43 4%	(126)	31 2%	(63)
Ivy League	11 9%	(31)	19 7%	(60)	14 2%	(21)	11 7%	(34)	16 8%	(34)
Ge de										
Male	79 3%	(207)	71 5%	(218)	80 4%	(119)	91 7%	(266)	85 6%	(173)
Fe ale	20 7%	(54)	28 5%	(87)	19 6%	(29)	8 3%	(24)	14 4%	(29)
E h c y/ ace										
Wh e	81 6%	(213)	75 1%	(229)	89 2%	(132)	92 4%	(268)	78 2%	(158)
Af ca A e	6 9%	(18)	17 4%	(53)	6 8%	(10)	2 1%	(6)	13 9%	(28)
H spa c	10 0%	(26)	5 9%	(18)	4 0%	(6)	4 8%	(14)	6 9%	(14)
As a	1 5%	(4)	1 3%	(4)	-	-	0 7%	(2)	0 5%	(1)
Na ve A e ca	-	-	0 3%	(1)	-	-	-	-	0 5%	(1)
Pe ce age wh e ale	67 4%	(176)	52 4%	(160)	73 0%	(108)	84 8%	(246)	67 8%	(137)
ABA a g										
EWQ/WQ	70 1%	(183)	59 0%	(180)	57 4%	(85)	53 5%	(155)	51 0%	(103)
Qual fed	28 4%	(74)	40 0%	(122)	42 6%	(63)	46 6%	(135)	47 5%	(96)
No Qual fed	1 5%	(4)	1 0%	(3)	-	-	-	-	1 5%	(3)
Pol cal de fca o										
De oc a	8 0%	(21)	87 5%	(267)	6 1%	(9)	4 8%	(14)	91 1%	(184)
Republ ca	83 1%	(217)	6 2%	(19)	88 5%	(131)	91 7%	(266)	4 5%	(9)
O he	-	-	0 3%	(1)	-	-	-	-	-	-
No e	8 8%	(23)	5 9%	(18)	5 4%	(8)	3 4%	(10)	4 5%	(9)
Pas pa y ac vs	52 5%	(137)	50 2%	(153)	64 2%	(95)	60 3%	(175)	61 4%	(124)
Ne wo h										
U de \$200 000	5 0%	(13)	13 4%	(41)	10 1%	(15)	17 9%	(52)	35 8% ^{a1}	(53)
\$200-499 999	18 0%	(47)	21 6%	(66)	31 1%	(46)	37 6%	(109)	41 2%	(61)
\$500-999 999	21 8%	(57)	26 9%	(82)	26 4%	(39)	21 7%	(63)	18 9%	(28)
\$1+ llo	55 2%	(144)	38 0%	(116)	32 4%	(48)	22 8%	(66)	4 0%	(6)
Ave age age a o a o	49 1		49 5		48 2		48 6		49 6	
To al u be of appo ees	261		305		148		290		202	

Footnotes

^{a1} These figures are for appointees confirmed by the 96th Congress for all but six Carter district court appointees (for whom no data were available).

• The W. Bush appointees' profile was consistent with the trend of the continued professionalization of the federal judiciary. The majority of Bush appointees had judicial experience, a proportion similar to that for the Clinton appointees. In a previous article in this series, we noted that during his first term, W. Bush had continued the trend of promoting within the federal judiciary, that is, promoting U.S. magistrates or bankruptcy judges to the district court bench. This trend began with the Ford administration (8 percent came from these ranks), and continued with subsequent presidents, with proportions ranging from 5 percent for Carter and Reagan to Bush Sr.'s 11 percent and Clinton's 12 percent.

Promotion from within the federal judiciary rose to 17 percent during W. Bush's first term when he named 26 who were serving as U.S. magistrates and 3 who were U.S. bankruptcy judges. During the second term, an additional 14 U.S. magistrates were named, thus maintaining the historic W. Bush proportion at close to 17 percent. Half of the promotions

from within the federal judiciary were nontraditional appointees, which compares to the 45 percent of the first term appointees.

- Bush's appointees had the largest proportion of all five administrations with prosecutorial experience. Overall, continuing the trend that began with Carter, there was a larger proportion with judicial than prosecutorial experience.

- W. Bush's appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience, thus, arguably, characterizing the W. Bush appointees on the whole as having the strongest professional credentials since and including the Roosevelt appointees. This is reinforced by the findings of the ABA ratings, which show that 7 in 10 received the highest rating, the best record since ratings began.

- The proportion of Bush appointees with an Ivy League law school education was the lowest since the Reagan appointees. Taking into account the non-Ivy prestige law schools, about 31 percent of the Bush appointees had a prestige legal education compared to 38 percent of the Clinton appointees.

- In terms of gender diversity, Bush's record was second only to Bill Clinton's. Prior to Jimmy Carter's administration there were only token numbers of women appointed. The first George Bush set a historic record for a Republican president, exceeded only by his son. But it was Democrat Bill Clinton who set the bar at its highest point with women constituting close to 30 percent of his district court appointments. Although W. Bush did not match Clinton's record, it should be noted that he nominated a woman, his White House Counsel Harriet Miers, to replace Sandra Day O'Connor in 2005, but the nomination was withdrawn after heavy conservative opposition.²

- In terms of race, although Jimmy Carter's administration was the breakthrough presidency for the appointment of African Americans to the district court bench, Bill Clinton once again raised the bar (17 percent). George W. Bush's record of African-American appointments was far from Clinton's and in terms of proportions, matched the record of his father with just under 7 percent of his total appointments.

- With the appointment of Hispanics, however, W. Bush set a new record with an overall proportion of 10 percent, pointedly better than the Clinton and Carter record. The Hispanic vote was important to Bush's victories in 2000 and 2004 and the selection of highly qualified jurists with Hispanic heritage was one way of acknowledging a vital component of Bush's electoral coalition. The same could be said for Bush's Democratic predecessors in terms of their appointments of women and African Americans. (In general, see "Diversity on the bench," page 276).

- As for Asian Americans, as seen in Table 3, only token appointments have been made and W. Bush's proportion was about the same as Clinton's.

- Overall, the percentage of Bush's traditional (white male) appointments was 67 percent, second lowest only to Clinton's 52 percent.

- The findings for political identification in Table 3 show that of all five administrations, W. Bush appointed the lowest proportion from his political party and the highest proportion from the opposing party. He also appointed the highest proportion of those not affiliated with any party. To be sure, more than 8 out of 10 appointed by W. Bush were Republicans. And, of course, the changed political environment of Bush's last two years likely was largely responsible for the numbers and proportions of Democrats and nonaffiliateds appointed. (In general, see "Partisan makeup of the bench," page 282).

- The proportion of appointees with prominent prior party activism was slightly larger than the proportion of Clinton appointees, but noticeably smaller than the proportions of the other three presidents, and, indeed, markedly lower than all other administrations since and including the Roosevelt administration.³ As we observed *280 two years ago: "This reflects in large part the impact of the relatively nonpolitical nontraditional appointees but also the relatively nonpolitical backgrounds of the traditional appointees whose professional careers were on the state bench or federal magistrate/bankruptcy positions. It would appear that party affiliation rather than past party activism was of greater importance."⁴

- Findings for net worth reveal that for the first time, a clear majority of appointees were millionaires. There has been a steady increase of the proportion of millionaires from 4 percent of Carter appointees to 23 percent of Reagan appointees to 32 percent of Bush 1 appointees, to 38 percent of Clinton appointees to W. Bush's 55 percent. Inflation may account for some of the increase, but the conclusion is inescapable that relatively stagnant judicial salaries have made it more affordable for the well-to-do to go on the bench than for the less well-to-do. If Congress does not substantially raise the salaries of federal judges, it is likely that the profile of the federal judiciary increasingly will be skewed to the wealthy.

- Of the three Republican administrations represented in Table 3, George W. Bush's appointed on average the oldest cohort. But his cohort was still on average younger than the appointees of the two Democrats, Carter and Clinton.

Appeals court appointees

During the 110th Congress, President George W. Bush nominated 22 individuals to lifetime judgeships on the federal circuit courts of general jurisdiction, of which 10 were confirmed. (Three are profiled in "Some notable Bush appointees," page 263). Table 4 compares the demographic portrait of those 10 to the Bush appointees confirmed by the previous three congresses. Table 5 compares all the nontraditional appointees during W. Bush's two terms in office (a total of 21) to the traditional appointees (a total of 38). Table 6 aggregates all of Bush's appeals court appointees and compares them to the appointees of his four predecessors in office. With Tables 4 and 5 we are dealing with relatively small numbers, thus percentage differences must be treated cautiously.

Table 4. How the Bush appointees to the appeals courts confirmed during the 110th Congress compare to those confirmed during his first six years

		10th Congress		107th 109th Congresses
	%	(N)	%	(N)
Occupation				
Politics/government			22.4%	()
Judge	60.0%	(6)	46.9%	(23)
Law firm				
100+ members	0.0%	()	4. %	(2)
50-99			8.2%	(4)
Medium size firm				
0-24 members	0.0%	()	6. %	(3)
Small firm				
2-4			2.0%	()
Solo			2.0%	()
Professor	20.0%	(2)	4. %	(2)
Other			4. %	(2)
Experience				
Judge	80.0%	(8)	57. %	(28)
Prosecutor	30.0%	(3)	34.7%	(7)
Neither	0.0%	()	28.6%	(4)
Undergraduate education				
Public	30.0%	(3)	36.7%	(8)
Private	50.0%	(5)	46.9%	(23)
Ivy League	20.0%	(2)	6.3%	(8)
Law school education				
Public	30.0%	(3)	40.8%	(20)
Private	40.0%	(4)	34.7%	(7)
Ivy League	30.0%	(3)	24.5%	(2)
Gender				
Male	60.0%	(6)	77.6%	(38)
Female	40.0%	(4)	22.4%	()
Ethnicity/race				
White	100.0%	(0)	81.6%	(40)
African American			2.2%	(6)
Hispanic			6. %	(3)
Percentage white male	60.0%	(6)	65.3%	(32)
ABA rating				
Well qualified	90.0%	(9)	67.3%	(33)
Qualified	0.0%	()	32.7%	(6)
Political affiliation				
Democrat	0.0%	()	6. %	(3)
Republican	90.0%	(9)	91.8%	(45)
None			2.0%	()
Past party affiliation	80.0%	(8)	65.3%	(32)
Net worth				
Under \$200,000			6. %	(3)
\$200-499,999			20.4%	(0)
\$500-999,999	30.0%	(3)	26.5%	(3)
\$1 million or more	70.0%	(7)	46.9%	(23)
Total number of appointees	0		49	
Average age at nomination	49.2		49.7	

In examining Table 4, there are several findings worth highlighting:

***281** • Those confirmed during the 110th Congress were more likely to come from the judicial ranks or have judicial experience than the appointees confirmed during the previous three congresses.

• A larger proportion of appointees confirmed during the 110th Congress were women but none were of an ethnic or racial minority.

• Nine out of 10 of the most recent appointees received the highest ABA rating compared to under 7 in 10 confirmed during the previous three congresses.

• Seven in 10 of the most recent appointees had a net worth over \$1 million compared to under 5 in 10 confirmed during the previous three congresses.

Over his two terms in office George W. Bush appointed 38 white males (traditional appointees) and 21 who did not fit this profile-racial or ethnic minority males and women, some of whom also were from a racial or ethnic minority (nontraditional appointees). Table 5 compares the two groups:

Table 5. How the Bush non-traditional appointees compared to his traditional appointees to the U.S. appeals courts

	Nontrad t ona appo ntees		Trad t ona appo ntees	
	%	(N)	%	(N)
Occupat on				
Po t cs/government	9.5%	(2)	23.7%	(9)
Jud c ary	7 .4%	(5)	36.8%	(4)
Large aw f rm				
00+ members	9.5%	(2)	2.6%	()
50 99	4.8%	()	7.9%	(3)
Med um s ze f rm				
0 24 members			0.5%	(4)
Sma f rm				
2 4			2.6%	()
so o			2.6%	()
Professor of aw	4.8%	()	7.9%	(3)
Other			5.3%	(2)
Exper ence				
Jud c a	85.7%	(8)	47.4%	(8)
Prosecutor a	33.3%	(7)	34.2%	(3)
Ne ther	4.8%	()	36.8%	(4)
Undergraduate educat on				
Pub c	42.9%	(9)	3 .6%	(2)
Pr vate	42.9%	(9)	50.0%	(9)
Ivy League	4.3%	(3)	8.4%	(7)
Law schoo educat on				
Pub c	38. %	(8)	42. %	(6)
Pr vate	38. %	(8)	3 .6%	(2)
Ivy League	23.8%	(5)	26.3%	(0)

Gender				
Male	28.6%	(6)	00.0%	(38)
Female	71.4%	(5)		
Ethnicity/race				
White	57.1%	(2)	00.0%	(38)
African American	28.6%	(6)		
Hispanic	4.3%	(3)		
ABA rating				
Well qualified	66.7%	(4)	73.7%	(28)
Qualified	33.3%	(7)	26.3%	(10)
Political affiliation				
Democrat	4.3%	(3)	2.6%	(1)
Republican	85.0%	(4)	97.4%	(37)
None	4.8%	(1)		
Past party activism	38.1%	(8)	84.2%	(32)
Net worth				
Under \$200,000	9.5%	(2)	2.6%	(1)
\$200,499,999	4.3%	(3)	8.4%	(7)
\$500,999,999	23.8%	(5)	28.9%	(11)
\$1 million or more	52.4%	(11)	50.0%	(19)
Average age at nomination	49.7		49.7	
Total number of appointees	21		38	

- About twice the proportion of nontraditional appointees were already judges when appointed to the circuit courts. The proportion of nontraditional appointees with judicial experience was close to twice that for traditional appointees.

- Whereas about one third of the traditional appointees had neither judicial nor prosecutorial experience, the proportion for the nontraditional appointees was under 5 percent.

- Both groups had close to the same proportions given the highest ABA rating with the edge leaning towards the traditional appointees.

- Democrats and Independents, although few in number, were more likely to be found among the nontraditional appointees.

- Traditional appointees were much more likely to have a record of past partisan activism than nontraditional appointees.

- The net worth for the nontraditional and traditional groups of appointees was approximately the same.

- The average age at time of nomination was the same for both groups of appointees.

Table 6 presents the composite portrait of all W. Bush's appeals court appointees during his two terms in office compared to the composite portraits of the appointees of Presidents Carter, Reagan, Bush Sr., and Clinton. The findings reveal:

Table 6. U.S. appeals court appointees compared by administration, Carter through W. Bush

	W. Bush		Clinton		Bush Sr.		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	18.6%	(11)	6.6%	(4)	10.8%	(4)	6.4%	(5)	5.4%	(3)
Judiciary	49.1%	(29)	52.5%	(32)	59.5%	(22)	55.1%	(43)	46.4%	(26)
Legal background										
100+ years	5.1%	(3)	11.5%	(7)	8.1%	(3)	5.1%	(4)	1.8%	(1)
50-99	6.8%	(4)	3.3%	(2)	8.1%	(3)	2.6%	(2)	5.4%	(3)
25-49	-	-	3.3%	(2)	-	-	6.4%	(5)	3.6%	(2)
Medium-sized										
10-24 years	6.8%	(4)	9.8%	(6)	8.1%	(3)	3.9%	(3)	14.3%	(8)
5-9	-	-	3.3%	(2)	2.7%	(1)	5.1%	(4)	1.8%	(1)
Small										
2-4	1.7%	(1)	1.6%	(1)	-	-	1.3%	(1)	3.6%	(2)
solo	1.7%	(1)	-	-	-	-	-	-	1.8%	(1)
Professor	6.8%	(4)	8.2%	(5)	2.7%	(1)	12.8%	(10)	14.3%	(8)
Other	3.4%	(2)	-	-	-	-	1.3%	(1)	1.8%	(1)
Experience										
Judicial	61.0%	(36)	59.0%	(36)	62.2%	(23)	60.3%	(47)	53.6%	(30)
Prosecutorial	33.9%	(20)	37.7%	(23)	29.7%	(11)	28.2%	(22)	30.4%	(17)
Neither	25.4%	(15)	29.5%	(18)	32.4%	(12)	34.6%	(27)	39.3%	(22)
Undergraduate education										
Public	35.6%	(21)	44.3%	(27)	29.7%	(11)	24.4%	(19)	30.4%	(17)
Private	47.4%	(28)	34.4%	(21)	59.5%	(22)	51.3%	(40)	51.8%	(29)
Ivy League	17.0%	(10)	21.3%	(13)	10.8%	(4)	24.4%	(19)	17.9%	(10)
Law school education										
Public	39.0%	(23)	39.3%	(24)	32.4%	(12)	41.0%	(32)	39.3%	(22)
Private	35.6%	(21)	31.1%	(19)	37.8%	(14)	35.9%	(28)	19.6%	(11)
Ivy League	25.4%	(15)	29.5%	(18)	29.7%	(11)	23.1%	(18)	41.1%	(23)
Gender										
Male	74.6%	(44)	67.2%	(41)	81.1%	(30)	94.9%	(74)	80.4%	(45)
Female	25.4%	(15)	32.8%	(20)	18.9%	(7)	5.1%	(4)	19.6%	(11)
Ethnicity/race										
White	84.7%	(50)	73.8%	(45)	89.2%	(33)	97.4%	(76)	78.6%	(44)
African American	10.2%	(6)	13.1%	(8)	5.4%	(2)	1.3%	(1)	16.1%	(9)
Hispanic	5.1%	(3)	11.5%	(7)	5.4%	(2)	1.3%	(1)	3.6%	(2)
Asian	-	-	1.6%	(1)	-	-	-	-	1.8%	(1)
Percentage who are										
ABA ranked										
EWQ/WQ	71.2%	(42)	78.7%	(48)	64.9%	(24)	59.0%	(46)	75.0%	(42)
Qualified	28.8%	(17)	21.3%	(13)	35.1%	(13)	41.0%	(32)	25.0%	(14)
Political affiliation										
Democrat	6.8%	(4)	85.2%	(52)	2.7%	(1)	-	-	82.1%	(46)
Republican	91.5%	(54)	6.6%	(4)	89.2%	(33)	96.2%	(75)	7.1%	(4)
Other	-	-	-	-	-	-	1.3%	(1)	-	-
None	1.7%	(1)	8.2%	(5)	8.1%	(3)	2.6%	(2)	10.7%	(6)
Partisan/academic										
Non-White										
Under \$200,000	5.1%	(3)	4.9%	(3)	5.4%	(2)	15.6% ^{a1}	(12)	33.3% ^{aa1}	(13)
\$200-499,999	16.9%	(10)	14.8%	(9)	29.7%	(11)	32.5%	(25)	38.5%	(15)

\$500-999 999	27 1%	(16)	29 5%	(18)	21 6%	(8)	35 1%	(27)	17 9%	(7)
\$1+ llo	50 8%	(30)	50 8%	(31)	43 2%	(16)	16 9%	(13)	10 3%	(4)
Total number of appointees	59		61		37		78		56	
Average age of appointees	49 6		51 2		48 7		50 0		51 8	
Number of appointees by President	Bush appointed by President Clinton excluded these cases									

Footnotes

al Net worth was unavailable for one appointee.

aal Net worth only for Carter appointees confirmed by the 96th Congress with the exception of five appointees for whom net worth was unavailable.

- Almost 1 in 5 Bush appointees ***284** came to the courts of appeals from positions in government, typically the U.S. Attorney's office. This was the largest proportion by far for all five administrations.

- Slightly under half the Bush appointees were elevated from a lower court judgeship. Only the proportion for the Carter appointees ***285** was lower. On the other hand, the proportion with judicial experience was the second highest for all five administrations. And, significantly, the Bush appeals court appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience. Clearly, the Bush Administration was concerned with naming people with a track record that aligned with the judicial philosophy of the President.

- About one in four had an Ivy League law school education. However, when we add those who attended such prestigious non-Ivy league law schools as Chicago, Duke, Georgetown, Indiana, Michigan, Stanford, Texas, and Virginia, the proportion attending the most prestigious law schools came to over 50 percent, close to the same proportion as that of the Clinton appointees and larger than the 45 percent of Reagan and Bush Sr. appointees.

- The proportion of women appointed by W. Bush to the appeals courts was exceeded only by Clinton. The proportion of African Americans was higher than that of Bush's Republican predecessors but lower than the proportions for Carter and Clinton. Similarly, the proportion of traditional appointees was higher than the proportions for Carter and Clinton but lower than that of Bush's Republican predecessors.

- About 7 in 10 Bush appointees received the highest ABA rating. This was better than his Republican predecessors but lower, although close, to the Carter and Clinton proportions.

- Bush, Clinton, and Carter named approximately the same proportion of appointees affiliated with the opposition party, but Bush appointed the lowest proportion of those unaffiliated with a political party.

- About two-thirds of the Bush appointees had some record of previous party activism. The Clinton cohort had the smallest proportion but even for the Clinton judges, over half had a documented history of party activity.
- The Bush and Clinton cohorts were on the whole the wealthiest group of appointees of all five presidents. The same proportion (51 percent) of both presidents' appointees had a net worth of \$1 million or more.
- Bush's appointees were the second youngest of all five presidents. Only Bush's father appointed younger appeals court judges in terms of average age at the time of nomination.

W. Bush's judicial legacy

From the outset of the Bush presidency, judicial selection was targeted as a high priority and administration officials were quite candid about this. Viet Dinh, when he was Assistant Attorney General for Legal Policy during the early years of the presidency told us: “The legal legacy that the President leaves [is as] important as anything else we do in terms of legislative policy [W]e want to ensure that the President's mandate to us that the men and women who are nominated by him to be on the bench have his vision of the proper role of the judiciary.” He also noted that judicial nominations should not be thought of “as something apart from and secondary to [the] policy agenda but as an integral part of it.” ⁵

The then Associate White House Counsel Brett Kavanaugh, later named and confirmed to the U.S. Court of Appeals for the District of Columbia Circuit, also told us that the President “is very interested in this [selecting judges] and thinks it is one of his most important responsibilities....” ⁶ Two years later Kavanaugh's successor, Associate White Counsel Dabney Friedrich, told us that the President “has given a great deal of attention to judgeships over the past four years, and he will continue to do so.” ⁷ Two years subsequently Friedrich's successor, *286 Jennifer Brosnahan, assured us that “the President will continue to nominate the same kind of people that he has nominated in the past—people with extraordinary credentials and integrity, and who share his judicial philosophy.” ⁸

In recent decades, starting with the Reagan Administration, ideological/philosophical screening has been de rigueur for Republican administrations. As a result, the lower court appointees of Reagan and both presidents Bush have generally been more conservative in the exercise of their discretion than have the appointees of Democratic presidents. The Carp et. al. study of the voting behavior of W. Bush's district court judges in this issue of *Judicature* (see page 312) provides empirical support for this statement. After eight years of Bush appointments to the appeals courts, the ideological mix on those courts is thought to have sharply tipped to the conservative end of the ideological spectrum. ⁹

The impact of Bush appointments on judicial policy is most dramatically illustrated by the sharp divisions on the Supreme Court where Bush appointees Associate Justice Samuel Alito and Chief Justice John Roberts have helped push the Court even further to the right and whose support of civil liberties claims is relatively low. Barbara Perry in her article in this issue (see page 302) fleshes out the policy impact of the Roberts and Alito appointments.

Furthermore, in simple quantitative terms, the proportion of votes supporting civil liberties claims in non-unanimously decided decisions from 2005-2008 was 17 percent for Justice Alito (only Justice Thomas had a lower support level, 10 percent) and 23 percent for Chief Justice Roberts (virtually the same as Justice Scalia's support level). In contrast, Justice

Kennedy's civil liberties support level was 40 percent, and the four more liberal justices' support levels ranged from Justice Breyer's 74 percent to Justice Ginsburg's 81 percent.²⁰

Thus, George W. Bush's legacy includes the appointment of like-minded Supreme Court justices and lower court judges selected by a process structured to achieve that result.

Over the past two decades, the judicial confirmation process has become heavily politicized with active lobbying of senators by conservative and liberal groups. Senators have placed holds on nominations, conducted filibusters, and employed various delaying tactics. This has most notably been the case with appeals court nominees, but district court nominees were also affected. The Democrats were furious with Republican obstruction and delay of Clinton judicial nominees. Particularly during Clinton's second term, dozens of judicial nominations were delayed or killed. Democrats exacted payback during W. Bush's presidency, especially when the nominees were seen as excessively ideological and/or partisan. Rather than lower the partisan temperature, the President raised it. The article by Binder and Maltzman in this issue (see page 320) provides systematic analyses of confirmation battles and what variables are associated with greater or lesser contentiousness.

The level of distrust between Senate Democrats and the Bush White House escalated to the point that during the 110th Congress, the Senate refused to recess lest the President make recess appointments. Thus the Senate was in continuous pro forma session over the major holidays and the customary August recess.

W. Bush's judicial legacy then must be seen as including a highly politicized and confrontational selection and confirmation process.

In terms of the demographics and characteristics of those placed on the bench by George W. Bush, as discussed earlier in this article, the record is one of highly professionally qualified appointees and the most diverse cohort (race, ethnicity, gender) of any Republican president and of every Democratic president with the exception of Clinton and rivaling Carter. Indeed, Bush's proportion of Hispanics to the federal district courts was a historic record. A full discussion of diversity is found in the article in this issue by Jennifer Segal Diascro and Rorie Spill Solberg (see page 289).

While Democrat Barack Obama can be expected to set new historic records for diversity, George W. Bush set the benchmark for Republican presidents and it is unlikely that any future Republican president would fail to take account of his performance in this regard.

W. Bush's judicial legacy, then, is also that of a highly professionally qualified diverse judiciary.

In sum, George W. Bush and his administration set out with a vision for the judiciary and firm ideas of what the President wanted his judicial legacy to be. In that respect, unlike the ill-fated war in Iraq that was once touted as "mission accomplished," his successful placing on the bench two Supreme Court justices, 59 appeals courts judges, and 261 district court judges, all lifetime appointees to courts of general jurisdiction, truly constituted "mission accomplished."

***287 What next?**

What can we expect in selection and confirmation politics in the context of the emergent Obama presidency? While some early clues have been forthcoming in the wake of five circuit court and one Supreme Court nomination, we focus on the prospective thinking of our expert sources for assessing the future of the politics of federal judicial selection.

In the view of the outgoing judicial selection team from the Bush administration, there was little ambiguity about what should transpire. Associate White House Counsel Kate Todd underscored that President Bush believed, "that every judicial nominee deserves a fair up or down vote, and I don't think he has ever qualified it as saying 'just when they're

my nominees.” Assistant Attorney General Beth Cook agreed, noting that “The President has...not put caveats in terms of who should get votes and who should get hearings.”

As with any new administration, one might anticipate a honeymoon period or window of opportunity. As Nan Aron highlighted, “Bush rolled out his nominations, I think it was May, and we would hope that President Obama would roll out his nominees sooner than that.” Writing with the 20-20 vision of mid-June we know, of course, that the administration has been considerably more deliberate in its nomination behavior, nominating only five circuit court nominees to date with relatively little fanfare and moving firmly but deliberately with the framing of the Sonia Sotomayor Supreme Court nomination.

In assessing the landscape that they now face as they move into opposition mode, both Jay Sekulow and Curt Levey underscored their commitment to being vigilant while, nevertheless, recognizing political realities. Thus, Sekulow admitted, “It's going to be tough to mount a challenge. That doesn't mean give them a free pass.... But it's going to be tough to mount a successful filibuster challenge, or create the need for a nuclear option.”

Curt Levey's analysis struck a similar chord.

I think we want to make it much more principled.... If I have anything to say about it, we won't take a line here, a line there out of an opinion to demonize a person.... To the extent that we in the outside groups mount a spirited defense, I would certainly hope that it's more principled, and we certainly wouldn't...support...wholesale ideological support of the filibuster.

Remaining active and aggressive in the fray is, of course, important to groups like Sekulow's and Levey's for a number of reasons, not the least of which involve money and the cultivation of the group's base of support. Indeed, as Nan Aron observed, “They're already amassing a war chest raising money.... They will be out there, noisy, angry, putting a lot of attention on ramping up their base around judicial nominations.”

Focusing on the Senate and particularly, the Judiciary Committee, Nan Aron noted that with Ted Kennedy's role as the “conscience on that Committee” greatly diminished, senators “Durbin and Schumer are going to have to step up to the plate as they have over the past eight years; but do even more because more will be asked of them.” While acknowledging that senior Democratic senators on the Judiciary Committee, like Durbin and Schumer, and other senators, like Levin, truly “get” the judicial selection issue, Aron also underscored the critical role to be played by the “new breed” of Senate Democrats. “The most recent crop of Democrats elected were fighters on this issue, unlike the previous crop. Sheldon Whitehouse's performance on that Committee was first-rate. Claire McCaskill, Sherrod Brown, Amy Klobuchar...were first-rate, took an interest, spoke up, and I think that was really helpful in the last two years.”

On the Republican side, speaking long before Arlen Specter's decision to switch parties, Nicholas Rossi predicted that the Republicans would look to leadership from Specter, Orrin Hatch, and John McCain. In this view, McCain would appear to be playing the kind of “centrist” role for the Republicans that we have attributed to Lieberman for the Democrats. “As a member of the Gang of Fourteen, and the party's nominee in the last election, I think that where he is on some of these nominees may be a factor in the next Congress.” Rossi could not foresee, of course, Specter's switch to the Democratic party and the rise of conservative Alabama Republican Jeff Sessions to the ranking minority position on the Judiciary Committee which, after years of Specter and Hatch leading the Republicans, is bound to change the Committee dynamics in significant yet, presently, unpredictable ways.

Perhaps another wildcard in forecasting the future can be found in the demands of the American public in the radically changed political landscape. As one senior Democratic Senate aide took note, “A lot of this is...very different....[T]he

entire environment has changed. I think the American people are going to demand results and hold accountable those who don't come to the table....This isn't the trench warfare of the last sixteen years.”

Such optimism can be fueled by the recognition that, to the extent that Judiciary Committee Chair Patrick Leahy continues to practice what he preaches and fosters the traditional Committee norms and practices that protect minority prerogatives and a say in the process, the temperature of the selection process can be turned down and the acrimony and divisiveness of the past two decades can be attenuated. In such a world as a Democratic Judiciary Committee staff member noted, “It's just hard to imagine scenarios where you end up at a filibuster.” And, *288 adding further optimism to the mix is the recognition that Mitch McConnell is the Republican's minority leader. As one key Democratic Senate aide pointed out, “Negotiating will be in the middle. I have great respect for Senator McConnell and I would not be surprised to see him make more deals in the years ahead. That obstructing, simply stopping things, isn't enough.”

There is, of course, an alternative future to ponder, one where the Republicans choose to do battle over judges because, as a senior Democratic staffer put it, “They've got nothing else to focus in on.... They know how to do this. They know how to use those words, to talk about this. And it's easy. So as they are finding their way and reassuring their base that they are still relevant, and important, and powerful...they're going to oppose judges.” In such a scenario, the Obama presidency simply looms as the palette for another round of judicial selection tit for tat, an opportunity for obstruction, delay, and payback.

As foreseen by a key Democratic Senate aide,

the comments about judges already, two months before this guy has selected a single nominee...it strikes me that Republicans, certainly House Republicans, who have so little to say about this but nonetheless weigh in, and leadership Republicans in the Senate...have made extremely negative comments...when everything else is about coming together.... Without giving this guy a chance, without knowing how he's going to work with them, whether he will work with them, they're already negative. And so they're itching for fights. So does that bode well? Not particularly well and what I sense is, “Oh man, we can't wait to do some payback.” But payback for what...? Look at where we were and where we are now.

In the final analysis, of course, at least for the 111th Congress, the Republicans are facing a numbers game. Of great interest for the situation we currently find ourselves in, on the doorstep of a Supreme Court confirmation process, a senior Democratic Judiciary Committee aide put things in appropriate perspective.

If you get a Supreme Court nominee who is going to get 80 votes, not 100 votes, but 80 votes, could there be Republicans who feel very strongly, or feel that their images can be helped by being in opposition? Sure. Do they get to do that? Yeah! This is the United States Senate. They get to do that. They get to talk, they get to talk at great lengths. They get to make speeches, they get to do all kinds of stuff. But then there will be a vote. Now if the vote is for cloture, to end the filibuster, I would expect it to end the filibuster.... If it takes a week, it takes a week. If it takes two weeks, it takes two weeks. If you want to be on the wrong side of history for two weeks, that is fine. But it won't go away. So we'll see how it plays out. Whether a two hour speech in opposition is enough, or they really need thirty hours in opposition.

At bottom, we can predict with confidence that President Obama will aim to reverse the conservative tide on the federal courts and to restore an ideological and political balance. When the President leaves office, like George W. Bush before him, he can be expected to have left his mark on the judiciary and in so doing helped to shape and change the course of American law.

Footnotes

- a1 SHELTON GOLDMAN is a professor of political science at the University of Massachusetts, Amherst. (Sheldon.goldman@polsci.umass.edu) SARA SCHIAVONI is an instructor in political science at John Carroll University. (sschiavoni@jcu.edu) ELLIOT SLOTNICK is a professor of political science at The Ohio State University and associate dean of the Graduate School. (slotnick.1@gradsch.ohio state.edu)

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- 1 See <http://latimesblogs.latimes.com/presidentbush/polls/viewed> May 2, 2009.
- 2 The figures for Clinton's last two years were 57 of 83 district court nominees (68.7%) and 13 of 32 (40.6%) appeals court nominees confirmed.
- 3 An accounting of the W. Bush administration's selection of judges and the accompanying confirmation politics during the three previous sessions of Congress is recounted in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 *Judicature* 282 (2003); Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 *Judicature* 244 (2005); and Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking judges in a time of turmoil: W. Bush's judiciary during the 109th Congress*, 90 *Judicature* 252 (2007).
- 4 See *The American Bench, Who's Who* (national and regional editions), *Martindale Hubbell Law Directory*, and *The Judicial Staff Directory*.
- 5 George W. Bush, *President Bush Discusses Judicial Accomplishments and Judicial Philosophy*. Speech given at the Hilton Cincinnati Netherland Plaza, Cincinnati, OH. October 6, 2008.
- 6 Interview with Beth Cook, December 15, 2008. This citation and all undocumented citations throughout the remainder of this article are taken from extensive field interviews conducted in December, 2008 and January 2009 in Washington and/or in telephone interviews conducted after our return from the field. In some instances, as per our agreement when granted an interview, the names of our sources will not be included in the citation. We have, however, included an accurate characterization of the judicial selection involvement of all interviewees whether they are identified by name or not.
- 7 Mukasey is the the first federal court judge to serve in the position since Griffin Boyett Bell served as President Carter's Attorney General.
- 8 *Supra* n. 5.
- 9 The non Ivy League law schools attended by the appointees considered prestigious are: Berkeley, Chicago, Duke, Fordham, Georgetown, Illinois, Indiana, Michigan, NYU, North Carolina, Ohio State, Stanford, Texas, Vanderbilt, and Virginia.
- 10 Note that Table 2 of our 2007 article mistakenly put the average age of the first six years of appointees at 50. The average age should have been recorded as 48.7. This error was only discovered when preparing for this article.
- 11 Goldman, et. al., *W. Bush's Judiciary*, *supra* n. 3, at 268.
- 12 See the account in Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle For Control of the United States Supreme Court* 247 285 (New York: Penguin Books, 2008).
- 13 Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* 349 (New Haven: Yale University Press, 1997).

- 14 Goldman, et. al., Picking judges in a time of turmoil , *supra* n. 3 at 276.
- 15 Interview with Viet Dinh on January 6, 2003.
- 16 Interview with Brett Kavanaugh on January 7, 2003.
- 17 Interview with Dabney Friedrich on December 8, 2004.
- 18 Interview with Jennifer Brosnahan on December 6, 2006.
- 19 Charlie Savage, Appeals Courts Pushed to Right By Bush Choices, *New York Times*, October 29, 2008, at A 1, A 14.
- 20 See Table 2 in Sheldon Goldman, Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?, 7 *The Forum*, Issue 1, Article 9, p. 8. Online journal at www.bepress.com/forum/vol7/iss1/art9

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Senator Durbin Takes on Appellate Judge

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Body

A Senate Democratic leader Tuesday urged a Bush-appointed judge to recuse himself from cases involving enemy combatants and requested an explanation about information that might contradict his testimony about the White House's detainee policy.

"It appears that you misled me, the Senate Judiciary Committee, and the nation," Senate Democratic Whip Dick Durbin of Illinois wrote to Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia.

He urged Kavanaugh to remove himself from "all pending and subsequent cases involving detainees and enemy combatants." Kavanaugh's court gets more detainee cases than any other.

"Your lack of candor at your nomination hearing suggests you cannot approach these cases with impartiality and an open mind," Durbin wrote.

Kavanaugh declined to comment, but the court released a statement indicating Kavanaugh would not recuse himself from all related cases.

"Judge Kavanaugh's confirmation testimony was accurate, and Judge Kavanaugh will continue to carefully address recusal issues based on the law and facts of each case."

At issue is whether Kavanaugh, then White House staff secretary, misled the Senate panel during his confirmation hearing in May last year about how much he was involved in crafting the administration's policy on enemy combatants.

A Washington Post story Monday suggested that Kavanaugh told his White House colleagues in 2002 that Supreme Court Justice Anthony Kennedy, for whom Kavanaugh had clerked, would never accept any policy that denied American combatants a lawyer, as was then being considered by the administration.

Durbin, who first raised the issue Tuesday in an interview with National Public Radio, said the story appeared to contradict Kavanaugh's statement before the Senate Judiciary Committee during his confirmation hearing.

During the May 9, 2006 proceedings, Durbin asked Kavanaugh about William Haynes, a controversial nominee to the U.S. Court of Appeals for the Fourth Circuit.

"What did you know about Mr. Haynes' role in crafting the administration's detention and interrogation policies?" Durbin asked Kavanaugh.

"Senator I did not I was not involved and am not involved in the questions about the rules governing detention of combatants. And so I do not have the involvement with that," Kavanaugh replied, according to a transcript.

Senator Durbin Takes on Appellate Judge

Load-Date: June 27, 2007

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2 Senators Accuse Judge Of Misleading Committee

The New York Times

July 4, 2007 Wednesday, Late Edition - Final

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Section: Section A; Column 0; National Desk; Pg. 12

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Byline: By NEIL A. LEWIS

Dateline: WASHINGTON, July 3

Body

Senate Democrats have complained that a federal appeals court judge may have misled them at his confirmation hearings when he said he had no role in formulating detention policy when he was an official in the Bush White House.

Senators Patrick J. Leahy of Vermont, the chairman of the Judiciary Committee, and Richard J. Durbin of Illinois, a committee member, have questioned the forthrightness of the judge, Brett M. Kavanaugh, of the United States Court of Appeals for the District of Columbia Circuit.

Mr. Leahy has asked the Justice Department to investigate Judge Kavanaugh's comments, and Mr. Durbin has asked the judge to recuse himself from cases involving detainee issues.

A court spokesman for the judge responded that "Judge Kavanaugh's confirmation testimony was accurate, and Judge Kavanaugh will continue to carefully address recusal issues based on the law and facts of each case."

At issue are comments the judge made when his nomination to the appeals court came before the committee in May 2006. At the time, he was a senior White House lawyer who had helped screen the administration's judicial choices.

Mr. Durbin asked Judge Kavanaugh about his role in screening the nomination to an appeals court of William J. Haynes IV, who was the Pentagon's general counsel and was involved in creating many of the administration's interrogation policies for detainees at Guantanamo Bay, Cuba, and elsewhere.

"What did you know about Mr. Haynes's role in crafting the administration's detention and interrogation policies?" Mr. Durbin asked.

Mr. Kavanaugh replied: "Senator, I was not involved and am not involved in the questions about the rules governing detention of combatants and so I do not have any involvement in that."

In a news report first broadcast by National Public Radio, those comments were compared with an account last month in The Washington Post that Judge Kavanaugh had told colleagues in the White House in 2002 his view that Justice Anthony M. Kennedy of the Supreme Court would probably reject any administration claim that detainees were not entitled to lawyers. Judge Kavanaugh had served as a law clerk to Justice Kennedy.

The Post account did not, however, place Judge Kavanaugh at what it described as the heated meeting where the subject was discussed. In a June 26 letter to Judge Kavanaugh, Senator Durbin said, "It appears you misled me, the Senate Judiciary Committee and the nation."

2 Senators Accuse Judge Of Misleading Committee

He asked Judge Kavanaugh to disqualify himself from all cases involving detention and interrogation.

Senator Leahy said that Judge Kavanaugh had given him a similarly misleading answer at the hearing and that the Justice Department should investigate to see if any laws were broken involving lying to Congress.

Neither Judge Kavanaugh nor the department has responded to the letters.

<http://www.nytimes.com>

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June 27, 2007

Section: NATIONAL

SENATOR QUESTIONS JUDGE'S TRUTHFULNESS

The Associated Press

WASHINGTON

A Senate Democratic leader yesterday urged a Bush-appointed judge to recuse himself from cases involving enemy combatants and requested an explanation about information that might contradict his testimony about the White House's detainee policy.

"It appears that you misled me, the Senate Judiciary Committee and the nation," Senate Democratic Whip Dick Durbin of Illinois wrote to Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia.

He urged Judge Kavanaugh to remove himself from "all pending and subsequent cases involving detainees and enemy combatants." Judge Kavanaugh's court gets more detainee cases than any other. "Your lack of candor at your nomination hearing suggests you cannot approach these cases with impartiality and an open mind," Mr. Durbin wrote.

Judge Kavanaugh declined to comment, but the court released a statement indicating that the judge would not recuse himself from all related cases.

"Judge Kavanaugh's confirmation testimony was accurate, and Judge Kavanaugh will continue to carefully address recusal issues based on the law and facts of each case."

At issue is whether Judge Kavanaugh, then White House staff secretary, misled the Senate panel during his confirmation hearing in May last year about how much he was involved in crafting the administration's policy on enemy combatants.

A Washington Post story Monday suggested that Judge Kavanaugh told his White House colleagues in 2002 that Supreme Court Justice Anthony Kennedy, for whom Judge Kavanaugh had clerked, would never accept any policy that denied American enemy combatants a lawyer, as was then being considered by the Bush administration.

Mr. Durbin, who first raised the issue yesterday in an interview with National Public Radio, said the story appeared to contradict Judge Kavanaugh's statement before the Senate Judiciary Committee during his confirmation hearing.

During the May 9, 2006, proceedings, Mr. Durbin asked Judge Kavanaugh about William Haynes, a controversial nominee to the 4th U.S. Circuit Court of Appeals. "What did you know about Mr. Haynes' role in crafting the administration's detention and interrogation policies?" Mr. Durbin asked Judge Kavanaugh.

"Senator, I did not -- I was not involved, and am not involved, in the questions about the rules governing detention of combatants. And so I do not have the involvement with that," Judge Kavanaugh replied, according to a transcript.

---- **Index References** ----

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NewsRoom

Senators Subpoena The White House

Panel Demands Papers On NSA Wiretapping

By Michael A. Fletcher
Washington Post Staff Writer
Thursday, June 28, 2007

A Senate committee investigating the National Security Agency's warrantless wiretapping program issued subpoenas yesterday ordering the White House to turn over documents related to the eavesdropping effort, escalating a legal showdown between Congress and the Bush administration.

The Judiciary Committee's subpoenas were delivered to the offices of President Bush, Vice President Cheney and the national security adviser and to the Justice Department. They demanded copies of internal documents about the program's legality and agreements with telecommunications companies that participated in the program.

Lawmakers said their aim is to understand and reconstruct the administration's internal debate about the program's legality, an aim White House officials have resisted.

"This committee has made no fewer than nine formal requests to the Department of Justice and to the White House, seeking information and documents about the authorization of and legal justification for this program," [Sen. Patrick J. Leahy](#) (D-Vt.), chairman of the Judiciary Committee, wrote in letters delivered with the subpoenas. "All requests have been rebuffed."

The White House offered no word on whether it will turn over the documents by the July 18 deadline. "We're aware of the committee's action, and will respond appropriately," spokesman Tony Fratto said. "It's unfortunate that congressional Democrats continue to choose the route of confrontation."

Leahy also formally asked Attorney General Alberto R. Gonzales yesterday to investigate whether Brett M. Kavanaugh made false statements under oath last year, during his confirmation hearing for a seat on the U.S. Court of Appeals for the District of Columbia Circuit.

Kavanaugh, who was an associate counsel at the White House when legal arguments were raised to defend the administration's response to the Sept. 11, 2001, attacks, told the Judiciary Committee that he "was not involved and am not involved in the questions about the rules governing detention of combatants."

Leahy cited details from The Washington Post's series this week on Cheney's influence in the West Wing. Included was an anecdote about Kavanaugh's discussing a pending court challenge to the detention of a U.S. citizen accused of being a combatant, and whether Kavanaugh's legal mentor, Supreme Court Justice Anthony M. Kennedy, would uphold the constitutionality of the detention.

"I don't believe that he was truthful with us. . . . I don't think that the answers were truthful. And I'm just sending out the notice that, if answers are not truthful, we'll send it to the U.S. attorney and the attorney general and ask them what's going on," Leahy said.

Kavanaugh, reached last night, declined to comment. A Court of Appeals spokesperson for Kavanaugh said in a statement that "Judge Kavanaugh's testimony was accurate."

The subpoenas and Leahy's criminal referral come two weeks after other congressional panels subpoenaed two former White House aides in connection with the Justice Department's firing of nine U.S. attorneys. The subpoenas -- which are likely to be resolved in court -- are a clear sign of the Democrats' willingness to pursue protracted litigation as they conduct aggressive probes of administration policies.

Bush secretly launched the eavesdropping program after the Sept. 11 attacks. According to Bush's eventual public description, the program allowed monitoring without a warrant of telephone calls, e-mails and other

communication into or out of the United States when one of the parties was suspected of terrorist ties.

The existence of the classified program was revealed in media reports in December 2005, angering lawmakers who called the program an infringement of civil liberties. The Bush administration has defended it as crucial to protecting the nation from further attacks.

Congressional interest in the program was stoked by testimony last month by former deputy attorney general James B. Comey that in 2004, Gonzales, then White House counsel, tried to pressure then-Attorney General John D. Ashcroft to recertify a controversial part of the program while Ashcroft was recovering from gallbladder surgery.

Ashcroft refused to abandon his objections, which have not been disclosed, and the White House initially recertified the part of the program at issue without obtaining a routine affirmation of its legality from the Justice Department. Bush backed down, however, when Ashcroft, Comey and other Justice officials threatened to resign, and some changes were made to obtain the Justice Department's approval.

"After we learned from Jim Comey about the late-night hospital visit to John Ashcroft's bedside, it was even more imperative that we find out the who, what, how and why surrounding the wiretapping of Americans without warrants," said [Sen. Charles E. Schumer](#) (D-N.Y.).

The Judiciary Committee, seeming frustrated by what Leahy called "stonewalling" of its requests for information, approved the subpoenas last week. Three Republicans joined Democrats in the 13 to 3 vote to authorize the subpoenas.

"The bipartisan support for issuing these subpoenas demonstrates that both Democrats and Republicans are fed up with the misleading statements from the attorney general and the administration about this illegal program," said [Sen. Russell Feingold](#) (D-Wis.), a member of the committee.

In January, Bush announced that the original eavesdropping program would in the future be supervised by a special intelligence court. An administration proposal to overhaul the Foreign Intelligence Surveillance Act is pending in Congress.

Civil libertarians applauded the committee's action. "It is really time that Congress starts getting to the bottom of the administration's illegal spying program," said Caroline Fredrickson, director of the Washington legislative office for the American Civil Liberties Union.

Washingtonpost.com staff writer Paul Kane contributed to this report.

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October 25, 2005

Section: EDITORIAL

Slap them silly

Debra J. Saunders

NOW REPUBLICANS are "borking" one of their own. Robert Bork himself, the Reagan Supreme Court nominee who was rejected after the Dems barraged him with highly personal attacks, has attacked Bush's nomination of Harriet Miers to the Big Bench as "a disaster on every level." Conservative commentator Patrick J. Buchanan told CNN that Bush "gave conservatives a wet mitten across the face with this nomination."

I think these two are miffed because Bush didn't select a member of their in-crowd. Bork was rather bald-faced about it, when he explained to CNN that Miers' nomination was "a slap in the face to the conservatives who have been building a legal movement."

It's not enough that the National Law Journal named Miers one of America's 50 most influential women lawyers -- before she worked in the White House. In the world according to Bork, she's supposed to be a member in good standing of a select club of conservative ideologues/legal scholars.

Let me be clear on this: I am not saying that any senator -- Democrat or Republican -- has an obligation to vote for Miers.

I have questions, too. Miers had an odd flap with Sen. Arlen Specter, R-Pa., over the right to privacy. She said he misunderstood what she said about the Griswold decision, which the high court relied upon when it legalized abortion. That's not good. A justice cannot afford to be misunderstood.

Misunderstanding No. 2: Answering a Senate Judiciary Committee questionnaire, Miers wrote that, when addressing a lawsuit on the Voting Rights Act as a Dallas city councilwoman, "the council had to be sure to comply with the proportional representation requirement of the Equal Protection Clause." The Los Angeles Times ran a story in which legal scholars scoffed at her take on proportional representation and the law.

Brett M. Kavanaugh, Miers' successor as White House staff secretary, told me over the phone, "Some people read into that a different meaning than was clear in the context of the case she was describing." That is: Miers was referring to one person, one vote.

Again, a justice cannot afford to be misunderstood.

That said, Republican senators at least should hear out Miers. Let them listen to her testimony before the Judiciary Committee next month before they decide if she is or isn't qualified to serve on America's top court.

Besides, there is something refreshing about Bush's decision not to select a nominee from a prescribed list of appellate judges.

Brad Blakeman, a Washington lobbyist who worked with Miers in the White House, noted that if the Founding Fathers had wanted only judges to serve on the Big Bench, they could have written that into the Constitution -- except they didn't.

Blakeman believes the framers "felt that there should be diversity in the court and they gave the president wide discretion in picking someone who the president felt would complement the court." Miers fits that bill. She has been elected to the Dallas City Council. She served as president of the Dallas Bar Association. Methinks she might bring a real-world perspective to the tight little universe of legal lingo and black robes.

Those great legal minds make mistakes -- witness the bonehead Kelo decision that expanded the definition of "public use" so that cities can seize homes from law-abiding taxpayers under eminent domain, then hand them over to big corporations.

I have heard from conservative readers who tell me that Bush owes them the judges they want.

Wrong. Bush beat John Kerry nationally by about 3 percentage points in 2004. He's not king. He needs a nominee who will be approved by the Senate. He can't win with a Bork think-alike.

Conservatives ask: Why elect Republicans if we don't get the judges we want? Answer: So that you'll get judges you can live with.

If, as some insiders suggest, Bush does have to withdraw the Miers nomination, I have this bit of unsolicited advice: Bush should nominate a pro-choice Republican.

Until now, he has given the anti-abortion crowd everything they reasonably could expect. And this is how they say thank you. If this is how they behave when they think they've been slapped, they should be slapped silly.

E-mail: dsaunders@sfchronicle.com.

---- Index References ----

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Section: News
Section: 3

Colleagues find it hard to pinpoint Miers's influence

By Todd S. Purdum

WASHINGTON:

Ask any of Harriet Miers's typically press-shy White House colleagues what the Supreme Court nominee has been like in her years as a top Bush administration staff member, and the praise pours out. She is intelligent. Meticulous. Selfless. Insightful. But when it comes down to cases, they have a harder time. "You know, she's a very gracious and funny person," said Joshua Bolten, the director of the Office of Management and Budget, whom Miers succeeded as deputy White House chief of staff in 2003. "I was racking my brain trying to think of something specific." In the next breath, Bolten recalled relaxing with her at Camp David. "She is a very good bowler," he said. "For someone her size, she actually gets a lot of action out of the pins." What the defunct New York Herald Tribune once wrote about her earliest predecessor as White House staff secretary < Andrew Jackson Goodpaster, who created the job under President Dwight D. Eisenhower < could also apply to Miers: Her influence in the White House has often seemed hidden "behind a quiet facade that lends itself neither to anecdotes nor stuffiness." Miers's admirers say that she has brought diligence and determination to every task, and that her fingerprints are all over President George W. Bush's record in office. Finding her footprints is much harder. When colleagues are asked to cite an example of her influence on a particular policy or program, the invariable answer is that she affected them all. That lack of specificity has compounded the White House's difficulties in selling Miers's nomination to the Supreme Court, and opened the field to her harshest critics. For nearly five years, Miers has been among the least visible and voluble figures in a White House where even the most prominent and public staff members tend to be seen and not heard. The one policy dispute in which she is known to have taken a stand was her failed opposition to the Bush administration's early decision to stop cooperating with the American Bar Association in rating judicial nominees. As staff secretary for the first 2 1/2 years of the Bush administration, Miers was the last person to see every scrap of paper headed for the Oval Office, colleagues say. "You might think anybody who was preparing something to go to the president would already have taken care to see that it was perfect," said David Leitch, a former deputy White House counsel who is now general counsel with Ford Motor. "But Harriet always scrubbed them one more time," he said, "and managed to come up with things that people hadn't seen or thought of before, from the broad wording of an issue to errors in punctuation." Some who have worked with her say that the same punctiliousness that made her a sterling steward of the White House paper flow sometimes made her an impediment in her policy jobs, and that her focus on process bodes ill for her work as a justice. "It wasn't that she didn't do the job right," said David Frum, who was a White House speechwriter when Miers was staff secretary and has been one of her sharpest critics, "but the way she did the job rules her out of being a person you would think of as capable of handling this enormous responsibility." Miers's friends in and out of government say they do not recognize her critics' descriptions of her as an

unqualified presidential crony. "Harriet is a person who is incredibly capable and hard-working and fair and honest," said Susan Karamanian, an associate dean at George Washington University Law School and a Democrat who was guided by Miers as a young lawyer nearly 20 years ago. "When I practiced with Harriet, I never once heard her make a serious negative comment about anyone," Karamanian said. "And now for someone who's dedicated her life to working so hard in the profession, and treating everyone so fairly, to be the object of these statements is just incomprehensible to me." Kristen Silverberg, a former White House official who is now an assistant secretary of state, spent part of 2003 in Baghdad as an aide to L. Paul Bremer 3rd, the presidential envoy to Iraq, and recalled that "Harriet was always the first one on the phone to say, 'Is everything O.K.?' when there was bad news." Brett Kavanaugh, Miers's successor as staff secretary, said that her critics had overlooked the breadth of issues she had addressed in the White House. "For any lawyer in the country to be called upon by the president over the course of the past five years to provide advice on a full range of subjects," Kavanaugh said, "from national security law, to the Patriot Act, to any issue that may cross his desk, is a very significant role for any lawyer to play." Kavanaugh's own nomination for a seat on the U.S. Circuit Court of Appeals has been stalled in the Senate for more than two years, in the face of sharp Democratic questioning over his experience and ideology. Asked if Miers had sought his advice, he responded indirectly. "Her process will move more quickly," he said. "That's one thing that's sure."

--- Index References ---

Company: AMERICAN BAR ASSOCIATION; FORD MOTOR CO

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October 16, 2005

Section: NATIONAL

Miers' mind a mystery - except toward Bush

BILL ADAIR

WASHINGTON

When Harriet Miers finished reviewing a draft speech for President Bush, she would send it back to the White House speechwriters with comments. She wrote questions in the margins in her meticulous cursive.

Sometimes she wanted them to check their facts. "Is this something we're sure we believe?" she would write. Or simply, "DPC?", shorthand for whether it had been cleared with the president's Domestic Policy Council.

Her most biting comment was when she occasionally wrote, "This doesn't sound presidential."

In the Bush White House, it was Miers' job to make sure the president sounded presidential. If the White House was a factory, churning out speeches and letters and policy papers, Miers was chief of quality control, a key player who made sure the products - and the CEO - looked good.

As staff secretary from 2001 to 2003, Miers checked Bush's letters for mistakes and made sure he could pronounce the names of people he met. She even controlled his signature, deciding which documents he signed by hand and which went to the Autopen machine.

The swirl of discontent over Miers' nomination to the Supreme Court has focused on how little we know about her. In response, Bush has essentially said, Trust me. I know her. Indeed, he knows her because she has devoted the last six years to him, working such long hours she has virtually no time for a personal life.

Yet if that relationship is the key to understanding why Miers belongs on the court, even those who have seen them working together cannot bring the portrait of Harriet Miers into better focus. They describe her as warm and competent, but don't know what she thinks about major issues.

Miers has given so much of herself to Bush that it's difficult to know where he ends and where she begins.

'You are the best!'

Miers met Bush in 1989 and she later joined his "kitchen cabinet," an informal group of supporters helping launch his 1994 campaign to be governor of Texas.

It was an opportune time for both. Bush needed someone with legal expertise to help the campaign. Miers, who had been running a Dallas law firm and served one term on the City Council, was ready for something new.

Karin Torgerson, a lawyer with Miers' firm, said her boss had topped out in the Texas city.

"There really weren't that many more hurdles for her to climb in the Dallas legal market," Torgerson said. Miers' volunteer legal work for Bush was "a new obstacle, something new to challenge her."

Miers' friend Margaret Spellings, also a member of the kitchen cabinet, said Miers became interested in government service.

"I think she knew there was more to life than billable hours," said Spellings, now Bush's education secretary.

Miers, now 60, took her duties seriously. The morning after the 1994 election, when campaign workers were still bleary-eyed from celebrating the surprise victory, she held a meeting to explain the ethics rules for the transition.

As governor, Bush grew to trust Miers and appointed her to clean up the troubled state lottery. Miers, in turn, became a loyal supporter. Documents released last week by the state archives include notes and cards from her that gushed with praise.

"You are the best!" she wrote in a letter thanking him for taking part in a lottery meeting. In a birthday card, she wrote "You are the best Governor ever - deserving of great respect!"

A thank-you note said, "All I hear is how great you and Laura are doing. The dinner here was great - especially the speech! Keep up all the great work. Texas is blessed!"

Bush valued her work. "I appreciate your friendship and candor," he said in a thank-you note for a birthday card. "Never hold back your sage advice."

Working while others slept

When Bush became president, Miers became his staff secretary, one of toughest jobs at the White House.

In overseeing everything Bush said, wrote or read, she was with him morning, noon and night. Miers regularly visited him at the White House residence - rare for all but the most senior aides - and she accompanied him on most trips.

Miers was a workaholic, even on long flights on Air Force One. While other aides snoozed, she was in full motion, checking speeches, getting briefing books ready.

In 2003, she became deputy chief of staff for policy, where she was the link between Bush and his policy advisers. She became White House counsel in February, acting as Bush's chief legal adviser on everything from the Patriot Act to Supreme Court nominees. Instead of protecting Bush from the embarrassment of mispronounced names, she began protecting him from legal trouble.

David Frum, a former speechwriter who has been one of the sharpest critics of her nomination, said Miers was deeply devoted to Bush.

"In the White House that hero-worshipped the president, Miers was distinguished by the intensity of her zeal," Frum wrote in his blog on National Review Online. "She once told me that the president was the most brilliant man she had ever met."

In an interview last week, Frum characterized her as a loyal servant but not a big thinker.

"She was not somebody who cast a large shadow at the White House in terms of substantive achievement," he said. "She controlled the Autopen, she managed the paper flow, she was very precise and careful. But she was not somebody who played a role in the achievements and accomplishments of that White House."

Indeed, White House aides say Miers is more a listener than a talker. It is not uncommon for her to sit in a room full of people for a long meeting and never utter a word.

But friends and White House aides say that was her duty - to present Bush with all sides of an issue.

Brett Kavanaugh, the current staff secretary, said her role was to be "an honest broker" who did not take sides in presenting options to the president.

Spellings said Miers played that role well. "One of her strongest skills is to make sure that all points of view are considered."

Standing guard

As staff secretary, Miers was a stickler for accuracy. Names had to be spelled correctly, pronunciations had to be correct and, for goodness sakes, no typos.

She told her staff, "If he sees a typo in a memo, he questions the entire memo."

She was a master juggler, keeping track of items large and small. "She just had the brainpower to keep everything moving," said former White House aide Noel Francisco.

She sweated the big stuff, the little stuff and everything in between. She frequently asked, "Who signed off on this?"

She knew Bush's speaking style and made sure his speeches sounded genuine.

"The edits that really counted were the ones where she said, 'This doesn't sound like the president,' " said former speechwriter Noam Neusner. Miers made sure Bush's speeches were written in the active voice, in the short, declarative sentences he prefers. She changed every We to I.

She caught lots of mistakes. If a draft referred to something as "our most urgent domestic priority," it was Miers who would remember that Bush had used the same phrase months earlier to describe something else.

"In big speeches, Harriet often found things that nobody else found - especially inconsistencies," said former speechwriter Matthew Scully. "Harriet didn't miss things."

And yet, after working with her day after day, these colleagues are at a loss to say where Miers stands on big issues. She rarely expressed opinions. She did a lot of I-dotting and T-crossing, but she was like a frowning Secret Service agent, standing guard in front of the president but revealing little about herself.

Frum said that in all the time he worked with her, she had an opinion on just one issue - that the American Bar Association should play a role in judicial nominations.

"I cannot recall having a substantive conversation with her," Frum said.

But friends and other White House aides say that was her job - and her style.

"She's not a grandstander or a showoff type at all," said Spellings. "She doesn't feel like she has to add her two cents."

Rena Pederson, a longtime friend and the former editorial page editor of the Dallas Morning News, said Miers was content in a low-key role.

"I've often thought Harriet could write a really interesting book," said Pederson. "But she never will. She is so discrete and so loyal. That goes with the job description."

The White House has a strict ethic of anonymity. Everyone understands their role and nobody is supposed to be bigger than the president.

And yet, that is the very reason her nomination is under fire. She has been so anonymous that few people know who she is.

Said Neusner, "Harriet is the consummate Bush person - very diligent, very smart and loyal to the president. That doesn't necessarily make somebody well-known outside the White House."

Washington bureau chief Bill Adair can be reached at (202) 463-0575 or adair@sptimes.com

WORKING FOR BUSH

Harriet Miers' career with George W. Bush

IN TEXAS

- + Legal adviser to Bush's gubernatorial campaign, early 1990s
- + General counsel for the gubernatorial transition team, 1994
- + Chairwoman of the Texas Lottery Commission, a voluntary public service position, 1995-2000

IN WASHINGTON

- + Assistant to the president/staff secretary, 2001-2003
- + Assistant to the president/deputy chief of staff for policy, 2003-2005.
- + Counsel to the president, since February 2005

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---- Index References ----

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October 16, 2005

Section: Main News

Colleagues praise nominee's work but aren't specific

Todd S. Purdum

New York Times News Service

WASHINGTON -- Ask any of Harriet E. Miers' typically press-shy White House colleagues what she has been like in her years as a top Bush administration staff member, and the praise pours out. She is intelligent. Meticulous. Selfless. Insightful. But when it comes down to cases, they have a harder time.

"You know, she's a very gracious and funny person," said Joshua B. Bolten, the director of the Office of Management and Budget whom Miers succeeded as deputy White House chief of staff in 2003. "I was racking my brain trying to think of something specific."

In the next breath, Bolten recalled relaxing with her at Camp David. "She is a very good bowler," he said. "For someone her size, she actually gets a lot of action out of the pins."

What The New York Herald Tribune once wrote about her earliest predecessor as White House staff secretary -- Andrew Jackson Goodpaster, who created the job under Dwight D. Eisenhower -- could also apply to Miers: Her influence in the White House has often seemed hidden "behind a quiet facade that lends itself neither to anecdotes nor stuffiness."

Miers' admirers say that she has brought diligence and determination to every task, and that her fingerprints are all over President Bush's record in office. Finding her footprints is much harder.

When colleagues are asked to cite an example of her influence on a particular policy or program, the invariable answer is that she affected them all.

That lack of specificity has compounded the White House's difficulties in selling Miers' nomination to the Supreme Court, and opened the field to her harshest critics.

For nearly five years, Miers has been among the least visible and voluble figures in a White House where even the most prominent and public staff members tend to be seen and not heard.

As staff secretary for the first 212 years of the Bush administration, Miers was the last person to see every scrap of paper headed for the Oval Office, colleagues say.

"You might think anybody who was preparing something to go to the president would already have taken care to see that it was perfect," said David G. Leitch, a former deputy White House counsel who is now general counsel to the Ford Motor Co.

"But Harriet always scrubbed them one more time," he said, "and managed to come up with things that people hadn't seen or thought of before, from the broad wording of an issue to errors in punctuation."

Some who have worked with her say that the same punctiliousness that made her a sterling steward of the White House paper flow sometimes made her an impediment in her policy jobs, and that her focus on process bodes ill for her work as a justice.

"It wasn't that she didn't do the job right," said David Frum, who was a White House speechwriter when Miers was staff secretary and has been one of her sharpest critics, "but the way she did the job rules her out of being a person you would think of as capable of handling this enormous responsibility."

Brett M. Kavanaugh, Miers' successor as staff secretary, said that her critics had overlooked the breadth of issues she had addressed in the White House. "For any lawyer in the country to be called upon by the president over the course of the past five years to provide advice on a full range of subjects," Kavanaugh said, "from national security law, to the Patriot Act, to any issue that may cross his desk, is a very significant role for any lawyer to play."

---- Index References ----

Company: FORD MOTOR CO

News Subject: (Campaigns & Elections (1CA25); Civil Rights Law (1CI34); Government (1GO80); Legal (1LE33); Legislation (1LE97); U.S. Congressional Campaigns (1US07); U.S. Legislation (1US12))

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October 16, 2005

Section: A

Miers fights to win, friends say
The Supreme Court nominee is described as more than just an admirer of President Bush.

The Associated Press

WASHINGTON For all that talk about Harriet Miers' being a paper-pushing idolizer of the president, acquaintances say there is another side to her.

The Supreme Court nominee is a tough, ambitious lawyer who willingly used her spurs in cowboy country, a competitor who clawed her way to Texas' legal pinnacle and a behind-the-scenes player who held her own and then some in the White House's West Wing, they say.

Observations, testimonials and tidbits from friends and former colleagues have put Miers' life in sharper focus and shaped the debate over whether the 60-year-old White House counsel can survive the conservative maelstrom over her nomination.

The Dallas City Council was her lone elective office. That run paled in comparison with hard-nosed campaigns for president of the Dallas Bar Association and the State Bar of Texas, which required strong political skills. Miers was the first female president of both groups.

"Law firms are pretty cutthroat," said Lorelee Bartos, Miers' campaign manager for the council race in 1989.

Miers, one of 12 women in her Southern Methodist University Law School class, has a track record of surmounting challenges and stiff opposition. She was the first woman hired by her Dallas law firm, in 1972, and the first female president of Locke, Purnell, Rain & Harrell.

"You don't get to be those things without having that fortitude in you," Bartos said.

Miers developed a reputation as a meticulous, persistent inquisitor and worked for clients such as Microsoft Corp. and Walt Disney Co. Some critics have complained about a singular focus on dotting I's and crossing T's at the expense of the big picture.

Miers' friendship with Bush, whom she met in the 1990s, led to a professional relationship marked by unwavering loyalty since Bush was Texas governor.

When the newly elected president needed a White House staff secretary in 2001, he turned to the person he had relied upon as a candidate to research any weaknesses that could be exploited by his opponents. She later served as deputy chief of staff for policy and now, counsel.

“You need to be tough and smart and articulate and prepared. She’s all those things,” Brett M. Kavanaugh, an assistant to the president and staff secretary, said in a telephone interview. In White House meetings, Miers “always gets to the heart of the matter,” said Kavanaugh, a former associate counsel.

She was in charge of the White House selection of a chief justice nominee, vetting candidates’ records and often playing the tough questioner.

“We’d be talking about somebody’s background,” said Leonard Leo, now on leave as executive vice president of the Federalist Society, the conservative group whose headlined speakers have included Supreme Court justices and Bush administration official.

“There would be a moment of silence when she was clearly thinking about what was being said and then she would challenge it, asking, ‘But what specifically in those opinions strongly suggests that this is someone who ascribes to judicial restraint?’” Leo said.

Recently released birthday greetings and well-wishes between Bush and Miers sound like the adult equivalent of high-school mash notes.

“Dear Governor GWB, You are the best Governor ever deserving of great respect!” Miers wrote in 1997.

A regular at Camp David and the president’s Texas ranch, she wrote of her hope that Bush twins Jenna and Barbara would recognize that their parents are “cool.”

Such gushing language shows another side of Miers, who lists her favorite movie as “The Sound of Music” and would prefer ice cream for her last meal. She also is known as a self-effacing, intensely private person who rarely talks about herself and would cringe at the dissection of her life and career.

Conservative columnists are clamoring for Miers to withdraw her nomination, citing her lack of a judicial record.

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Company: MICROSOFT CORP (NORTH CAROLINA); WHITE HOUSE; MICROSOFT CORP (SEATTLE); DC HOLDCO INC; MICROSOFT CORP (TEXAS); WIHLBORGS FASTIGHETER AB NEW; MICROSOFT CORP; WALT DISNEY CO; WALT DISNEY CO (THE); DISNEY (WALT) CO (THE)

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October 15, 2005

High court nominee is tough, ambitious lawyer who has been trusted adviser to Bush

By DONNA CASSATA

Associated Press Writer

WASHINGTON For all that talk about Harriet Miers' being a paper-pushing idolizer of President George W. Bush, acquaintances say there is another side to her.

The Supreme Court nominee is a tough, ambitious lawyer who willingly used her spurs in cowboy country, a competitor who clawed her way to Texas' legal pinnacle and a behind-the-scenes player who held her own and then some in the White House, they say.

Observations and testimonials from friends and former colleagues have put Miers' life in sharper focus, shaping the debate over whether the 60-year-old White House counsel can survive the conservative maelstrom over her nomination.

The Dallas City Council was her lone elective office. That run, however, paled in comparison with hard-nosed campaigns for president of the Dallas Bar Association and the State Bar of Texas. Miers was the first female president of both groups.

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"You don't get to be those things without having that fortitude in you," Bartos said.

Miers developed a reputation as a meticulous inquisitor and worked for clients such as Microsoft Corp. and Walt Disney Co. Some critics have complained about a singular focus at the expense of the big picture.

Her acquaintance with Bush, whom she met in the 1990s, led to a professional relationship marked by unwavering loyalty since Bush was Texas governor.

Bush chose her as White House staff secretary in 2001 and she later served as deputy chief of staff for policy and now, counsel.

"You need to be tough and smart and articulate and prepared," said Brett M. Kavanaugh, an assistant to the president and staff secretary. "She's all those things," Kavanaugh said of Miers, who "always gets to the heart of the matter" in White House meetings.

Miers was in charge of the White House selection of a chief justice nominee, vetting candidates' records and often playing the tough questioner.

Conservative columnists are clamoring for Miers to withdraw her nomination, citing her lack of judicial record. Internet blogs are cattily complaining about her hair style and use of black eyeliner.

For all of the unanswered questions about Miers, her devotion to Bush has never been in doubt.

In "Ask the White House" online chats, Miers was the loyal soldier, never deviating from the administration line. Her 1984 red Mercedes with aging campaign bumper stickers is a mainstay in the White House parking lot a reminder of the long hours she puts in for her boss.

In recently released birthday greetings and well-wishes between Bush and Miers, she describes Bush as "the best Governor ever" and a "cool" parent.

Such gushing language shows another side of Miers, who lists her favorite movie as "The Sound of Music" and would prefer ice cream for her last meal.

Miers realized a long time ago that she would never be a beauty queen. In a speech in May, she recalled that like other little girls, she used to watch beauty pageants when she was growing up and imagine someday traversing a runway draped in an ermine robe.

"As they say in Washington, that was a stretch," Miers said. Her aspirations later focused on medicine, then the law.

The legal profession became her life. She never married, and frequently travels from Washington to Dallas to be with her ailing mother, Sally, 91. Like the president, she has a brother named Jeb one of three brothers. A sister, Catherine, died in 2003.

Miers converted from Roman Catholic and occasional worshipper at Episcopal and Presbyterian services to an evangelical. At age 34, she was baptized by full immersion, consistent with the church's teachings.

Looking to assuage conservatives, White House officials have cited her conservative religious beliefs while arguing that she would not let them influence her judicial opinions. Texas Supreme Court Judge Nathan Hecht, a friend, has said Miers opposes abortion but doesn't condemn gay relationships.

---- Index References ----

Company: MICROSOFT CORP; DISNEY (WALT) CO

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October 13, 2005

Section: A Section

For Miers, Proximity Meant Power; Longtime Bush Confidante Became Gatekeeper of Access to the President

Amy Goldstein

Peter Baker

In the days last November after he was elected to a second term, President Bush had chosen Alberto R. Gonzales as his next attorney general, and word was spreading that the president might replace him as White House counsel with longtime confidante Harriet Miers. A small number of advisers inside and outside the White House grumbled that she was ill-suited to become top lawyer to the president.

As a deputy chief of staff, these detractors quietly warned, Miers could be slow to make decisions, with a penchant for detail over strategic thinking. "People came to me with concerns," recalls Leonard A. Leo, executive vice president of the conservative Federalist Society, who said he heard complaints "that her management style was one that could miss the forest for the trees." Leo, who favored a friend for the job, confirmed that he forwarded the concerns about Miers when consulted by the White House.

Bush appointed Miers as his counsel nonetheless, and 11 months later nominated her to fill a pivotal vacancy on the Supreme Court created by the retirement of Justice Sandra Day O'Connor. Having now seen Miers at work, Leo said, "whatever concerns I may have harbored . . . have since evaporated" and he supports her nomination.

Still, the internal worries about how she would perform as counsel reflect a widespread view that, during five years in three jobs at the president's side, Miers has wielded formidable power with fairness and attention to detail -- but rarely was a strong voice in policy decisions the administration has faced.

"The thing about Harriet is, it wasn't about Harriet," said Education Secretary Margaret Spellings, a friend. "To her, it was a matter of moving the grist through the mill. . . . She was a manager of the process."

Unlike some high-level presidential aides, Miers has never sought to advance her own views. Amid the clash of ideas and egos in the West Wing, colleagues say, she has been an island of reserve and decorum. "She blushes when the rest of us got a little raunchy," said Spellings, who worked with her closely as Bush's domestic policy adviser.

At staff meetings, Miers spoke up only when she considered it essential. "There were plenty of us banging around with very strong views on issues, and she understood she was wearing the striped shirt," said Indiana Gov. Mitchell E. Daniels

Jr. (R), who was Bush's first budget director. "A word from Harriet would calm everybody down. She did have that schoolmarm voice."

Her demure exterior, however, cloaks a tough will and an uncommonly close relationship with Bush. In the Oval Office and on the road, Miers has spent more time with him than perhaps any aide except Chief of Staff Andrew H. Card Jr. On Sept. 11, 2001, she was flying on Air Force One as it sped the president to the Midwest and back after the terrorist attacks.

In June 2003, when Bush stood on the deck of the USS Abraham Lincoln to declare that "major combat operations" had ended in Iraq, Miers was part of a nucleus of aides who stayed overnight with him on the aircraft carrier. She is with him often at his ranch in Crawford, Tex., and is a regular weekend visitor to the presidential retreat at Camp David.

Such proximity to Bush makes her unlike any Supreme Court nominee of the past generation. Not since 1965, when Lyndon B. Johnson nominated his personal lawyer and trusted adviser, Abe Fortas, has a president chosen someone with whom he is on such close terms.

Miers's atypical profile -- she is the first Supreme Court nominee in three decades who has not been a judge -- has given ammunition to supporters and detractors alike. Critics suggest she lacks gravitas and constitutional expertise and has not shown herself a sufficiently deep thinker to decide the nation's most profound legal questions. Others portray her as fair, diligent and a quick study who would import real-life experience to the court.

"She was always pleasant, always polite, always being tough as the paper kept moving," said former White House press secretary Ari Fleischer. "Is that a skill you need to be a Supreme Court justice? No, I don't think so. But it's a reflection of, when she has a mission, she knows how to accomplish it."

As a corporate lawyer in Dallas, Miers had been Bush's personal lawyer and worked as counsel to his campaigns for governor and president. Still, when she was invited to move to Washington, "it was certainly a challenging decision," said her sister-in-law, Elizabeth Lang-Miers, a Dallas judge. "She had so much respect for the president, but leaving Dallas, her home and her career was kind of a difficult decision."

Fleischer recalled that Miers had hoped she would become White House counsel from the outset. Instead, she was offered the job of staff secretary to the president. It is, Daniels said, "a thankless job. . . . Always a flak-catching job."

As staff secretary, Miers was the last person to handle every piece of paper that went to Bush, and, with scores of employees, it was her task to make sure each document was accurate and ready for the president's eyes. The papers ranged from correspondence to bills Bush was signing into law to memos synthesizing policy recommendations from White House and agency staff. Early every evening, she delivered to the president's residence in the East Wing a binder consisting of his schedule for the following day and tabbed sections that contained background material on the people and issues he would face. Fleischer called it "a perfectionist's job."

"You would have a particular phrase [in a memo] or a particular addition, and she would call you and explore at great length what that meant," said John Bridgeland, former director of the White House domestic policy council and the USA Freedom Corps.

"You had to meet her standards, which are very, very high standards, to get documents in to the president," said one former administration official who agreed to speak of a former colleague only on the condition of anonymity. "I would be fibbing if I didn't say at times that was frustrating."

In 2001, Bush's first year in office, Miers rejected the text of the White House Christmas card and ordered a new version because, the White House said, she did not think it was written well enough.

Miers played the quiet arbitrator. David W. Hobbs, the former White House director of legislative affairs, said he got calls from Miers "at 10 or 11 at night that [presidential counselor] Karl [Rove] or another White House staffer wanted the president to do something, but she wanted to check and make sure I was aware of it and didn't think it was going to cause damage on the legislative front."

Her work habits were legendary. Almost every Sunday, Miers went to the office after church, said Spellings, who says she cannot recall ever being at the White House when Miers was not there -- unless she was traveling with Bush. "She'd always read memos through again," said Kristen Silverberg, a former domestic policy adviser who is now an assistant secretary of state. "She'd be at the building till late at night reading everything to make sure everything was perfect."

Sen. Kay Bailey Hutchison (R-Tex.), a friend from Texas, said Miers's life outside work is "not much. She works all the time." Occasionally, they have attended a ballet or opera, Hutchison said, adding, "I tried to get together with her several times, but she ended up having to cancel."

Many colleagues admired Miers's zealous work ethic, and her skill at balancing competing interests within the administration. "She was an impeccably honest broker and accurate conveyor of information to the president with no spin or distortion," said budget director Joshua B. Bolten, who was Bush's first deputy chief of staff for policy.

Others held a less charitable view. Some colleagues "really felt she was the place where the action stopped and the hand-wringing began," said a former administration official who spoke on the condition of anonymity.

By July 2003, when Miers succeeded Bolten as deputy chief of staff, the dominant policy issue before the White House was a drive to push through Congress a new prescription drug benefit for elderly patients on Medicare. Thomas A. Scully, who was running the Medicare program, remembers Miers at all the meetings at which Bush was briefed. She impressed Scully as smart, but he said, "She had a very limited ego and was the ultimate Bush staff person. . . . I remember her at one point saying, I'm not a health care expert, so I'm not going to question."

"She can either dial it way down or way up as the situation calls for," said Spellings, who added that when her friend asserts herself, she does so "with the utmost intelligence."

Still, the deputy chief's job plunged her into a range of issues, some of which would become themes of Bush's reelection campaign. They included immigration policy, the space program, health information technology, Social Security, and a sequel to the No Child Left Behind law that would affect high schools. Last fall, as the country faced a shortage of flu vaccine, Miers immersed herself in the administration's eventual decision to import supplies from Germany. "I remember Harriet wanting to understand every nook and cranny of how vaccines are manufactured, how the approval process works," Spellings said.

Last February, she moved into the counsel's office. She has, said the current staff secretary, Brett M. Kavanaugh, handled constitutional-level matters, including issues involving executive privilege, the review of the USA Patriot Act and the National Security Council.

Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) said he intends to question Miers more closely but that he believes "her experiences with the president on the issues which have come to her as White House counsel are germane" to the court. Specter said that, in his interactions -- including on the nominations of John G. Roberts Jr. to be chief justice and herself -- Miers has struck him as responsive, intelligent and a strategic thinker. "A real professional," he said.

Already, Specter has had a firsthand glimpse of her work style. On Tuesday, he said, he asked her when she could complete a preliminary background questionnaire. "Some people take forever. Not Harriet Miers," he said. She told him she would return it within three days.

Harriet Miers, who got her start in the administration as the president's staff secretary, was known for her thoroughness in vetting papers for his review.

---- Index References ----

Company: EDUCATION ENRICHMENT RESOURCES; EDUCATION DEVELOPMENT INTERNATIONAL PLC; EDUCATION SYSTEMS CORP; EDUCATION CONNECTION SERVICES LLC; EDUCATION MANAGEMENT LLC

News Subject: (Legal (1LE33); Top World News (1WO62); Government (1GO80); Legislation (1LE97); Judicial (1JU36); U.S. Legislation (1US12))

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DOWN TO THE LAST DETAIL

Legal Times

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Body

National

BUSH'S PICK FOR WHITE HOUSE COUNSEL SPORTS AN EXACTING STYLE

In an administration that makes a virtue -- for its staffers, at least -- of anonymity and self-effacement, Harriet Miers could well be considered a saint.

Miers, 59, tapped to replace Attorney General-designate Alberto Gonzales as White House counsel, has long been one of the most discreet, most private, and most protective members of George W. Bush's inner circle.

Now Miers, the White House deputy chief of staff, is poised to become one of its most prominent as well.

The first female president of the State Bar of Texas and a Dallas native, Miers has known Bush since 1993, when she became counsel to his successful gubernatorial campaign. In 2001, she moved to Washington with the newly elected president. She has worked here -- as White House staff secretary and now deputy chief -- ever since.

She has also earned a reputation as exacting, detail-oriented, and meticulous -- to a fault, her critics say.

She can't separate the forest from the trees, says one former White House staffer.

But Miers' supporters say her emphasis on detail and procedure are exactly what the Office of the White House Counsel requires.

She is very thorough and very hard-working and very conscientious and very careful, which is why she was a good choice for staff secretary and why she's a good choice as counsel, notes Brett Kavanaugh, a former White House associate counsel who replaced Miers as staff secretary in the summer of 2003.

White House spokesman Allen Abney says Miers will not be granting interviews until she begins her new job.

Of course, there is no inherent contradiction in being able to provide the big-picture advice, both legal and political, usually required of a White House counsel and possessing a rigorous attention to detail.

And Miers clearly enjoys the most important prerequisite for any successful White House counsel: the absolute confidence of her client.

DOWN TO THE LAST DETAIL

Harriet Miers is a trusted adviser, on whom I have long relied for straightforward advice, Bush said in a statement released on Nov. 17, the day he announced his intention to appoint Miers to the counsel post.

They are very close professionally, adds Kavanaugh, who has been nominated for a seat on the U.S. Court of Appeals for the D.C. Circuit. Personally, the president has great confidence in her judgment, experience, and care.

PUSHING THE PROCESS

Yet it's not at all clear how Miers will fare in a job that includes a substantial amount of policy work. As staff secretary, she held the critical and demanding job of vetting every piece of paper that landed on Bush's desk or ended up in his nightly briefing book.

By all accounts, Miers' thoroughness and her reputation as an honest broker, eager to allow all viewpoints to be heard, stood her in good stead as staff secretary.

People understand winning or losing. What they don't understand is that they didn't have a fair hearing, Miers said in a 2003 interview with a sister publication of

She did raise some eyebrows early in Bush's first term by arguing against eliminating the American Bar Association's 50-year-old role of vetting potential federal judiciary nominations, a move led by Gonzales. (The ABA was removed from the vetting process in March 2001.)

She drilled down on everything so it was perfect, on every single thing, says one former associate White House counsel.

Yet her tenure in the Office of the Chief of Staff, where she is a top domestic policy adviser, has been more problematic. She had to fill the shoes of Joshua Bolten, a former Senate trade counsel and Goldman Sachs executive in London. Bolten, who left to become head of the Office of Management and Budget, had been steeped in policy arcana for years.

I would take clients in to see Josh, says one Washington lobbyist. But nobody in my world knew who Harriet was. They would see [Assistant to the President for Domestic Policy Margaret] Spellings and [Assistant to the President for Economic Policy Steven] Friedman instead.

Her critics say the problem goes beyond what Miers does or doesn't know about policy -- and right back to a near-obsession with detail and process.

There's a stalemate there, says one person familiar with the chief of staff's office. The process can't move forward because you have to get every conceivable piece of background before you can move onto the next level. People are talking about a focus on process that is so intense it gets in the way of substance.

One former White House official familiar with both the counsel's office and Miers is more blunt.

She failed in Card's office for two reasons, the official says. First, because she can't make a decision, and second, because she can't delegate, she can't let anything go. And having failed for those two reasons, they move her to be the counsel for the president, which requires exactly those two talents.

Responds White House Deputy Counsel David Leitch: She certainly delegates. She couldn't possibly dream of doing any of these jobs, this job or the job she has now, without delegating.

WALKING IN FOOTSTEPS

There is no precise job description for the White House counsel. As the president's lawyer, the counsel's responsibilities can be narrowly construed -- checking for legal problems on any White House policy, speech, or proclamation -- or broadened to include substantive policy guidance.

DOWN TO THE LAST DETAIL

Since Watergate, the office has also taken a major role in making sure ethics rules are followed and financial disclosure forms properly completed.

The job, says former White House Counsel A.B. Culvahouse, ranges from vetting a declaration that this is National Dairy Goat Week to whether there's a policy on allowing the use of the White House or Old [Executive Office Building] for meetings by outside groups, and if it is permissible, whether it's something you'd discourage.

There were also frequent clashes with the speechwriters, recalls Culvahouse, who was President Ronald Reagan's counsel from 1987 to 1989 and is now chairman of O'Melveny & Myers.

They always wanted to say something provocative and interesting and press-worthy. The counsel's office would modulate it to be less provocative.

However the job is handled, though, it is tough to remain out of the spotlight for long.

The office is now the principal vetter for judicial nominations, always a highly charged area and one that, in the next four years, will almost certainly have to approve a Supreme Court nominee or two.

Ari Fleischer, the White House press secretary during Bush's first two years, says he occasionally found it useful to let Gonzales speak for the administration.

Whenever I needed Al to go out and talk, he would. He'd make phone calls, Fleischer recalls. He wasn't a publicity hound, but he understood the role of the press.

There are major public reverberations to the most private, sensitive internal deliberations. That means Harriet will need to think about the public hat that she wears even though her strengths lie in the private-advice category, says Fleischer, who now runs his own consulting shop.

He adds, I think she'll be up to the challenge because she's very smart.

That view is echoed in Dallas, where she first started practicing law in 1972.

In my view, she's a lawyer's lawyer [who] grasps facts very quickly, in terms of sizing up a situation, says James Francis, who was chairman of Bush's 1994 gubernatorial campaign and suggested that Miers become campaign counsel.

She doesn't make careless mistakes and doesn't tolerate careless mistakes in others, adds Francis, who runs his own investment company.

At her new job, Miers won't be working alone. The counsel's office, which in the Bush administration has operated with fewer than a dozen associate counsel, will always draw on the much larger resources of the Department of Justice and its Office of Legal Counsel and Office of Legal Policy.

More important, the man Miers is replacing, Alberto Gonzales, will be right down the street, a big change from the situation of most White House counsel, whose predecessors disappear into the private sector.

That could heighten the already ambiguous relationship between the Justice Department and the White House over which one takes the lead on various matters, including judicial selection.

If you know you have Gonzales at Justice, does it matter who you have in the White House counsel's office? muses the Washington lobbyist.

That's particularly true when it comes to judge picking.

Right now, the White House counsel and the White House generally control a large part of the judicial selection process, explains John Yoo, a former deputy assistant attorney general in the Office of Legal Policy during the first Bush term. But there's no natural reason that has to be the case, says Yoo, who teaches at the University of

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California at Berkeley School of Law. Over time, the lead of picking justices has been in different places. Much of the function the White House counsel currently performs has been in the DOJ.

Still, there will always be issues that lead directly back to the counsel's office, no matter how many other agencies were involved in making a particular decision -- issues like those involving the legal conduct of U.S. soldiers.

Gonzales, for example, was vilified over his Jan. 25, 2002, memorandum that provided a legal basis for not applying the Geneva Conventions to Taliban prisoners captured by the United States in Afghanistan.

It was the counsel's office that had to provide a constitutional argument supporting Vice President Dick Cheney's right to keep details of his National Energy Policy Development Group secret, and prevent General Accounting Office chief David Walker from reviewing its internal deliberations.

To litigate that took some guts and some judgment [as to] why the stakes in the litigation are worth the risks politically, says the former White House staffer.

Ditto for the White House decision not to go ahead and launch an internal investigation into whether the White House had provided special favors for the collapsed energy giant Enron Corp.

The conventional wisdom was to investigate, says the former staffer. But Gonzales opted for a more-passive approach -- that we not investigate ourselves -- and that turned out to be the right decision, contrary to a lot of the advice he was getting.

Until Gonzales actually assumes his new job, and Miers replaces him, it is impossible to know how the two will share their overlapping responsibilities. And it is far from clear which members of the counsel's office will move with Gonzales, who will stay, and who will move into the private sector.

According to the former White House official familiar with both Miers and the counsel's office, Miers has already begun meeting privately with the current associate counsel. The former official was told by one associate counsel who had met with Miers that the conversation was both awkward and uncertain.

STAR-SPANGLED RESUME

Miers comes to the counsel's job with an impressive resume and a number of firsts.

Born in 1945, she grew up in Dallas and, until moving to Washington with Bush, spent almost her entire life there.

She went to Southern Methodist University for both her undergraduate degree (in mathematics) and her J.D. She spent one summer working for plaintiffs lawyer Melvin Belli in San Francisco.

After law school, Miers clerked for U.S. District Judge Joe Estes (also in Dallas). In 1972, she became the first woman hired by Locke Purnell Boren Laney & Neely, a venerable Dallas firm that traces its roots back to the 1890s.

She became president of the Dallas Bar Association in 1985, and in 1989 was elected to a two-year term as an at-large candidate on the Dallas City Council.

After Bush was elected governor, she represented him in a title dispute over his East Texas fishing house. In 1995, Bush appointed Miers to a six-year term on the Texas Lottery Commission when it was mired in scandal. She was a driving force behind its cleanup.

Miers was elected president of Locke Purnell in 1996, by then a 225-lawyer firm. Three years later, it merged, and she became co-manager of Locke Liddell & Sapp.

Miers, president of the State Bar of Texas from 1992 to 1993, played an active role in the American Bar Association. She was one of two candidates for the No. 2 position at the ABA, chair of the House of Delegates, before withdrawing her candidacy to move to Washington.

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A commercial litigator, Miers represented such clients as the Microsoft Corp., the Walt Disney Co., and the Republic National Bank.

In 1996, at an Anti-Defamation League Jurisprudence Award ceremony, Bush introduced Miers as a pit bull in Size 6 shoes, a tag line that has persisted through the years, in part because colorful anecdotes or descriptions about Miers are notoriously difficult to find.

She's not a back-slapper. She's very businesslike, says Texas Supreme Court Justice Nathan Hecht, who has dated Miers over the years and has known her since he first became a lawyer at Locke Purnell in 1975.

She's also very kind. She always remembers everybody's birthday, and has a present for them. She'll be finding a present for somebody in the middle of the night, he says. Can't it wait until next week? No, she'd say, It has to be done now.

Miers, who turns 60 in August, is single, a devout churchgoer, and very close to her family: two brothers and her mother in Dallas and a third brother in Houston.

Even people who know her well note that she is extremely private, good at eliciting opinions from others, but not generally revealing of her own.

And she seems genuinely honored to work in the White House, they add. In her 2003 interview with she talked about her job of taking the nightly briefing book to the president.

Sometimes when we are carting it over there, we think, My goodness, Miers said.

Thomas Connop worked closely with Miers at Locke Liddell from 1986 until 2001.

There are a lot of colorful characters in the Texas legal market, and I could probably come up with lots of stories about other folks, flattering and unflattering, says Connop, a Locke Liddell partner.

Harriet is a hard worker, personable, a client-oriented attorney who is extremely thorough and not flamboyant. And I don't think I'd be hurting her feelings by saying that.

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Sheldon Goldman^a Elliot Slotnick^b Gerard Gryski^c Gary Zuk Sara Schiavoni^d

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W. BUSH REMAKING THE JUDICIARY: LIKE FATHER LIKE SON?

George W. Bush's judicial appointees so far are comparable to his father's. Even more so than his father's, his administration is clearly coordinated and is expending the resources to place on the bench those who share the President's judicial philosophy.

WESTLAW LAWPRAC INDEX**JUD -- Judicial Management, Process & Selection**

Turbulent is as good a description as any of American political life over the last decade. Turbulence was certainly at the forefront of the birth of the George W. Bush presidency in the context of a popular vote loss and a contested electoral college victory facilitated by an unprecedented and controversial Supreme Court decision. The first two years of the Bush presidency were marked by political turbulence over his bold and divisive domestic policy initiatives and the virtually even split in party control of the United States Senate. With the defection of Vermont Senator Jim Jeffords from the Republican Party, control of *283 the Senate shifted from the Republicans to the Democrats barely five months after Bush's inauguration. And then the horrific events of September 11, 2001, thrust the country into a war against terrorism both at home and abroad.

Within the context of these momentous events, the administration of George W. Bush nominated judges to the lower federal courts. Some of the nominations themselves added to the political turbulence. This article explores the first two years of the Bush administration's efforts to staff the federal bench, the politics of confirmation in the United States Senate, and the demographic and attribute profile of the Bush nominees who were confirmed to lifetime positions to lower courts of general jurisdiction *284 by the 107th Congress.

Like previous articles in this series, which began a quarter of a century ago with the Carter administration, reliance is placed on interviews with key participants in and observers of the nomination and confirmation processes as well as data drawn from the questionnaires submitted by the nominees to the Senate Judiciary Committee. In addition, data were collected from the newspapers of nominees' home states, registrars of voters or boards of election, standard biographical sources,² and in some instances directly from the Bush appointees themselves.

The selection process

Any assessment of the processes used for selecting judges during the first two years of the Bush presidency must start with the recognition that staffing the judiciary was a central component of the President's domestic policy agenda. As stated by Assistant Attorney General Viet Dinh:

The legal legacy that the president leaves [is as] important as anything else we do in terms of legislative policy. ... We want to ensure that the highest quality judges, the highest quality intellects, men and women with the highest integrity, populate the federal bench. And let's be clear about it, we want to ensure that the President's mandate to us that the men and women who are nominated by him to be on the bench have his vision of the proper role of the judiciary. That is, a judiciary that will follow the law, not make the law, a judiciary that will interpret the Constitution, not legislate from the bench.³

Associate White House Counsel Brett Kavanaugh added that the President is very interested in this and thinks it is one of his most important responsibilities on the domestic side. Obviously, he has a lot of things going on, but he has devoted more attention to the issue of judges than any other president.⁴

Such a characterization stands, for some, in sharp contrast to the place of judicial selection in the presidential priorities of the Clinton White House where, according to Nan Aron, Executive President of the Alliance for Justice, the administration could be accused of “not making judgeships a priority. ... “⁵ In the Bush administration, however, “it was very clear from the outset that judges were going to be such a visible part of the President's program. Judgeships were both symbolically and actually symbols of presidential power.”

For its part, of course, the Bush administration would characterize its judicial vision in terms of the way in which nominees view the scope of judicial power and not through an orientation towards reaching particular results. Indeed, as Viet Dinh noted,

We are extremely clear in following the President's mandate that we should not, and do not, and can not employ any litmus test on any one particular issue, because in doing so we would be guilty of politicizing the judiciary and that is as detrimental as if we were unable to identify men and women who would follow the law rather than legislate from the bench.

Structurally, at the most basic level, the processes used by the Bush administration for designating judicial nominees are not dramatically different than recent presidencies in their reliance upon senior personnel from the White House, primarily the Office of the White House Counsel, where both Alberto Gonzalez, White House Counsel, and Brett Kavanaugh, Associate White House Counsel, are deeply involved in judicial selection matters, and the Department of Justice, primarily through the Office of Legal Policy (OLP), a division headed during the period covered by this article by Assistant Attorney General Viet Dinh. The OLP replaced the Office of Policy Development (OPD) from the Clinton and Bush Sr. years, a change that has been seen as symbolically significant by some.

The Office of Legal Policy was the name given to the new Justice Department division created by the Reagan administration. By returning to the original name of the office, this perhaps signalled that this President Bush's judicial selection behavior would be more like that of President Reagan, known for his aggressive pursuit of a conservative agenda through judicial appointments, than that of his two successors. C. Boyden Gray, who served as the White House Counsel during the first Bush's tenure, did not see any such motivation in the change, noting that “Every Justice Department is slightly different. I think it's just a question of personal style.”⁶ Viet Dinh opined that the change underscored that it was important to us to get back to the history of the establishment of the office. The day I was sworn into office, the Attorney General signed the order renaming the office, the Office of Legal Policy. That's the name [that] ... reflects the fact that what we do is not simply development policy, but also evaluating, implementing and generating policy.

At the heart of the Bush administration's judicial selection processes is the Judicial Selection Committee, a joint enterprise between White House personnel and OLP, chaired by Alberto Gonzalez. In our interviews with Viet Dinh and Brett Kavanaugh, we attempted to ascertain *285 the precise membership of this group but, beyond confirming their own participation and that of Gonzalez, we were unable to identify the other participants. This stance was taken,

Dinh explained, “in order to preserve the deliberative process for the President. But suffice it to say that the primary participants are from the White House Counsel's Office and the Department of Justice comprising both this office and the Attorney General when appropriate.” Kavanaugh explained that not identifying names was “part of a larger principle that we don't usually discuss who is involved in the deliberative process and who is making what recommendations to the President.” However, their counterparts in the Reagan, Bush Sr., and Clinton administrations were more forthcoming in this matter and helped to flesh out the historical record by indicating committee participants.

When we noted that our research during the Clinton administration revealed that representatives from the First Lady's office, the Vice-President's office, legislative affairs, and the President's Chief of Staff, among others, were present at meetings of the Judicial Selection Committee during the Clinton years, Dinh added that “the people who would have an interest in this process are represented” but did not offer further elaboration.

The Judicial Selection Committee, according to Kavanaugh, “gets together and discusses just where we stand on both the nominations side and the confirmation side.” At the outset of the selection process, the Committee oversees the development of names to take to the President for his initial approval, what Dinh labeled “the presidential check-off.” Characterizing the level of presidential involvement at this relatively early stage of judicial selection, Dinh noted “I do know that he has [exercised] direct, personal and specific decision-making authority on each and every candidate. So when I say it is a presidential check-off, I mean it is [literally] a presidential check-off.” As in past administrations, the names of potential district court nominees are initially submitted, according to Dinh, “from the [home state] senators, or whomever the relevant player is. ...” For the circuit courts the names tend to be generated more by the administration.

Once the President approves to move forward, the Department of Justice oversees a two-pronged background investigation of the potential nominee, including an internal vetting process conducted by OLP staff as well as a field investigation conducted by the FBI, which is characterized by Dinh as “your normal background investigation for presidential personnel” but specifically targeted toward judicial nominees, going into issues of temperament and impartiality in addition to the normal background check. In describing the OLP investigation, Dinh noted that it “is quite similar, actually, to the activities of interest groups such as the American Bar Association where we contact members of the bench and bar in the affected community and do a staff vetting report.” The American Bar Association's own vetting of candidates, however, historically done prior to their nomination by the president, has been removed from the Bush selection processes, a matter that will be explored further below.

Dinh reported that the meetings of the Judicial Selection Committee are held “as necessary and once a week unless there is no business,” a luxury rarely if ever enjoyed during the first two years of the Bush administration when large numbers of nominees were processed to be sent to the Senate. All interviews of potential nominees were conducted at the White House, although both Viet Dinh and Brett Kavanaugh characterized the Judicial Selection Committee as completely collaborative in its operation, with no distinct role played by White House as distinct from Justice Department *286 participants. According to Dinh,

We do not think of ourselves as separate offices serving different functions. We do have primary responsibilities, we do have specific expertise, but when we introduce ourselves to the candidates or other people we may introduce ourselves as being from the Department of Justice or we may not. We do not think of our participation as part of the White House Counsel's Office or part of the Department of Justice. I think it is just a concerted effort to serve the President the best way we can.

Kavanaugh concurred, describing the process as “really collaborative, we work together, [and] try to be a seamless whole.”

Significantly, under Clinton the political facets of judicial selection were openly avowed to be the province of White House personnel while the more professional facets of the evaluation of candidate credentials were handled by the Justice Department. Under Bush, it appears, no such distinctions are recognized. As assessed by Dinh,

It's just a matter of we're all sitting here contributing to the decision-making process. There's not a separate Department of Justice interview and then a White House interview. There's a joint interview, with joint input, with joint assessment that is not divided between politics and qualifications.

Dinh did concede, however, that there was one important facet of the process where some distinction of function could be found:

The outreach to senators, the liaisons for senators, are done by the White House Counsel's Office, and that may be more in regard to what you mean by politics, whether it [the nomination] is going to fly or not. The White House Counsel's Office handles the contact and consultations to all home state senators, even on circuit courts, and even if the person is from the opposite party.

And it is in the performance of this consultative role that one finds the greatest divide between the characterization of the process by the administration and its supporters, and the perception of Senate Democrats and the administration's critics. Viet Dinh put it quite succinctly " We recognize *287 home state senators' prerogatives; that's why we consult." Brett Kavanaugh concurred, noting, "We consult with the home state senators on both district court and courts of appeals and run by them, before an FBI background check, names of people who are under consideration to get their reactions ahead of time, and that helps avoid problems down the road." Kavanaugh added, "We maintain consultation logs, and I think there's been extensive consultation."

Consultation does not, in any sense, convey, however, that senators have a veto power over the administration's choices, whether the senators are Democrats or Republicans. According to Kavanaugh:

Consultation doesn't mean, obviously, that the home state senator picks ... the judge, but it does mean that we consult in the sense of discussing potential names with them and hear what they have to say. If someone says ... " I wish you would pick my person," and that's an overstatement just to give you a flavor, that's different from a home state senator [saying] "Gee, that person has real problems, let me tell you about the problems." That kind of thing we take very seriously. Sometimes home state senators have specific information that may not have come to us.

Sharing this view of extensive White House consultation with home state senators was Judiciary Committee Republican Chief Counsel Makan Delrahim, a senior staff assistant serving Senator Orrin Hatch: "I don't think we have to worry about this White House. They've been just incredible, the amount of consultation they've had with the home state senators...." ⁷

As noted, however, the area of consultation is one about which there is considerable disagreement concerning the performance of the President's judicial selection team. According to Elliot Mincberg, Vice President, General Counsel and Legal and Education Director of People for the American Way, for example,

*288 What you saw was almost a complete abandonment of Clinton's efforts to put the advice back into advice and consent. Unfortunately, what we've been seeing from the president is confrontation rather than consultation and cooperation. ⁸

Marcia Kuntz, of the Alliance for Justice, linked the issue of consultation with broader concerns:

The administration's penchant for secrecy is very much evident in its conduct of the judicial selection process, both in cutting out the ABA and not circulating these names ahead of time, and in its failure to consult with the Senate before nomination. The names just don't get out there in the same way. There's no public discussion, there's no vetting outside the administration.⁹

Democratic staff members in the Senate who were involved in discussions of potential nominees in consultative processes raised similar themes. One noted:

There is no interest or evidence that there will be balance or moderation coming from the White House. They don't want a check and balance on this, they want a blank check. Their view of consultation, negotiation, building relationships, is a very narrow view. It remains a unilateralist view of how to create a relationship. There were times, fairly early in the process, where suggestions were being made, arrangements could have been made, nobody was trying to rub anybody's face in anything, where we thought accommodations on all sides could have been worked out. But there was no interest in doing that. There was a lot of the "permanent campaign" going on.

If, indeed, the fundamental approach to the nature of consultative processes has been altered from the Clinton years, and we must note that none of the parties interviewed and quoted here are disinterested, there are important consequences that can follow. A Democratic staffer observed:

The President has every right to nominate ... but all we're asking is, "Don't *289 send us the worst guys." Hatch used to call up Clinton and say, "Don't send me that guy. I don't think I can get him through." Or, "I'm not going to be able to support him." And they'd listen. Now I've had a federal judge tell me 'You know what? I give the Republicans their due. They play hardball. That's why they are going to win.' Clinton certainly didn't [play hardball]. And we don't. We believe in this institution too much. There was a check and balance ... that is pretty much going to go away. What we're going to be left with is when you can get 51 guys to vote against a judicial nominee or 41 people to filibuster a judicial nominee, that's the only time they're in trouble.

When the administration's vetting of a potential nominee, through its Judicial Selection Committee, is completed, and there is satisfaction that appropriate consultations have been held and the candidate passes muster, the name will be forwarded to the President for his signing off on the formal nomination. At this stage, according to Brett Kavanaugh, the President is very involved in the process. Obviously, you don't discuss things with a president, this president or any president, until you have everything refined and the recommendation and options tied up in a way that's appropriate for his time, particularly now since there are a number of issues on his plate, since September 11th.

Departures from status quo

There remain two areas of judicial selection processes under Bush that warrant additional exploration because they represent potentially significant departures from the status quo characterizing the approach of past administrations. First, at the outset of his administration, President Bush ended the formal role played by the American Bar Association in the rating of candidates before final decisions on nominations were made by the President. More recently, on October 30, 2002, the President offered a timetable proposal suggesting the parameters for the flow of all phases of the judicial selection process, from notification requirements suggested for sitting judges regarding their plans for stepping down from the bench through the time taken to conduct various facets of the confirmation process.

*290 From the administration's perspective, the swirl of controversy that surrounded the removal of the ABA's formal participation in the presidential stages of judicial selection could be characterized as much ado about very little. Viet Dinh noted that the administration recognized that the ABA, through the Senate Judiciary Committee and through individual senators, had a role in this process. It was very clear when I took office that Senator Leahy, then Chairman of the Senate Judiciary Committee, would not clear any person for a hearing unless and until that person had received a rating from

the ABA. So the ABA was an integral part of the Senate Judiciary Committee's consideration of the candidacy and we did everything in our power to cooperate in that process.

Towards that end, Dinh established a procedure whereby when a nomination was sent to the Senate for confirmation consideration, the name was concurrently sent to the ABA so that it could start its review processes.

Brett Kavanaugh further elaborated on the administration's position on ABA involvement in judicial selection, a position he felt was widely mischaracterized. The President felt it was unfair and unwise to give one outside group preferential access to the process, particularly when there are a number of bar associations that we hear from and the ABA had this preferred role, which seemed unwise. It was not a suggestion that the ABA shouldn't be rating judges. In fact, the President has touted on numerous occasions the fact that the ABA has rated people like Justice Owen well qualified, unanimously. So it wasn't commentary on whether it was appropriate for the ABA to rate judges. It was commentary on the fact that no one outside group should really be part of the nomination process, and it goes, in some ways, to a broader issue of presidential prerogatives and what's appropriate. It was obviously interpreted by some as a way of kicking the ABA out. And, obviously, the ABA would rather be involved in the front end rather than the confirmation side, the back end. But we felt, the President certainly felt, that the appropriate thing was for the ABA and every other group that was to rate the President's nominees to have the same shot. I think there was a sense by some Democrats at the beginning that this means that the President is going to be *291 turning to people who are not qualified because he's scared or afraid of the rating process. Nothing could be further from the truth. We welcome an examination of the qualifications of his nominees. So I think it was mischaracterized by some, as things often are when decisions are made by a president, that there was a lot of politics going on. But it was really a principled decision about what the appropriate role for the ABA was and not a decision about what kind of nominees there would be nor a decision about whether the ABA appropriately could rate the judges as other groups could.

Boyden Gray succinctly summarized the view that little has really changed. "The ABA, I think, is just as honored now as it was when I was here. The only thing is that they don't get the upfront knowledge about it, but they're full players. They're getting everything they've always had." A similar assessment was offered by Makan Delrahim from his perspective as Republican Chief Counsel of the Judiciary Committee which, when first chaired by Orrin Hatch during the Clinton years, had ended the ABA Committee's "most favored" status in the process, a change lasting until the Democrats regained control of the Senate chamber and Patrick Leahy assumed the Judiciary Committee chairmanship.

Senator Hatch looked at it as a matter of equity. Should the Hispanic Bar Association do a vetting before the Committee acts on it or the president sends it down? What about the Minority Law Students Association? Any association could provide useful advice and they should. And the ABA is just one of them. ... They've provided their service and it has been valuable.

Since the advent of the 108th Congress, with the ABA removed from the presidential facets of judicial selection, the Republicans back in control of the Senate, and Senator Orrin Hatch again chairing the Judiciary Committee, the question of what status the ABA's post-hoc ratings will play in the confirmation process looms both larger and on somewhat more tenuous footing. Indeed, as Delrahim underscored,

The ABA can do its work, but we're not going to allow the ABA to delay our consideration of judicial nominees. I mean *292 there's no constitutional reason ... to allow any outside group to delay the advice and consent process of the Senate.

Critics of the administration's posture towards the ABA see the implications of its removal from the front end of the selection process in a much more negative light, with unhappy consequences. Nan Aron, for example, argues that, one difference between now and years before is the chilling effect that excluding the ABA has had on the desire and ability of lawyers to be upfront, to share their views of the nominees. It's staggering. I remember from the '80s lawyers would call and say, "Just got word from the ABA that so and so had been nominated. You guys ought to take a look."

Now, as Marcia Kuntz added, “there is a lot of pressure on people not to be candid. Once somebody is nominated, there is an inevitability to confirmation, so why would they stick their necks out and say anything negative?”

In Aron's view, this reality is consistent with a broader administration motivation for altering the ABA's role in the process in the first place:

I am convinced, I am absolutely convinced, that the reason the administration removed the ABA, I don't care what they say, is not because they are afraid of the rating, because we all know that ratings were uniformly high. It wasn't the ratings that caused them to take them out. It was their desire for total and complete secrecy, and that's another thing that's a huge departure. It's a major change. It's shrouding the entire judicial selection process in secrecy.

The second major departure of the Bush approach to judicial selection, the nascent effort to regulate the time parameters of the process, was not unveiled until October 30, 2002, just one week before the 2002 congressional elections. The President's proposal, stemming, in part, from his view that the Senate had displayed a poor record in confirming his nominees, contained four central recommendations, collectively targeted at filling vacancies expeditiously as seats on the federal bench became open. To succeed, the President's proposal would require behavioral changes not only in the administration's own behavior, in some instances, but in the institutional behavior of the Senate and the judiciary as well:

1. Federal judges should give a year's notice of their intention to take retirement or senior status.
2. The president should nominate a replacement judge within 180 days of receiving such notice.
3. The Senate Judiciary Committee should hold hearings within 90 days of receiving a nomination.
4. The full Senate should hold a floor vote within 180 days of the initial receipt of the nomination.

Adding to its luster was the notion that the proposal was targeted at the process irrespective of the occupant of the White House. Viet Dinh emphasized this point. “I think it's a perfectly sensible plan. It operates irrespective of who is in power, either in the administration or in the Senate.” Recognizing that the plan required considerable cooperation from participants in the process outside of White House control, Dinh noted the administration's flexibility in how meeting the guidelines might be accomplished:

We would support a Senate rule change to codify this, but we would support anything short of a rule change. A Judiciary Committee rule change, a bipartisan gentlemen's agreement, Judicial Conference resolutions, whatever it is in order to get as close to the ideal that there should be an orderly process of at least giving a person a full day hearing and an up or down vote.

In a similar vein, Associate White House Counsel Brett Kavanaugh noted that “things rarely happen overnight, but he has set out a marker. The President ultimately would like to see the Senate come around to the view that it would make sense to have a standard process that applies to every judicial nominee.” In Kavanaugh's view, such a standardized process would enable the judicial selection process to emerge from the tit-for-tat obstructionism that has characterized both the Clinton and Bush administration's selection efforts. Kavanaugh added:

Have a process where people know the rules in advance, the rules of the road. We're going to have hearings; we're going to have votes. And if you think someone is out of the mainstream, it is incumbent upon you to make that case, whether you are a Republican objecting to a Clinton nominee or a Democrat objecting to a Bush nominee. And, ultimately, you have to convince your colleagues that is the case and not bottle up a nominee. That's not fair to the nominee, it's unfair to the president, it hurts the courts, [and] breaks down the whole process. It deters good people from getting involved.

While committed, in the long run, to the necessity of a Senate rule change as an ultimate goal, Kavanaugh admitted,

That takes time. A lot of times, ideas like this, you keep plugging, you keep plugging and, ultimately, it may come to fruition. And that's what we plan to do with this. The President said the goal is to have a new judge ready to take office the day the old judge retires. That's the seamless transition we're seeking. That's a process. Perfection will probably never be achieved in every case. But improving the process significantly, we think, can be achieved with these kinds of timetables.

In analyzing the President's mandate, it is important to underscore the critical “end game” of the proposed process-floor action on a nomination. According to Viet Dinh,

This process is not meant as a way to override ... prerogatives of home state senators. To the extent that we can accommodate those interests and also succeed in expeditious resolution, great! With respect to holds, a hold is nothing but an intention to filibuster. And its only force is the prerogative to filibuster on the floor. We have absolutely no intention of disturbing [the] century old tradition of Senators to filibuster on the floor. ... [T]he call for a vote on the floor within 180 days is nothing but a statement, “Hey, let's get it out in the open.” It's not necessarily a call that you have to have passed cloture within 180 days. If you want to exercise the floor prerogative of denying cloture, fine, just do it. Do it within 180 days, according to normal rules of floor debate, including filibuster, but do it out in the open.

Some skepticism about the President's proposal can be seen among the administration's supporters. Boyden Gray, for example, noted

I think they'll try and hold to it. Maybe they'll be able to. But I, myself, am a little bit skeptical of finite timetables that you *293 have to get so and so out. It's just not quite susceptible to such precision.

In addition to such practical concerns about the plan's operation, substantive criticisms of the proposal were also offered, in this instance, from the Democratic side of the Senate aisle. One aide noted that the proposal doesn't take into account when a president stacks nominations, numerous nominees at the beginning. There is no regard to how controversial they may be, how time consuming the records may be. They are just supposed to get a hearing pretty quickly.

Another Senate aide offered,

Portraying it as a situation that has gotten worse is just playing into their argument. Their argument has now gotten to the point where the President is seriously committed to the proposal that he made right before the election. “Okay, let's just take politics out of this; I'll just take all the marbles. Forget about blue slips, forget about hearings, forget about everybody. We'll just have this arbitrary time clock that says within 180 days I get an up or down vote.” A Democratic president's moderate nominees were not allowed to go forth, but now we're supposed to flip the switch.

While not opposed, in principle, to a “neutral” proposal instituted under a veil of ignorance at some future time when nobody could know the identity of the president or the partisan balance of the Senate, he continued,

We should say we will start this with the next president. This is an interesting set of concepts. Let's start it with the next set of guys so that none of us really benefit. Well, I can assure you that will never be offered.

Synthesizing the multiple concerns raised about the President's proposal Elliot Mincberg of People for the American Way asserted that, “aspirational goals may not be a bad idea to suggest in the abstract, but it's important to always consider individual circumstances.” Citing complaints that some of the earliest Bush nominees were still waiting to have their hearings, Mincberg continued:

Well, from the perspective of the administration of the courts, there is a very good reason for that. If you process nominees first in, first out, you're going to have a huge number of vacancies because if the first ones are the most controversial ones, and you take the most time to review, then the result is that the ones who are less controversial don't get reviewed. So I think it's important, frankly, from my perspective, to add some things of a more qualitative nature. I think that the more moderate, less controversial nominees should get priority in processing and they always have, and they should, because it makes perfect sense from the perspective of helping the courts do their job. And that's something that's hard to write in the rules, but is something that has to be considered. And it's a bit counterintuitive to the notion that every nominee should follow a particular schedule. It is certainly true that there is a need to try and make the process work better, but again, I think where that starts, is not with attempted timetables, but with attempts to try and lower the temperature of the process a little.

In the final analysis, Minchberg noted, there was a certain irony in the President's proposal.

It really isn't appropriate for a president on the one hand to say, at least quietly, I'm going to put a strong ideological stamp on the judiciary but, on the other hand, I want these guys processed in an assembly line process. It doesn't make sense. It's not consistent with the whole division of authority in advice and consent.

Confirmation politics

The confirmation vote on federal judgeship nominees is the final stage in a contextual process in which, historically, the drama has been played out before a nominee is actually brought to the Senate floor. Indeed, only under the rarest of circumstances, representing the worst case scenario of a breakdown in "normal" judicial confirmation processes, will a candidate be reported out of Committee and then be defeated on the Senate floor. This was the case, however, with former President Clinton's attempt to appoint Ronnie White to a district court vacancy in Missouri. In this instance a strict party-line vote resulted in White's defeat on the Senate floor. While the first two years of the Bush presidency did not witness a floor defeat for any of his nominees, two of his candidates (Priscilla Owen and Charles Pickering) received almost equally rare negative votes from the Democratic-controlled Senate Judiciary Committee, while the nominations of 28 other district and circuit court candidates expired at the end of the 107th Congress and were returned to the President without any action being taken on them by the Committee.

The context for the playing out of the confirmation process in the first two years of the Bush presidency serves as ample prelude to an understanding *294 of the Bush confirmation record. At the outset, there was the legacy of *Bush v. Gore* and a very tenuous electoral victory for the President that could not be seen, in any sense, as a rousing mandate in the judicial selection arena. There was the legacy of the acrimonious judicial selection politics of the Clinton years and what many would characterize as unprecedented mistreatment of Clinton's nominees, particularly during his second term in office.⁰ There was the reality and the irony of the lightning rod of John Ashcroft, a key participant in judicial selection battles during the Clinton years (and the central player in the aforementioned defeat of Ronnie White) now serving as the head of the Justice Department, the very part of the executive branch that would play a lead role in vetting potential judicial nominees. And, of course, there was, at first, the specter of an evenly divided Senate.

Adding to these potential problems for judicial selection inherited by the President were new ones that emerged once he was in office. First, the Democrats regained control of the Senate when Jim Jeffords left the Republican Party caucus and all legislative work came to a halt for several weeks as struggles to reorganize the body proceeded at center stage. Then the tragedy of September 11 struck and judicial selection matters vied for attention at the Judiciary Committee with pressing legislative issues of anti-terrorism and national security. The presence of anthrax in mail sent to Senator Leahy even shut down the then Judiciary Committee Chair's office. In such a setting, the politics of judicial confirmation would inevitably be problematic and, it is fair to say, the nomination behavior *296 of the administration only served to fan the flames of potential confirmation controversy in the eyes of the President's critics. The relationship between the

confirmation environment faced by President Bush and the context that preceded it was well tapped by Elliot Minberg of People for the American Way:

You kind of have to talk about the last two years in the context of the six and a half years or so that occurred before that. President Clinton, some would argue to his credit and some would argue to the detriment of various interests, really made an effort with respect to all judicial nominations from the Supreme Court down, to depolarize the issue, to genuinely put some advice back into advice and consent in terms of soliciting views from senators from both sides of the aisle. Unfortunately, the reward for that, in large measure, was not moving people along but some unprecedented stonewalling. And I think all of that really set a very bad tone, frankly, for what happened in the past two years.

That “tone” was only exacerbated, according to one Democratic Senate staff member, by the approach that the administration took coming out of the starting gate. In his view, the Bush team was very skillful in making arguments to editorial writers and others which sounded neutral and fair but would have had the result of being unfair in the historical context in which we found ourselves, in a context where they had held all nominees to the 6th Circuit for four years and all the nominees to the D.C. Circuit for four years. For them to then insist on rushing a bunch of guys through who were not as close to the center line as the Clinton nominees had been seemed, to some, to be overreaching.

More broadly, the aide added, What they're willing to do, better than any other group I know, is simply be a-historical [and say], “That was then,” or just ignore it and say, “This is now.”

This point was seconded by Marcia Kuntz of the Alliance for Justice, who asserted that nominations were made with absolutely no recognition of the obstructionism during the Clinton years. These were the Administration's choices and then to say they were held up is also completely unfair because Leahy did move people—certainly much more quickly than we would have liked.

History, of course, is a two-edged sword, and any suggestion that Democratic efforts to obstruct and delay Bush's nominees were simply “payback” for the treatment received by Clinton's nominees was rejected outright by C. Boyden Gray:

What changed two years ago was doing slowdown the first year of a president's term, and that was new. The Democrats will argue, though, that it's just tit for tat for what happened during the Clinton years. But it isn't really, because you're measuring last year versus first year and, of course, if the first year figures carry through, then the appellate nominees will really be decimated.

Conceding that slowing down confirmation processes occurs routinely when a presidential election draws near, Gray emphasized, “What has not been tradition is doing it to appellate nominees in the first two years. That was new.”

It was into this contentious environment that the President, on May 9, 2001, formally announced his first 11 judicial nominees. Associate White House Counsel Brett Kavanaugh noted of this group that they exemplified what the President was looking for. A group of nominees, in terms of their excellence, which they all shared, and their integrity, which they all shared, and support, which is huge, which they all shared. It was a diverse group, a well qualified group, a bipartisan group. It was an incredibly credentialed group.

There was no denying that the group was symbolically diverse and significantly experienced. Seven were sitting judges and four had extensive experience as advocates before the Supreme Court. Six of the 11 were women or minorities. These included Roger Gregory, Barrington Parker, and Miguel Estrada. Gregory, first nominated by Bill Clinton, had failed to gain confirmation to the Fourth Circuit Court of Appeals, ultimately being seated on that court as a recess appointment. By virtue of that appointment, he became the first African American to sit on the Fourth Circuit, yet his term would automatically expire if he were not renominated and confirmed. Parker, also an African American, was a sitting district

court judge first appointed by President Clinton. Estrada was the first Hispanic nominated to the D.C. Circuit Court of Appeals, arguably second only to the Supreme Court as the most important court in the country.

Yet several of the nominees raised red flags for many Democrats, largely because of their prominent conservative credentials which, in some instances, were paired with close associations with the Federalist Society. The purported conservatives included Estrada as well as Dennis Shedd, former aide to Strom Thurmond, Texas Supreme Court Justice Priscilla Owen, Ohio Supreme Court Justice Deborah Cook, Jeffrey Sutton, an Ohio litigator with strong “state’s rights” credentials associated with cases testing the reach of the Americans with Disabilities Act, conservative legal scholar and law professor Michael McConnell, District Court Judge Terrence Boyle, a former aide to Jesse Helms, and a nominee, John Roberts, Jr., whose nomination nine years earlier during the administration of the President’s father, George H.W. Bush, languished in the Senate and went unconfirmed.

Elliot Minberg gave the President some credit for some of the designees:

I think Bush took one very small step in a positive direction by renominating Gregory for the Fourth Circuit. That was a nominee who was supported pretty firmly by both the Republican senators who had pledged before the election to support him but, nonetheless, I think there is no question he deserves credit for that. But with that exception, and possibly Parker from the Second Circuit as well, I think it is very clear that nominations, with respect to the Courts of Appeals in particular, have been very centrally and somewhat secretly controlled at the White House level. And in a way that is very clearly designed to go one step further beyond the Reagan/Bush strategy in the '80s and early '90s to really put a very strong ideological stamp on the federal courts.

***297** Responding to a question about whether Gregory and Parker could be considered an “olive branch” from the administration, a Democratic Senate aide replied:

As far as I know, Judge Parker was President Bush’s choice from day one. Roger Gregory was included because John Warner and, to a lesser extent, George Allen, were committed to that nomination, and followed through on it. It was all done within the Republican family. It was the right thing to do.

Nan Aron of the Alliance for Justice took note that the President, had a very public press conference, invited his nominees, and proudly showed them off to the world and talked about the kind of judges he wanted. And that was a departure, certainly, from the way in which the Clinton administration picked judges. For one thing, it was very clear from the outset that judges were going to be such a visible part of the President’s program.

This bold nomination strategy was characterized by one Senate aide as, perhaps, flowing from the need to act quickly with both a slim Republican majority in the Senate and the precarious health of Senators Thurmond and Helms. Such nomination behavior could also be seen as a “payoff” of sorts to the most conservative elements of President Bush’s electoral coalition. Whatever the reason for the approach, it did not play well among Democrats. As one Democratic aide put it:

It certainly seemed to us that there was an effort at really packing the courts, at really skewing the courts and changing the balance on a number of circuits. I think their intention was to ram them through, to work very quickly to get these judges confirmed while the Republican majority held. It was heavily front-loaded and they were going to be very aggressive.

Critics of the administration’s choices, such as Nan Aron, felt that there were alternatives to the President’s approach, such as turning to some of the unconfirmed nominees of the Clinton administration, that could have gotten the confirmation process off on a better footing.

If they had really meant to put up an olive branch, they would have gone back to the circuits where there was real obstructionism. They would have put up nominees who had Republican support. Kent Marcus had support from DeWine and Voinovich. ... They've had ample opportunity to do that and, in fact, every time Carl Levin has tried to sit down with the White House to talk to them about the Sixth Circuit they've shunned him and, finally, they said, "Oh, we'll put a Democrat on the district court."

Interestingly, the administration expected that judicial selection and the initial announcement of nominees would be a catalyst for controversy. As noted by Associate White House Counsel Brett Kavanaugh:

We recognized, even then, and that was before Senator Jeffords switched parties, that there was a lot of focus on the judicial selection issue. That was clear from day one. And that two things were already clearly in play. Number one, the potential payback for frustration by some Senate Democrats over what they perceived to have happened to some of President Clinton's nominees and, second, a different vision of the judiciary, a result oriented vision of the judiciary that some interest groups have. ... [P]eople who have that view are not going to be very happy with people who don't. And that's a short answer to a much more complex issue but, in shorthand, that summarized what was going on. So we knew there was going to be controversy.

Clearly, however, it is unlikely that the administration would have predicted that two years after the President's 11 initial nominations to the courts of appeals, over one-fourth (Boyle, Estrada, Owen) would *298 remain unconfirmed.

Confirmation difficulties for these nominees as well as other prominent candidates, such as Brooks Smith (Third Circuit), Charles Pickering (Fifth Circuit), and Carolyn Kuhl (Ninth Circuit), and, in particular, the negative votes in the Judiciary Committee on Charles Pickering and Priscilla Owen which, effectively, killed their candidacies during the 107th Congress coalesced to make federal judicial selection to the lower courts an election issue of some, perhaps unprecedented magnitude in the midterm congressional elections of 2002. ² As Elliot Minberg noted, "The issue of nominations has been one for a long time that both the secular and religious right had been very concerned about, and Bush gave them everything they could have wanted."

Nan Aron amplified on this theme:

Bush's speech a couple of days before the election about judges was clearly designed to draw out the ... base of Republican voters. ... It was a demonstration of, again, the ability of the Republicans to talk about the issue of the courts in a way that will pump up, placate, a part of their base. Not all of their base, but enough of their base to draw them out to voting.

Brett Kavanaugh did not dispute the electoral implications of the issue:

It is what it is, and the President made it a campaign issue. Not THE central one but A central one. [It was] kind of astonishing in the Coleman-Mondale debate the day before the election they were talking about Judge Pickering. [During] the Senate debate in Minnesota they were talking specifics about a Mississippi Court of Appeals nominee which is somewhat extraordinary, *299 which shows, I think, how the president had made the issue national.

As to whether the President's activity altered electoral outcomes, Kavanaugh opined: there's no way for anyone to know that but, certainly, the President thought it was an issue that people should consider when they were voting for Senate candidates, and he said that in Georgia and Minnesota, Missouri, Iowa, all over the place. In Texas, certainly, before the election he talked about Justice Owen. I don't think anyone can ever determine exactly what motivated people but, certainly, the President thought it was important and should be factored into the voters' decisions.

Like most electoral issues, judicial selection may have cut both ways. Thus, as Nan Aron noted, Mary Landrieu voted against Dennis Shedd, which was something that she thought was probably pretty risky at the time. And what has

interested a lot of people is that when Bush came to her state [Louisiana] the weekend before the election, Bush did not bring up her vote on Dennis Shedd, which says to a lot of people that the Republicans could be afraid that publicizing some of these votes on some very distasteful nominees might actually be harmful.

While the Republicans would regain control of the Senate by a slim margin in the 2002 election, it is difficult to gauge, overall, what role the politics of advice and consent played in the election's national outcome. Further, during the first six months of the 108th Congress, it remains equally clear that the Republican majority has remained frustrated in its efforts to confirm some of the administration's highest priority nominees. In part, that may be explained by the actions the President took on the opening day of the legislative session of the 108th Congress on January 7, 2003, when he renominated all of the judgeship candidates *300 whose names had been returned to him, unconfirmed, at the end of the legislative session of the 107th Congress less than two months earlier. These included those of Priscilla Owen and Charles Pickering, who had been voted down in Committee. Our interviews for this article were conducted both the day before and the day after these judges were renominated and, consequently, were quite revealing in both the prognostications that were made and the reactions engendered.

The process, as described by Assistant Attorney General Viet Dinh, for deciding which nominees among those unconfirmed by the 107th Congress would be resubmitted was a fairly straightforward one:

Those nominees were sent letters requesting them to update their files and make sure that their Senate questionnaires were current. Those whose nominations went unconfirmed for more than a year and a half were asked to go through an updated FBI background check and a truncated re-interview. The requests included wording that, by design, preserves the maximum option for the president: Your nomination has been returned to us. We are now evaluating candidates to recommend to the President for renomination and we proceed on the assumption that you would like to be considered for renomination. Please call me if you have a second thought about that renomination.

Nobody, up to this point, I think I can say this without breaking confidences, has notified me that they would like not to be considered. Of course, the President's decision whether to nominate or renominate a person is his [alone].

Brett Kavanaugh stressed the underlying principle guiding the administration, "which the President made clear, that every judicial nominee deserves an up or down floor vote. And that stands for those people who were nominated in May, 2001 who still haven't gotten an up or down floor vote and those people who were nominated just a few months ago." The critical implication of this baseline principle is that there is no distinction whatsoever in the decision to renominate a Charles Pickering or a Priscilla Owen, defeated in a Judiciary Committee vote, from the decision to renominate any of the nominees whose nominations expired at the end of the 107th Congress without having received a Committee hearing or vote.

There is no logical difference between someone who never gets a Committee hearing or a Committee vote and someone who does, but gets a negative vote in Committee in our judgment. In both cases you've been prevented from getting to the floor of the Senate for your up and down Senate floor vote to which we think the Constitution entitles you and which Senate rules indicate as the final Senate action on any nominee vote. Justice Owen and Judge Pickering-their nominations were not returned to the President as they would have been had they been voted down on the floor of the Senate. It's a formality but it's indicative of a broader principle, and the broader principle is the one the President has articulated.

This position, strongly held by Kavanaugh and the administration, flows from the premise that the Senate's advice and consent role does not lie with the Judiciary Committee but, rather, with the entire chamber.

Within hours of our interview with Brett Kavanaugh, all of the failed nominations from the 107th Congress, including those of Pickering and Owen, were renominated. Makan Delrahim, Judiciary Committee Counsel, noted of the White

House, “I don't know what goes into their thinking about their nominees or how they did it, but they looked at the batch; they were qualified nominees; [and they] sent them down and, I think, did the right thing.”

Others, however, had different expectations for the President's renomination behavior and/or different reactions to it. One voice from the Democratic side of the Senate aisle predicted that Owen would be renominated, perhaps not right away, but that Pickering would not in the wake of the controversy surrounding the difficulties and ultimate removal from the majority leadership position of Trent Lott, Pickering's primary Senate sponsor.

I believe that Senate Republicans and the White House feel vindicated [by the congressional elections of 2002] and that they have received a mandate to continue down this path. ...They feel even more strongly [than in 2001] that their being strident will be more desirable to their constituencies and acceptable to the American people.

And I also believe that the outcome of this election will have very serious consequences because of the powers of the majority. ...I think it will be the most successful court packing we have ever seen. ... I begin [this year] with a great sense of foreboding and a sense that much of what the most extreme elements in the White House want to achieve will be achieved within the next two years.

With the benefit of knowing that all the nominees were resubmitted to the Senate,³ Elliot Minberg observed the following day:

I am a little surprised that it was quite so in your face. It is clear that they want to push the envelope. [The Administration's strategy is] we are going to go for the max and we realize we may not get it. But that will get us more in the end. And from a political hardball perspective, one could understand it. From the perspective of the federal courts and the future of the nominations process, I think it's not the way to run a railroad.

Indeed, as confirmation politics proceeds into the 108th Congress, it is clear that the President's approach to renomination (and new nominations) has focused attention on two procedural phenomena in the Senate that could have profound implications for the ongoing pace of advice and consent processes. Clearly, it is incumbent to include discussion of the Senate's blue slip process as well as any senator's prerogative to engage in unlimited debate, to mount a filibuster against a judicial nominee, as two mechanisms through which the President's judicial appointment goals can be seriously hampered and, in some instances, defeated.

The blue slip system is an internal Senate norm operating through the Judiciary Committee aimed at protecting the interests of home-state ***301** senators when district and appeals court vacancies are being filled by residents of their states.⁴ Under the custom of senatorial courtesy, presidents will routinely consult with home-state senators of their own party when filling such vacancies. In effect, the senatorially developed blue slip system serves to protect the interests of all home-state senators, regardless of whether or not they are from the president's party. Operationally, whenever a lower federal court nomination is received by the Judiciary Committee, blue slips are sent out by the chair soliciting comments from the two home-state senators. Historically, absent the return of the blue slip by both home-state senators, a hearing on the nominee would not be scheduled, thereby giving all home-state senators a meaningful potential to delay or obstruct a nomination while serving, at the same time, to induce the president to consult on nominations, even across party lines.

The “normal” flow of blue slip processes, as outlined above, has met with a few “wrinkles” over the course of the past three decades. First, when Senator Edward Kennedy chaired the Judiciary Committee during the Carter administration, perhaps fearful of some southern senators using their blue slip prerogative to block the appointment of progressive and/or minority judges, he announced that a blue slip hold would not be honored in instances where the Committee's judgment was to move forward with a hearing, thereby allowing the Senate to work its will. Later, when Joseph Biden chaired the Committee starting in 1987 and into the early 1990s, a variant of the Kennedy rule was instituted. It remains

unclear, however, whether the rule was ever actually put into play to hold a hearing absent a returned blue slip (blue slip logs were not public at that time though they are at present and can be found on the Justice Department's web site).

What is clear is that, during the Clinton administration, numerous nominees went without Senate hearings when the Republicans had a majority and Senator Orrin Hatch chaired the Committee. Presumably, this was because a home-state senator had withheld a blue slip or, in some instances, totally outside of the blue slip process, an “anonymous hold” had been placed on a nomination utilizing norms in the Senate regarding the scheduling of legislative matters that were never meant to have such significant and definitive reach. Through the use of the blue slip system and/or such holds, it appears that virtually any Republican senator could stall a nomination and keep it from going forward. In a similar vein, during the first half of the Bush administration, corresponding to the 107th Congress, the blue slip would now become a mechanism which the chamber controlling Democrats could honor to delay or obstruct some of the President's nominees. During this period, however, the withholding of blue slips became a public matter and anonymous holds on nominees did not appear to be standard fare. After the midterm congressional elections, with the Republicans back in the majority and Orrin Hatch returning to the Committee's center chair, the issue of what role the blue slip would play in assuring Democrats some say regarding the processing of Bush's nominees has assumed new urgency.

From the perspective of Makan Delrahim, nothing has or will change under Hatch's stewardship, which he describes as proceeding along the same lines as previous Judiciary Committee chairs. He characterizes the blue slip process as a

Senate versus President, not a Democrat/Republican issue. It was to protect ourselves from embarrassing political appointments by a president. It's a way to cut against the White House prerogative and constitutional role of appointing judges. There are not going to be any changes. We will take the home-state senators' views. They'll be given weight. They will not be dispositive if there has been consultation by the White House. So we don't anticipate any policy changes there.

Viet Dinh characterized the administration's expectations regarding the blue slip system in similar terms, also tracing Hatch's approach to historical precedent:

It continues Senator Biden's blue slip policy which basically says that if the senator had been consulted prior to nomination then the blue slip will be advisory and the views of the senator will bear weight. [On the other hand] if there had been no consultation, the blue slip will be dispositive. That's a mechanism for the Senate to enforce its own prerogatives in getting some sort of advance warning, to know that there is consultation.

As noted above, however, the Biden precedent may be less clear cut than characterized by the Senate majority and the administration, something akin to simply “advance warning” and, again, we are met by alternative takes on history. Indeed, as one Democratic staff aide predicted:

What they'll say is, nothing has changed. And what he'll attempt to do, given his room to do it, will be to totally abandon the practice he followed as Chairman when the Republican senators were exercising their blue slips against a Democratic president's nominees and will instead have seen the light and decide that it is an abhorrent practice. ... The blue slip for Democrats is not something they relish using in a negative way. Rather, it's supposed to set up a system where it is never used.

I mean the whole point of it is to encourage meaningful consultations in advance of the nomination. There are a number of Democratic senators who don't feel they received meaningful consultation in advance of the nominations over the last two years. In such instances, where meaningful consultation has not occurred in the eyes of the home state senators, and blue slip holds are not seen as dispositive by the Chair because there has been advance warning, we have reached a juncture in the confirmation process where the prospect of mounting a filibuster against such a lower court nominee becomes not only real, despite its unprecedented nature, but may even be seen by some as a necessity.

For his part, Makan Delrahim advised against resort to a filibuster on judicial nominees because it's a way to debate, it's not a way to write into the Constitution [that] a super majority *302 of the Senate needs to advise and consent on a president's nominees. If the majority of the Senate would like to [vote to confirm] it's the height of politicization to employ filibusters.

Viet Dinh also lamented the potential for utilization of a filibuster, while allowing it to serve as documentation of the degree to which advice and consent processes had deteriorated:

I've seen everything in the last two years that I did not think I would see and hoped, for our Constitution's sake, that we would never see. So, do I anticipate it? Probably not. Do I look forward to it? Absolutely not. Do I hope that it doesn't happen? Yes, simply because that would be unprecedented and it would just move us further down into the cesspool of partisan politics over nominations. Is [the] filibuster the next ground? We keep seeming to break new ground with each Congress starting with the last one. How bad can we make it? How painful can we make it for the nominees? How bad can we obstruct this process?

Regardless of how destructive a filibuster would be to the process, Dinh asserted that, nevertheless, the administration would not alter its nominating approach or behavior.

We are putting our work product on the line. We're putting the President's credibility on the line when we send a nominee up. ... We are confident that each and every single one of our candidates would make a great federal judge.

That the utilization of a filibuster was a possibility at the outset of the 108th Congress was noted by Elliot Minberg, whose position was that "all tools should be on the table in light of the kind of aggressive attitude we've seen." Tactical decisions will have to be made that "will depend on particular circumstances. I think Pickering and Owen, precisely because they were rejected already by the Senate, may be considered better candidates for that than others may be."

Nan Aron agreed, noting in the case of Owen:

I think they have to filibuster Priscilla Owen, not that they want to filibuster but simply because there are ten of them on record who voted against her. And so it seems to me not to engage in a filibuster where you have your ten Democrats opposed would, I think, lead people to believe that they don't even care that much.

An overall assessment of the administration's judicial selection success during the first two years of the Bush presidency depends, in some respects, on the eyes of the beholder. Boyden Gray highlighted a point made by all those sympathetic to the administration's selection strategy and frustrated with the fruits of two years of nomination and appointment outcomes.

The Constitution says nothing about appellate versus district, but the fact remains that the senators basically control the district nominees. So to say you've put out a lot of district court nominees doesn't really meet the issue. The issue is over appellate nominees. That's where the fights always have been, are now, and will be in the future.

Associate White House Counsel Brett Kavanaugh offered, perhaps, an even stronger indictment.

District Courts have moved along. Courts of Appeals have been completely unsatisfactory. The President used the word 'lousy,' and I'll stay with his word. The pace at the Court of Appeals level is really unsatisfactory, and the President stated so quite often. And it was. There's no other way to describe it, compared to the first two years of past administrations.

Accentuating the positive, Viet Dinh noted that the good part is that we have nominated at a record pace. ... [J]udicial nominations [should not be thought of] as something apart from and secondary to [the] policy agenda but as an integral part of it. ... And because of that strong pace, we had one hundred judges confirmed.

Dinh was quick to add, however, “We would have liked to have had even more confirmed.”

Others offered evaluations that were considerably less despondent about the administration's success rate and, correspondingly, less critical of the confirmation processes that created the record. As Elliot Minberg put it:

When you combine the fact that you had a White House that was clearly, at the appellate court level, moving in a very strong ideological direction with the fact that they were not consulting, from a procedural perspective, the result of that is that there is inevitable conflict, and that is what we saw in the last two years. And I think it is very clear, from the basis of the historical record, that the number of people processed is quite good by comparison to the six and a half years preceding it.

The beneficial consequences of confirming so many judges in the congressional session, as portrayed by one Senate aide, were that, “the vacancies numbers are down, down, down. It isn't as if the crisis were growing.” Another Senate aide, also from the Democratic side of the aisle, downplayed the rhetoric of “crisis” and, instead, attempted to highlight the palpable progress that had been made:

Those who say “oh it's a crisis, oh it's a crisis, oh it's a continuing crisis, oh the crisis is getting worse, things are deteriorating” are wrong. Because, practically, we actually made progress in the last year and a half in what should have been the worst and most adversarial setting of them all. Not only were one hundred nominations voted on and confirmed, some unanimously, some with a bunch of negative votes, but twenty judgeships were authorized in one way or another, in the DOJ authorization bill, which is more than the Republicans authorized in six years. So, portraying it as a situation that has gotten worse is just playing into their argument.

Regardless of the nomenclature utilized to describe the current advice and consent setting, it remains clear that neither side is very happy. The administration and its supporters do not feel that they are getting their fair share of judges through the confirmation maze; for its part, the Democratic opposition does not feel that it is receiving appropriate consultation from the White House nor sufficient respect, within the Senate, for long time institutional norms and traditions. Instead, they feel, crass power politics has become the name of the game.

Predicting the future of federal judicial selection and advice and consent processes is, of course, a risky business. Few, for example, would have predicted when the Bush administration first came into office that filibusters would become a part of the confirmation landscape for *303 lower federal court judgeships and, perhaps, an increasingly utilized one in the days ahead. If there is a formula for overcoming the present acrimonious atmosphere and doing “better” in this arena, according to Elliot Minberg, there needs to be, from the top, from the President on down a commitment to lowering the temperature. What it will probably take is a very strong commitment by folks who are respected by both parties to call for bilateral disarmament, if you will, rather than unilateral disarmament.

Minberg was not, however, very optimistic that such “disarming” was likely to occur in the foreseeable future. “I don't think the prognosis, for ratcheting down the controversy is very high.” In a similar vein, a Democratic staff member acknowledged that:

There are vacancies ... that have been around too long. But with no cooperation, a lot of progress was made. With a modicum of cooperation and moderation, there wouldn't be a problem. ... [But] I think, barring some unforeseen development, or real willingness to take this on by some stalwart members of the Democratic caucus, they are going to win.

At the end of the 107th Congress, when all was said and done, 83 Bush nominees to the district courts were confirmed as were 16 nominees to the appeals courts of general jurisdiction.⁵ Fifteen district court and 15 appeals court nominees were not acted upon by the 107th Congress. The statistical portrait of those confirmed follows.

District court appointees

President George W. Bush's commitment to racial and gender diversity in his administration was extended to his district court appointments. Almost one-third were nontraditional appointees, the best record of any Republican administration, and a record surpassed only by Bill Clinton and that is within one percentage point of Jimmy Carter's. Table 1 looks at the demographic and attribute profile of Bush's 26 nontraditional appointees as compared to his 57 traditional (white male) appointees. Capsule biographical sketches of some of the traditional and nontraditional appointees confirmed by the 107th Congress are found in "Recent Bush appointees," page 286.

Table 1 Proportion of nontraditional lifetime judges in active service on courts of general jurisdiction-January 1, 2001 through January 1, 2003

	2001 %	(N)	2003 %	(N)	% increase
U.S. district courts					
Women	9.9% ^{a1}	(30)	21.0% ^{a1}	(40)	7.7%
African American	0.7%	(7)	3.3%	(75)	5.6%
Hispanic	4.8%	(32)	5.3%	(35)	9.4%
Asian	0.8%	(5)	0.8%	(5)	
Native American	0.2%	(1)	0.0%		
U.S. courts of appeals					
Women	21.0% ^{a2}	(35)	21.6% ^{a2}	(36)	2.9%
African American	7.1%	##(2)	7.8%	(3)	8.3%
Hispanic	6.0%	(0)	6.0%	(0)	
Asian	0.6%	(1)	0.6%	(1)	
U.S. Supreme Court					
Women	22.2% ^{a3}	(2)	22.2% ^{a3}	(2)	
African American	0.0%	(0)	0.0%	(0)	
All three courts					
Women	9.9%	(67)	21.2%	(78)	6.6%
African American	0.0%	(84)	0.6%	(89)	6.0%
Hispanic	5.0%	(42)	5.4%	(45)	7.1%
Asian	0.7%	(6)	0.7%	(6)	
Native American	0.0%	(0)	0.0%		
Total nontraditional ^{a4}	32.1%	(270)	34.3%	(288)	6.7%

Footnotes

a1 Out of 664 authorized lifetime positions on the U.S. district courts.

a2 Out of 167 authorized lifetime positions on the numbered circuits and the U.S. Court of Appeals for the District of Columbia Circuit, all courts of general jurisdiction.

a3 Out of nine authorized positions on the U.S. Supreme Court.

a4 The total does not double count those who were classified in more than one category. # Includes Roger Gregory, who was given a recess appointment on December 27, 2000. Note that Gregory is not included as a Clinton appointee for purposes of Table 4 in the main text, which is confined to confirmed lifetime appointees. President George W. Bush nominated Gregory, who was confirmed and is thus included in the 2003 figures for this table and statistics for the W. Bush appointees in tables 3 and 4 in the main text.

***305** Table 1 shows that a significantly larger proportion of the nontraditional candidates were serving in a judicial capacity (either on the state courts or as federal magistrates or bankruptcy judges) than were the traditional appointees. It is possible that the administration was more comfortable going with nontraditional candidates who had a judicial track record compatible with the President's judicial philosophy. This is particularly significant, as the proportion of nontraditional appointees who were Republicans was lower than that of the traditional appointees and in terms of past party activism was significantly lower than that for the traditional appointees. There was a lower proportion of nontraditional than traditional appointees who had neither judicial nor prosecutorial experience, suggesting that on the whole the nontraditional appointees may have been even better qualified and more experienced than the traditional appointees.

The nontraditional and traditional appointees had relatively small differences in educational background and were approximately equal in the proportion receiving the highest ABA rating. They also had a similar net worth. A majority of both groups were millionaires. However, the nontraditional appointees were on average a full three years younger than the traditional appointees.

Table 2 examines the composite portrait of the W. Bush appointees compared to the appointees of the four previous administrations. The proportion of the W. Bush appointees who were serving in the judiciary at the time of their nomination was tied with the Clinton appointees' proportion as the highest of all five administrations.

The trend of a career judiciary has continued with the W. Bush appointees. Over the past 40-plus years, the proportion of appointees who were already serving as federal magistrates or U.S. bankruptcy judges has climbed from almost none to 8 percent of the Ford, 5 percent of both the Carter and Reagan, 11 percent of Bush Sr., 12 percent of Clinton, and a record 16 percent of all W. Bush district court appointees. W. Bush named 11 U.S. magistrates and 2 U.S. bankruptcy court judges to the federal district bench and 6 of the 13 were nontraditional. About three-quarters of the Clinton district court appointees who were serving as magistrates or bankruptcy judges were nontraditional but before Clinton most such appointees were white males. Clearly, service on the state and federal judiciaries is the most favored route to a federal district judgeship, and this is especially true for women and minorities.

Like his father's appointees, approximately 10 percent of the appointees were members of extremely large law firms, proportions significantly higher than those for the other three administrations. Likewise the proportions of those practicing in small firms was lower for the two Bush administrations than for the other three.

In terms of professional experience, the W. Bush appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience. More than half the appointees had both judicial and prosecutorial experience -- the only administration of all five with such a record. Unlike his father's record, with the highest proportion of those with neither judicial nor prosecutorial experience, the son's record thus far is the lowest proportion of all five administrations. Like the previous four administrations, there was a larger proportion with judicial experience than with prosecutorial experience. This underscores the trend toward a career judiciary.

In terms of undergraduate and law school education, the proportion of W. Bush appointees receiving an Ivy League school education was the lowest of all five administrations. With law school education, if we add to the Ivy League law schools such prestigious law schools as Berkeley, Duke, Georgetown, Stanford, Texas, Vanderbilt, and Virginia, the proportion of W. Bush appointees with a prestige legal education is about 19 percent. In contrast, the Clinton appointees with a prestige legal education was about 38 percent and for the Bush Sr. appointees 34 percent.

The proportion of W. Bush's women appointees was second only to the Clinton record but within a percentage point of Bush Sr.'s record. Approximately one-fifth of both father and son's appointees were women--approximately one third higher than the breakthrough Carter appointments and about two and a half times larger than the Reagan record. The proportion of Hispanic appointments was the highest for all five administrations but the proportion of African-

American appointees was well below the record for Democrats Clinton and Carter but higher than the Reagan record and approximately the same as Bush Sr.'s record. The impact of the Bush appointees on racial and gender diversity on the district courts is suggested in "Diversity on the bench," page 295.

In light of the administration's decision to remove the Standing Committee on Federal Judiciary of the American Bar Association from the pre-nomination stage, it is of interest to find that the proportion of W. Bush appointees with the highest ABA rating was the largest of all five administrations. By ABA standards, the W. Bush appointees are the most qualified appointees since the ABA began rating appointees in the administration of Dwight D. Eisenhower. About 7 out of 10 appointees received the highest rating. It is possible that eliminating the ABA from the pre-nomination stage has meant that once a nomination has been announced those surveyed in the nominees' legal community would be reluctant to voice negative evaluations of individuals whose appointments are a virtual fait accompli. But it is also possible that the administration's screening process has been able to identify extremely accomplished and well-thought-of persons for appointment.

The proportion of the W. Bush appointees who were Republicans was lower than that of his father's appointees. *306 The proportion of Democrats and Independents was higher than his father's. About 1 in 10 had no party affiliation—a record high. The proportion with a record of past political activity was higher than the proportion for the Clinton appointees but lower than that of the three other administrations' appointees.

The net worth figures show that for the first time, well over half the appointees were worth in excess of \$1 million. Only about one in four had a net worth under \$500,000, the lowest proportion of all five administrations. Given the relatively low pay for federal district judges, it would seem that only the relatively well-off could afford to go on the bench. The problem of low judicial salaries is an ongoing one and one that has been voiced by Chief Justice Rehnquist in his annual reports on the state of the judiciary.⁶

Interestingly the average age of the W. Bush appointees was the highest of all five administrations. Bush Sr.'s appointees were on average more than two years younger than his son's appointees. Both Bush administrations as well as the Reagan administration were known as concerned with reshaping the judiciary in the president's image and surely one of the most effective ways to do this is by appointing younger judges. However, the record for W. Bush will only be complete when his tenure is over and only at that time will the finished portrait of his appointees emerge.

Appeals court appointees

Sixteen persons were confirmed to lifetime positions to courts of general jurisdiction on the U.S. Courts of Appeals. Fifteen nominations were not acted upon. Six, or slightly more than one-third of those confirmed, were nontraditional. Because the numbers are small, comparisons between groups must be made with extreme caution. Table 3 compares the nontraditional to the traditional appeals court appointees.

Despite the small numbers involved, there are some findings that stand out as significant. All but one of the nontraditional appointees were serving on the bench at the time of their nominations (more than 80 percent), while only 3 out of the 10 traditional appointees (30 percent) were in active judicial service. The one non-judge among the nontraditional judges was serving in a governmental position but had previous judicial experience. Equally striking is that 4 (or 40 percent) of the traditional appointees had neither judicial nor prosecutorial experience.

In terms of undergraduate and law school education, both groups were similar. The same was true for their *307 ABA ratings—about two-thirds of each group received the highest rating. As for political party identification, there was a dramatic difference between the groups. Every one of the traditional appointees was a Republican and 9 of the 10 (90 percent) had a background of political activity. In contrast, only half the nontraditional appointees were Republican

and only half had a background of political activity. In terms of net worth, about half the nontraditional candidates were worth more than \$1 million as compared to 70 percent of the traditional appointees.

Although both groups were closer in age than their district court counterparts, the average age of the nontraditional appointees was lower than that for the traditional appointees.

Table 4 aggregates all of W. Bush's appeals court appointees and compares them to the previous four administrations. Because the total number of appeals court appointees confirmed during the 107th Congress is relatively small compared to the appointees of the previous administrations, percentage differences must be interpreted with caution.

Half the W. Bush appointees were sitting as judges at the time of their nominations, the second lowest proportion of all five administrations but not by much. On the other hand his appointees had the largest proportion with judicial experience. All five administrations had proportions of their appointees with judicial experience well above the 50 percent level, reinforcing what we found for the district courts—that the trend toward the professionalization of the judiciary continues.

The W. Bush appointees had the smallest proportion of appointees with neither judicial nor prosecutorial experience, suggesting that on the whole their professional credentials were as impressive, if not more so, than appointees of previous administrations.

The proportion of those who were in large law firms at the time of appointment was the lowest of all five administrations.

In terms of undergraduate and law school education, the statistical profile was similar to the Clinton appointees. One in four had an Ivy League law school education. If we add to these law schools such prestigious law schools as Chicago, Georgetown, Michigan, and Virginia, about 56 percent had the highest quality legal education, which is about the same proportion as that of the Clinton appointees (57 percent). This compares to 45 percent of each of the Reagan and Bush Sr. cohorts with such a prestigious legal education.

In terms of gender and ethnicity, the proportion of women was about the same as Bush Sr.'s proportion and considerably lower than Clinton's historic record. Proportionately, however, the W. Bush African-American appointees set a new record, exceeding the Clinton administration proportion. However, two of the three appointees were Democrats nominated as part of the compromise package of first appeals court appointees unveiled on May 9, 2001, and it is doubtful that this proportion will be sustained. There were no Hispanic appointees although the administration sought to place Miguel Estrada on the D.C. Circuit. But even had the administration been successful, the proportion of latinos would have been considerably lower than Clinton's historic record. Overall, the proportion of nontraditional appointees was approximately the same as Carter's but did not match Clinton's unprecedented proportion of a majority of appeals court appointments going to women and minorities.

The proportion of W. Bush appointees with the highest ABA ratings was the highest of all three Republican administrations but lower than the Carter and Clinton records. Nevertheless, the close to 70 percent receiving the highest rating, taken in conjunction with judicial and prosecutorial experience, buttresses the conclusion that the appointees tended to meet high standards of professional competency.

Because the compromise package of May 9, 2001 included two Democrats, the proportion of opposition party appointees was the highest of all five administrations. Since then, as far as we can determine, no Democrat has been nominated to the appeals courts, and thus this proportion most assuredly will not be sustained.

***309** The proportion with a background of past political activity was an impressive three out of four. This is close to the proportions of three previous administrations, but not Clinton's, whose proportion was the lowest of all five presidencies.

In terms of net worth, the table shows a steady increase in the proportion of those with a net worth in excess of \$1 million. Close to two-thirds of the W. Bush appointees were millionaires. Like the findings for the district courts, these findings provide additional support for the Chief Justice's plea for higher judicial salaries to enable more of the less well-to-do to be able to afford going and remaining on the bench.

The average age of the W. Bush appointees was 50.6, almost two years older than the Bush Sr. appointees' average age. However, that may well change given the younger ages of most of those renominated and newly nominated during the 108th Congress.

What lies ahead

The results of the congressional election of 2002 placed the Senate back in Republican hands. But Democrats made it clear that they would oppose nominees to the appeals courts who they believed were too extreme. Democrats mounted a filibuster against Miguel Estrada and Priscilla Owen. As of this writing, Democrats appeared prepared to filibuster some other nominees as well. The message Democrats seem to be sending to the White House is that any future nominee to the Supreme Court and nominees to the appeals courts would have to be considerably more moderate ideologically and philosophically in the eyes of the Democrats in order to win confirmation.

Republicans have argued that by preventing a vote by the Senate because of filibustering, which can only be stopped by a cloture vote of 60 senators, the Democrats are changing the Constitution from a majority vote needed to confirm to a supermajority vote of at least 60 to confirm court nominees. Democrats have countered that it is fairer and more democratic to have opposition to nominees out in the open and fully debated than for the nominations to languish in the Senate Judiciary Committee without hearings as had happened to numerous Clinton nominees. However, it is questionable whether the Democrats will be able to mount filibusters against more than a token number of Bush nominees. The filibuster is clearly a weapon that can only be used sparingly. Although this is not a problem with unified government, the problem of obstruction and delay at the committee level, when there is divided government, is not likely to go away unless both parties agree on a set of ground rules that would hold from Congress to Congress, whichever party controlled Congress or the presidency.

The record thus far is one of contentiousness. Yet despite this, the 107th Congress confirmed 83 district court judges and 16 appeals court judges to courts of general jurisdiction. As of June 15, 2003 the 108th Congress, notwithstanding the filibusters, has confirmed 22 district court and 9 appeals court judges. Because Republicans control the Senate, all nominees are or will be having hearings and votes in the Senate Judiciary Committee with the nominations sent to the senate floor. This is hardly the crisis that the administration and Republican senators have proclaimed.

To be sure, all lower court or only appeals court nominations coming to a standstill would, of course, constitute a crisis. Arguably it would also be a crisis if Chief Justice William Rehnquist's replacement was the subject of a filibuster. However, a filibuster over a nominee to fill an associate justiceship might not reach the level of a judicial branch crisis no matter how undesirable it would be for the Supreme Court to operate at less than full strength. The solution, of course, is for President George W. Bush to do what President Bill Clinton did when filling two vacancies on the Supreme Court and indeed when filling vacancies on the circuit courts-nominate people who will win broad support among senators of both parties.

Aiming for consensus rather than confrontation is surely the prudent course of action. But on the basis of our interviews with key participants in the selection and confirmation process as well as close observers of it, we fear that such a conservative strategy is not in the offing. What this means is that we can expect all but the most high profile judicial nominations, particularly to the Supreme Court but also a select few at the lower court level, to be confirmed-which means the vast majority of nominees will get through. But the fight over those few nominees actively opposed and

obstructed by the Democrats will reinforce and even enhance the bitterness and ideological warfare in the Senate. How this will play with the electorate will be seen in the elections of 2004.

When it comes to an assessment of the 99 Bush appointees confirmed by the 107th Congress, the statistical portrait is one of high competence and professionalism. The cohort is generally comparable to the Bush Sr. appointees, appointees also confirmed by a Senate controlled by the Democrats. Even more so than the father's, the son's administration is clearly coordinated and is expending the resources to place on the bench appointees who share the President's judicial philosophy. How successful has the administration been thus far in achieving that objective? Have his appointees provided fair and impartial justice? Only a detailed examination of the appointees' performance on the bench will be able to answer those questions.

RECENT BUSH APPPOINTEES

A number of Bush appointees received the highest professional evaluation by the Standing Committee on Federal Judiciary of the American Bar Association. Capsule biographies of some of them appears below.

Richard F. Cebull received his undergraduate and legal education in his home state of Montana. He had experience as a state trial court judge after which he served for 25 years as a partner in a highly regarded law firm and acquired a reputation that earned him a listing in *Best Lawyers in America*. He was named a U.S. magistrate in 1998, the position he held at the time of his appointment to the Montana federal district bench in 2001.

Stanley R. Chesler was born in Brooklyn, New York, and educated at Harpur College and the St. John's University School of Law where he graduated first in his class. He served for about six years as an assistant district attorney in the Bronx before moving to the U.S. attorney's office in New Jersey. After about seven years there he was named a U.S. magistrate in the New Jersey district court in 1987. In 2002 he was promoted to a federal district court judgeship.

Edith Brown Clement was born in Birmingham, Alabama, and did her undergraduate work at the University of Alabama before receiving her legal education at the Tulane University School of Law. Upon graduation from law school she settled in New Orleans and was a law clerk to federal district judge H. W. Christenberry. She served in private practice as an associate and then partner in a prominent firm. She was a member of the Republican National Lawyers Association and was also active in the Federalist Society. She was appointed to the federal district court for the Eastern District of Louisiana by George Bush Sr. in 1991 and promoted to the U.S. Court of Appeals for the Fifth Circuit by W. Bush in 2001.

Rosemary M. Collyer comes from Portchester, New York and was educated at Trinity College in Washington, D.C., and the University of Denver Law School. She has had extensive governmental experience, serving as chair of the Federal Mine Safety & Health Review Commission for three years and general counsel for the National Labor Relations Board for five years. In 1989 she joined the large law firm of Crowell & Moring in Washington, D.C., and was subsequently listed in *Best Lawyers in America*. In 2002 she was nominated and confirmed to the federal district court in Washington, D.C.

Legrome D. Davis was born in Columbus, Ohio. He did his undergraduate work at Princeton and received his law school education at Rutgers-Camden. He was an assistant district attorney in Philadelphia for about 10 years before ascending the Court of Common Pleas in Philadelphia in 1987. He was first nominated to the federal district court for the Eastern District of Pennsylvania by President Bill Clinton in July 1998 and then again in January 1999, but the Senate Judiciary Committee did not hold a hearing. In January, 2002, Judge Davis was nominated by President George W. Bush, had a hearing two months later, and was confirmed about one month after that.

Claire V. Eagan was born in the Bronx in New York City, graduated from Trinity College in Washington, D.C., and from Fordham Law School. She was a law clerk for federal district judge Allen E. Barrow of the Northern District of

Oklahoma, the court to which she would eventually be appointed. She then went into private practice in Tulsa where she was an associate and then a shareholder in a well-known law firm. Subsequently she was included in an edition of *Best Lawyers in America*. In 1998 she became a U.S. magistrate judge, the position she held at the time of her nomination to the federal district bench for the Northern District of Oklahoma in 2001. She was confirmed in less than three months.

David C. Godbey was born and raised in Texas and graduated from Southern Methodist and then Harvard Law School where he served on the law review. He clerked for Fifth Circuit Judge Irving L. Goldberg and then went into private practice as an associate and then partner. He was a politically active Republican. In 1994 he was elected and subsequently reelected to a state district court position, the post he held when nominated and confirmed to the federal district bench in Texas (Northern District).

Callie V. Granade, granddaughter of the late Judge Richard Rives of the U.S. Court of Appeals for the Fifth Circuit, was born in Lexington, Virginia. She was educated at Hollins College and the University of Texas Law School. After law school she clerked for Fifth Circuit Judge John Godbold and subsequently served as an assistant U.S. attorney in Alabama. When Jeff Sessions became U.S. attorney, she developed a good working relationship with him, and it was Sessions as a United States senator from Alabama who sponsored her for the federal district judgeship on the Southern District of Alabama bench. At the time of her nomination in August of 2001 she was serving as interim U.S. attorney. She was confirmed in early February 2002.

Sam E. Haddon, born in Louisiana, is an alumnus of Rice University and the University of Montana Law School. After law school he clerked for Montana federal district Judge William J. Jameson and then moved into private practice. From 1969 until his nomination, he was a partner in a well-known Missoula law firm. He was active professionally (including a stint as a director of the American Judicature Society). A politically active Republican, he nevertheless had bipartisan support for the federal district judgeship for Montana that he received on May 17, 2001, winning confirmation about two months later.

Harris L. Hartz, originally from Baltimore, Maryland, received his undergraduate and law school degrees from Harvard with high honors. He moved to New Mexico and served in the U.S. attorney's office for about three years before entering private practice. In 1988 he joined the New Mexico Court of Appeals where he served for 11 years before returning to private practice. He was nominated and confirmed in 2001 to a seat on the U.S. Court of Appeals for the Tenth Circuit.

Cindy K. Jorgenson was born in California and did her undergraduate work at Occidental College and her law school training at the University of Arizona. She stayed in Arizona after law school, working as a deputy county attorney for nine years before moving to the U.S. attorney's office, holding the position of assistant U.S. attorney for the next 10 years. In 1996 she became a superior court judge, the position from which she was elevated to the federal district court for Arizona. She was nominated on September 10, 2001, and confirmed the following February.

Jose L. Linares was born in Havana, Cuba, and came to the United States with his family when he was a child. He graduated from Jersey City State University and Temple University Law School. He was in private practice as an associate, partner, and then senior partner until ascending the Essex County Superior Court in 2000, the position he held when nominated on August 1, 2002 for the federal district court for New Jersey. He was confirmed on November 14, 2002.

Philip R. Martinez comes from El Paso, Texas, and did his undergraduate work at the University of Texas at El Paso before his legal training at Harvard. He returned to Texas and entered private practice before becoming a state judge in 1991. A Democrat, Judge Martinez was nominated in October of 2001 and confirmed the following February.

Michael W. McConnell hails from Louisville, Kentucky. He was educated at Michigan State and then at the law school at the University of Chicago. From law school he clerked first for Judge J. Skelly Wright on the U.S. Court of Appeals

for the District of Columbia Circuit and then for Associate Justice William J. Brennan on the U.S. Supreme Court. He subsequently worked as an assistant to the solicitor general in the Reagan administration before moving to a faculty position at the University of Chicago Law School where he stayed for 11 years. In 1997 he became a professor of law at the University of Utah. Named with the first group of Bush appeals court nominees on May 9, 2001, Professor McConnell's nomination was stalled because some of his writings and his work with the Federalist Society stimulated opposition on the part of liberal groups and liberal Democrats on the Senate Judiciary Committee. Finally, more than 16 months from the date of his nomination, he had a hearing. By that time it was clear that he had much support from the academic legal community that cut across ideological lines. He was confirmed to the U.S. Court of Appeals for the Tenth Circuit on November 15, 2002.

Terrence F. McVerry was born in Pittsburgh and was educated (both undergraduate and law school) at Duquesne. He served as an assistant district attorney for Allegheny County from 1969-1973. In 1978 he was elected to the Pennsylvania House of Representatives where he served until 1990. During that time and until he became a state judge, he also was engaged in private practice. He went on the Court of Common Pleas in 1998 but lost the general election in 1999. He was serving as law department director for the Allegheny County solicitor's office when he was tapped in 2002 for the federal district court for the Western District of Pennsylvania. He was confirmed on September 3, 2002.

Barrington D. Parker, Jr., was born in Washington, D.C., where his father was a federal district judge. He received his undergraduate and legal training at Yale, subsequently clerked for U.S. District Judge Aubrey E. Robinson, Jr., and then went into private practice in New York. A Democrat, he was named by President Bill Clinton to the federal district bench for the Southern District of New York in 1994, the position he held when President George W. Bush nominated him on May 9, 2001, for the U.S. Court of Appeals for the Second Circuit. His hearing was held under tight security just two days after the September 11 attacks. He was confirmed on October 11, 2001.

James H. Payne, born in Texas, received his undergraduate and legal education at the University of Oklahoma. He served in the U.S. Air Force during the Vietnam War and after his tour of duty became an assistant U.S. attorney, a position he held for three years. He subsequently practiced law in Muskogee, Oklahoma, for 15 years, during which time he was active on behalf of Republican Senator Henry Bellmon. In 1988 he was named a federal magistrate, the position he held at the time of his elevation to the Oklahoma federal district bench in 2001.

Reena Raggi was born in Jersey City, New Jersey, did her undergraduate work at Wellesley College and received her law degree from Harvard. Upon graduating law school she clerked for Seventh Circuit Judge Thomas Fairchild. Later she served as assistant U.S. attorney for more than six years and was interim U.S. attorney for close to four months in 1986. In 1987 she was named by President Ronald Reagan to the federal district court for the Eastern District of New York, the office she held when she was appointed in 2002 to the U.S. Court of Appeals for the Second Circuit.

Linda R. Reade, born in Sioux Falls, South Dakota, completed her undergraduate and law training at Drake University where she was managing editor of the law review. From 1980 to 1986 she was in private practice and from 1986 to 1993 an assistant U.S. attorney. In 1993 she ascended the Iowa state district court bench, from which she was promoted in 2002 to the federal district court for the Northern District of Iowa.

William J. Riley was born in Lincoln, Nebraska. His higher education was entirely at the University of Nebraska. In law school, he was editor-in-chief of the law review. After graduation he clerked for federal appeals court judge Donald P. Lay. For the following 28 years he was an associate and then partner of a prominent Omaha law firm, and he earned an endorsement in Best Lawyers in America. He was nominated to the U.S. Court of Appeals for the Eighth Circuit on May 23, 2001, and was confirmed the following August 2.

Julie A. Robinson was born in Omaha, Nebraska. Her undergraduate and law school degrees were taken at the University of Kansas. She was an assistant U.S. attorney for nine years before becoming a U.S. bankruptcy judge in 1994, the position she held when nominated and confirmed to the Kansas federal district court in 2001.

Reggie B. Walton was born in Pennsylvania, did his undergraduate work at West Virginia State College, and received his legal training at American University. After graduation he returned to Pennsylvania and worked for two years as a public defender in Philadelphia. He returned to the District of Columbia where he served as an assistant U.S. attorney. He went on the local D.C. bench in 1981 and, with the exception of a two year period including a stint as a senior White House advisor in the Bush Sr. administration, was serving on the D.C. bench when appointed in 2001 to the U.S. District Court for the District of Columbia.

Freda L. Wolfson was born in New Jersey and received her undergraduate and law degrees from Rutgers, where she was an editor of the law review. She was in private practice until 1986 when she became a U.S. magistrate, the post from which she was promoted in 2002 to the U.S. District Court for New Jersey.

Terry L. Wooten was born in Kentucky but completed all his higher education at the University of South Carolina. He was an assistant solicitor for Richland County, South Carolina, from 1982-1986 and from 1986 to 1991 he was Chief Counsel (Minority from 1987) for the U.S. Senate Judiciary Committee. From 1992 to 1999 he served in South Carolina as assistant U.S. attorney before becoming a U.S. magistrate judge. He was elevated to the federal district bench in South Carolina in 2001.

Sheldon Goldman

DIVERSITY ON THE BENCH

Bench diversification in the first two years of the Bush administration, as seen in Table 1, slowed from the rather frenetic pace of the Clinton era. When all three court levels are combined, the percentage of nontraditional judges in active service increased 6.7 percent (as compared to 36.2 percent in Clinton's first two years). There were modest gains for women, African Americans, and Hispanics. The number of Asian Americans remained the same, and with the resignation of Judge Billy Michael Burrage from the Eastern District of Oklahoma in March 2001 the federal judiciary lost its only jurist with a Native American heritage.

The only net gains on the courts of appeals were one additional female and one African American. Currently, each appeals court has at least one female judge in active service. The Ninth Circuit is highest in absolute numbers with six women in active service. Only the First and Tenth Circuits are without African American judges; in fact an African American has yet to serve on those two courts. The Sixth, Eighth, and D.C. courts have two African American judges, and the remaining seven courts have one. Historically, the court that has had the most African Americans serving (five) is the Sixth Circuit. Hispanic judges-both currently and historically-have yet to serve on the Fourth, Sixth, Seventh, Eighth, and D.C. Circuits. Three courts (Second, Fifth, Ninth) have two Hispanic judges and the First, Third, Tenth, and Eleventh Circuits each have one. Ninth Circuit Judge Atsushi Tashima is the only Asian American to be in active service on the courts of appeals.

The biggest increase in nontraditional representation was on the district bench. Women, African Americans, and Latinos advanced significantly. Ten nontraditional judges left the bench during the 107th Congress; five of those vacancies are unfilled. Parenthetically, in the other five cases a nontraditional judge was replaced by a white male. The district benches in eight states (Alaska, Idaho, Maine, Montana, New Hampshire, North Dakota, Vermont, and Wyoming) have never

had a nontraditional judge. Of course, none of the states in question has either a large judge complement or sizable minority population. Ten states have never had a female district judge, 15 an African American, 36 a Hispanic, and 47 an Asian American. As mentioned above, the only jurist with a significant Native American heritage in the history of the district courts was from Oklahoma.

Table 2 aggregates the district courts by circuit, and lists the percent of female judges in each jurisdiction. Also, the percent of African Americans and Hispanics is compared to the percentage of each group in the general population. The percentage of women is highest on the district courts of the Ninth Circuit, and falls below 20 percent on the First, Fourth, and Fifth. A fairly close match exists for the percent of African American judges and percent in general population for the First, Sixth, and Seventh Circuits, with the largest disparities present in the Fifth, Eighth, Ninth, Eleventh, and District of Columbia. The discrepancies for Hispanics are considerably wider; in fact, two circuits (Fourth and Eighth) have no Hispanic judges in active service. The fit is closest in the First, Seventh, and District of Columbia Circuits.

Table 2 Diversity on the District courts, January 1, 2003: active judges aggregated by circuit

Circuit	% Female, district courts	% African American, general population	% African American, district courts	% Hispanic, general population	% Hispanic, district courts
First	7.2	5.2	3.5	3.5	27.6
First ¹		4.	4.5	5.6	4.5
Second	25.9	4.5	8.6	3.9	.7
Third	2.	.7	5.8	7.2	3.5
Fourth	4.6	22.3	4.6	4.0	0.0
Fifth	6.5	7.4	8.6	24.2	.
Sixth	23.2	2.7	2.3	2.3	0.0
Seventh	22.7	.3	.4	8.	6.8
Eighth	24.4	7.	4.3	2.8	0.0
Ninth	29.0	5.3	4.0	25.0	5.0
Tenth	23.7	4.2	7.7	4.0	7.7
Eleventh	23.0	20.4	.3	.2	4.8
D.C.	26.7	60.0	28.6	7.9	7.

Footnotes

¹ Excluding Puerto Rico

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PARTISAN MAKEUP OF THE BENCH

Despite having appointed the largest cohort of district judges of any president and the second largest complement of appellate judges (after Reagan), Bill Clinton was unable to overcome the Republican gains made by his two predecessors. At the start of the 107th Congress 51 percent of the judges sitting on the lower federal bench were appointed by Republican presidents. Ironically, at the end of that Congress, as shown in Table 1, the partisan scales had tilted the other way, with 50.6 percent of active judges appointed by Democratic presidents.

Table 1 Makeup of federal bench by appointing president, January 1, 2003 (lifetime positions on lower courts of general jurisdiction)

	District courts				Courts of appeals			
	Active (N)	%	Senior (N)	%	Active (N)	%	Senior (N)	
W. Bush	12.4%	(83)	-	-	9.6%	(16)	-	-
Clinton	44.0%	(292)	-	-	34.1%	(57)	1.0%	(1)
Bush	17.8%	(118)	4.1%	(14)	16.2%	(27)	7.1%	(7)
Reagan	14.5%	(96)	32.1%	(109)	18.0%	(30)	35.7%	(35)
Carter	4.2%	(28)	28.2%	(96)	6.0%	(10)	24.5%	(24)
Ford	0.5%	(3)	6.2%	(21)	0.6%	(1)	6.1%	(6)
Nixon	0.6%	(4)	17.9%	(61)	0.6%	(1)	14.3%	(14)
Johson	0.2%	(1)	7.9%	(27)	-	-	10.2%	(10)
Kennedy	-	-	2.4%	(8)	-	-	1.0%	(1)
Eisenhower	-	-	1.2%	(4)	-	-	-	-
Vacancies	5.9%	(39)	-	-	15.0%	(25)	-	-
Totals ^{a1}	100.0%	(664)	100.0%	(340)	100.0%	(167)	100.0%	(98)

Footnotes

^{a1} Percentages rounded to 100%

This rather odd result stems from two factors. First, 54 of the 71 (76.1 percent) judges who left the bench during George W. Bush's first two years in office were appointed by Republican presidents. This fits the historical pattern in which accelerated departures-especially retirements-from the bench accompany changes in partisan control of the White House. In fact, of the 62 judges who either took senior status (56) or resigned (6), fully 76 percent were appointed by Republican presidents. The figures for the district and appeals bench are 81 percent and 60 percent, respectively.

Second, the consequences of the bitter partisan politics of the first half of 2001 that were followed by the fractious politics of divided government for the remainder of the term were in no way on more prominent display than in the area of judicial selection. To be sure, George W. Bush benefitted from the extraordinary number of vacancies he inherited (82), courtesy of the same brand of partisan stalemate he also would witness. Had he been able to fill even a fraction of the 64 vacancies extant at the start of the 108th Congress, Republican appointees easily would comprise a majority of the federal judiciary.

In 2001 the Judicial Conference of the United States, the administrative arm of the federal judiciary, recommended to Congress that 10 and 44 new judgeships be authorized for the appellate and district courts, respectively (along with the permanent authorization of 7 temporary district judgeships). The congressional response in the climate of divided government was no appellate bench expansion, 8 new, and 7 temporary seats on the district courts, and permanent authorization of 4 temporary positions.²

Nonetheless, 12 of Bush's 83 (14.5 percent) appointment opportunities for the district courts were to fill new positions. Bill Clinton had been awarded a rather modest bench expansion of 19 seats on these courts, only 7 of which he was able to fill before his term expired.³ The lion's share of district court appointment opportunities were occasioned by retirements (61 or 73.5 percent), with a relative handful from elevations (4), resignations (4), and deaths (2). Of the 16 appointment opportunities at the appellate level, 14 came from judges taking senior status, 1 from a new position,⁴ and 1 from resignation.

Partisan control of the courts of appeals is in the hands of the Republicans who have appointed 52.8 percent of all active judges, and this control is likely to be solidified by the 2004 presidential election. The levels of partisan rancor over appointments to the appellate bench soared in the 107th Congress, triggered by especially confrontational politics over nominations to the Fifth, Sixth, and District of Columbia Circuits. Sixteen Bush nominees were confirmed, a modest

figure but one that nonetheless puts him on track to surpass Clinton and perhaps even exceed the record 78 appeals courts judges appointed by Ronald Reagan. Clearly, partisan control of the lower federal bench will be among the issues hinging on the outcome of the 2004 presidential election.

Factoring senior status judges into the equation redounds to the Republican advantage. Combining both court levels, 53.9 percent of all seats are occupied by Republican-appointed judges. The Republican edge is more evident at the appellate level, where Republicans enjoy a 57.1 percent majority, compared to 53.2 percent for the district courts. When senior status judges are added to those in active service, the bench size of these two Article III courts grows to 1,205. Add to that the number of vacancies, and the figure swells to 1,269. g

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Table 1 Bush's non-traditional appointees compared to his traditional appointees to the federal district courts, 2001-2002

	Nontraditional appointees		Traditional appointees	
	%	(N)	%	(N)
Occupation				
Politics/government	7.7%	(2)	8.8%	(5)
Judge	6.5%	(6)	42. %	(24)
Law firm				
100+ members	.5%	(3)	8.8%	(5)
50-99			8.8%	(5)
25-49	3.9%	()	0.5%	(6)
Medium size firm				
10-24 members	3.9%	()	5.3%	(3)
5-9	3.9%	()	5.3%	(3)
Small firm				
2-4			3.5%	(2)
Solo			3.5%	(2)
Professor of law	3.9%	()	.8%	()
Other	3.9%	()	.8%	()
Experience				
Judge	6.5%	(6)	49. %	(28)
Prosecutor	53.8%	(4)	49. %	(28)
Neither	5.4%	(4)	26.3%	(5)
Undergraduate education				
Public	34.6%	(9)	45.6%	(26)
Private	57.7%	(5)	49. %	(28)
Ivy League	7.7%	(2)	5.3%	(3)
Law School Education				
Public	57.7%	(5)	50.9%	(29)
Private	34.6%	(9)	42. %	(24)
Ivy League	7.7%	(2)	7.0%	(4)
Gender				
Male	34.6%	(9)	00.0%	(57)
Female	65.4%	(7)		
Ethnicity/race				
White	53.9%	(4)	00.0%	(57)
African American	23. %	(6)		
Hispanic	23. %	(6)		
ABA rating				
Well Qualified	73. %	(9)	68.4%	(39)
Qualified	26.9%	(7)	29.8%	(7)

Not Qualified			.8%	()
Political affiliation				
Democrat	.5%	(3)	5.3%	(3)
Republican	69.2%	(8)	89.5%	(5)
None	9.2%	(5)	5.3%	(3)
Past party affiliation	38.5%	(0)	64.9%	(37)
Net worth				
Under \$200,000	3.9%	()	5.3%	(3)
\$200-499,999	26.9%	(7)	9.3%	()
\$500-999,999	5.4%	(4)	7.5%	(0)
\$ + million	53.8%	(4)	57.9%	(33)
Average age at nomination	48.2		5 .2	
Total number of appointees	26		57	

Table 2: U.S. district court appointees compared by administration

	W. Bush		Clinton		Bush		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	8.4%	(7)	11.5%	(35)	10.8%	(16)	13.4%	(39)	5.0%	(10)
Judiciary	48.2%	(40)	48.2%	(147)	41.9%	(62)	36.9%	(107)	44.6%	(90)
Legal field										
100+ years	9.6%	(8)	6.6%	(20)	10.8%	(16)	6.2%	(18)	2.0%	(4)
50-99	6.0%	(5)	5.2%	(16)	7.4%	(11)	4.8%	(14)	6.0%	(12)
25-49	8.4%	(7)	4.3%	(13)	7.4%	(11)	6.9%	(20)	6.0%	(12)
Medium size firm										
10-24 years	4.8%	(4)	7.2%	(22)	8.8%	(13)	10.0%	(29)	9.4%	(19)
5-9	4.8%	(4)	6.2%	(19)	6.1%	(9)	9.0%	(26)	9.9%	(20)
Small firm										
2-4	2.4%	(2)	4.6%	(14)	3.4%	(5)	7.2%	(21)	11.4%	(23)
solo	2.4%	(2)	3.6%	(11)	1.4%	(2)	2.8%	(8)	2.5%	(5)
Professor of law	2.4%	(2)	1.6%	(5)	0.7%	(1)	2.1%	(6)	3.0%	(6)
Other	2.4%	(2)	1.0%	(3)	1.4%	(2)	0.7%	(2)	0.5%	(1)
Executive										
Judicial	53.0%	(44)	52.1%	(159)	46.6%	(69)	46.2%	(134)	54.0%	(109)
Prosecutorial	50.6%	(42)	41.3%	(126)	39.2%	(58)	44.1%	(128)	38.1%	(77)
Neither	22.9%	(19)	28.9%	(88)	31.8%	(47)	28.6%	(83)	31.2%	(63)
Undergraduate education										
Public	42.2%	(35)	44.3%	(135)	46.0%	(68)	37.9%	(110)	55.9%	(113)
Private	51.8%	(43)	42.0%	(128)	39.9%	(59)	48.6%	(141)	34.2%	(69)
Ivy League	6.0%	(5)	13.8%	(42)	14.2%	(21)	13.4%	(39)	9.9%	(20)
Law school education										
Public	53.0%	(44)	39.7%	(121)	52.7%	(78)	44.8%	(130)	52.0%	(105)
Private	39.8%	(33)	40.7%	(124)	33.1%	(49)	43.4%	(126)	31.2%	(63)
Ivy League	7.2%	(6)	19.7%	(60)	14.2%	(21)	11.7%	(34)	16.8%	(34)
Gender										
Male	79.5%	(66)	71.5%	(218)	80.4%	(119)	91.7%	(266)	85.6%	(173)
Female	20.5%	(17)	28.5%	(87)	19.6%	(29)	8.3%	(24)	14.4%	(29)
Ethnicity/race										
White	85.5%	(71)	75.1%	(229)	89.2%	(132)	92.4%	(268)	78.7%	(159)
African American	7.2%	(6)	17.4%	(53)	6.8%	(10)	2.1%	(6)	13.9%	(28)
Hispanic	7.2%	(6)	5.9%	(18)	4.0%	(6)	4.8%	(14)	6.9%	(14)
Asian	-	-	1.3%	(4)	-	-	0.7%	(2)	0.5%	(1)
Native American	-	-	0.3%	(1)	-	-	-	-	-	-
Percentage who are										
ABA ranked	68.7%	(57)	52.4%	(160)	73.0%	(108)	84.8%	(246)	67.8%	(137)
EWQ/WQ	69.9%	(58)	59.0%	(180)	57.4%	(85)	53.5%	(155)	51.0%	(103)
Qualified	28.9%	(24)	40.0%	(122)	42.6%	(63)	46.6%	(135)	47.5%	(96)

No Qual fed	1 2%	(1)	1 0%	(3)	-	-	-	-	1 5%	(3)
Pol cal de fca o										
De oc a	7 2%	(6)	87 5%	(267)	6 1%	(9)	4 8%	(14)	91 1%	(184)
Republ ca	83 1%	(69)	6 2%	(19)	88 5%	(131)	91 7%	(2 66)	4 5%	(9)
O he	-	-	0 3%	(1)	-	-	-	-	-	-
No e	9 6%	(8)	5 9%	(18)	5 4%	(8)	3 4%	(10)	4 5%	(9)
Pas pa y ac vs	56 6%	(47)	50 2%	(153)	64 2%	(95)	60 3%	(175)	6 1 4%	(124)
Ne wo h										
U de \$200 000	4 8%	(4)	13 4%	(41)	10 1%	(15)	17 9%	(52)	35 8% ^{a1}	(53)
\$200-499 999	21 7%	(18)	21 6%	(66)	31 1%	(46)	37 6%	(109)	41 2%	(61)
\$500-999 999	16 9%	(14)	26 9%	(82)	26 4%	(39)	21 7%	(63)	18 9%	(28)
\$1+ llo	56 6%	(47)	38 0%	(116)	32 4%	(48)	22 8%	(66)	4 0 %	(6)
Ave age age a o a o	50 3		49 5		48 2		48 6		49 6	
To al u be of appo ees	83		305		148		290		202	

Footnotes

^{a1} These figures are for appointees confirmed by the 96th Congress for all but six Carter district court appointees (for whom no data were available).

Table 3 Bush's nontraditional appointees compared to his traditional appointees to the federal appeals courts, 2001-2002

	Nontraditional appointees		Traditional appointees	
	%	(N)	%	(N)
Occupat on				
Po t cs/government	6.7%	()		
Jud c ary	83.3%	(5)	30.0%	(3)
Large aw frm				
00+ members				
50 99			0.0%	()
Moderate s ze frm				
0 24 members			20.0%	(2)
Sma frm				
2 4			0.0%	()
Professor of aw			20.0%	(2)
Other			0.0%	()
Exper ence				
Jud c a	00%	(6)	50.0%	(5)
Prosecutor a	6.7%	()	30.0%	(3)
Ne ther	0.0%	(0)	40.0%	(4)
Undergraduate educat on				
Pub c	50.0%	(3)	40.0%	(4)
Pr vate	33.3%	(2)	40.0%	(4)
Ivy League	6.7%	()	20.0%	(2)
Law schoo educat on				
Pub c	50.0%	(3)	50.0%	(5)
Pr vate	6.7%	()	30.0%	(3)
Ivy League	33.3%	(2)	20.0%	(2)
Gender				
Ma e	50.0%	(3)	00%	(0)
Fema e	50.0%	(3)		
Ethn c ty/race				
Wh te	50.0%	(3)	00%	(0)
Afr can Amer can	50.0%	(3)		
H span c				
ABA rat ng				
We Qua fed	66.7%	(4)	70.0%	(7)
Qua fed	33.3%	(2)	30.0%	(3)

Political affiliation

Democrat	33.3%	(2)		
Republican	50.0%	(3)	00%	(0)
None	6.7%	(1)		
Past party affiliation	50.0%	(3)	90.0%	(9)
Net worth				
Under \$200,000	6.7%	(1)		
\$200-499,999			20.0%	(2)
\$500-999,999	33.3%	(2)	0.0%	(1)
\$1 million or more	50.0%	(3)	70.0%	(7)
Average age at nomination	49.8		51.0	
Total number of appointees	6		0	

Table 4: U.S. appeals court appointees compared by administration

	W. Bush		Clinton		Bush		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	62%	(1)	66%	(4)	108%	(4)	64%	(5)	54%	(3)
Judiciary	500%	(8)	525%	(32)	595%	(22)	551%	(43)	464%	(26)
Legal field										
100+ years	-	-	115%	(7)	81%	(3)	51%	(4)	18%	(1)
50-99	62%	(1)	33%	(2)	81%	(3)	26%	(2)	54%	(3)
25-49	-	-	33%	(2)	-	-	64%	(5)	36%	(2)
Medium size firm										
10-24 years	125%	(2)	98%	(6)	81%	(3)	39%	(3)	143%	(8)
5-9	-	-	33%	(2)	27%	(1)	51%	(4)	18%	(1)
Small firm										
2-4	-	-	16%	(1)	-	-	13%	(1)	36%	(2)
solo	62%	(1)	-	-	-	-	-	-	18%	(1)
Professor	125%	(2)	82%	(5)	27%	(1)	128%	(10)	143%	(8)
Other	62%	(1)	-	-	-	-	13%	(1)	18%	(1)
Experience										
Judicial	688%	(11)	590%	(36)	622%	(23)	603%	(47)	536%	(30)
Prosecutorial	250%	(4)	377%	(23)	297%	(11)	282%	(22)	304%	(17)
Neither	250%	(4)	295%	(18)	324%	(12)	346%	(27)	393%	(22)
Undergraduate education										
Public	438%	(7)	443%	(27)	297%	(11)	244%	(19)	304%	(17)
Private	375%	(6)	344%	(21)	595%	(22)	513%	(40)	518%	(29)
Ivy League	188%	(3)	213%	(13)	108%	(4)	244%	(19)	179%	(10)
Law school education										
Public	500%	(8)	393%	(24)	324%	(12)	410%	(32)	393%	(22)
Private	250%	(4)	311%	(19)	378%	(14)	359%	(28)	196%	(11)
Ivy League	250%	(4)	295%	(18)	297%	(11)	231%	(18)	411%	(23)
Gender										
Male	812%	(13)	672%	(41)	811%	(30)	949%	(74)	804%	(45)
Female	188%	(3)	328%	(20)	189%	(7)	51%	(4)	196%	(11)
Ethnicity/race										
White	812%	(13)	738%	(45)	892%	(33)	974%	(76)	786%	(44)
African American	188%	(3)	131%	(8)	54%	(2)	13%	(1)	161%	(9)
Hispanic	-	-	115%	(7)	54%	(2)	13%	(1)	36%	(2)
Asian	-	-	16%	(1)	-	-	-	-	18%	(1)
Percentage who are										
ABA members	625%	(10)	492%	(30)	703%	(26)	923%	(72)	607%	(34)
EWQ/WQ	688%	(11)	787%	(48)	649%	(24)	590%	(46)	750%	(42)
Qualified	312%	(5)	213%	(13)	351%	(13)	410%	(32)	250%	(14)
Political affiliation										
Democrat	125%	(2)	852%	(52)	27%	(1)	-	-	821%	(46)
Republican	812%	(13)	66%	(4)	892%	(33)	962%	(75)	71%	(4)

Other	-	-	-	-	-	-	13%	(1)	-	-
None	62%	(1)	82%	(5)	81%	(3)	262%	(3)	107%	(6)
Passive	750%	(12)	541%	(33)	703%	(26)	667%	(52)	732%	(41)
Net worth										
Under \$200,000	62%	(1)	49%	(3)	54%	(2)	156% ^{a1}	(12)	333% ^{a2}	(13)
\$200-499,999	125%	(2)	148%	(9)	297%	(11)	325%	(25)	385%	(15)
\$500-999,999	188%	(3)	295%	(18)	216%	(8)	351%	(27)	179%	(7)
\$1+ million	625%	(10)	508%	(31)	432%	(16)	169%	(13)	103%	(4)
Total number of appointees	16		61		37		78		56	
Average age of appointees	50.6		51.2		48.7		50.0		51.8	

Footnotes

- a1 Net worth was unavailable for one appointee.
- a2 Net worth only for Carter appointees confirmed by the 96th Congress, with the exception of five appointees for whom net worth was unavailable.

Footnotes

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- c GERARD GRYSKI and GARY ZUK are professors of political science at Auburn University.
- d SARA SCHIAVONI is a doctoral candidate in political science at The Ohio State University.
- 1 See Goldman, A profile of Carter's judicial nominees, 62 JUDICATURE 246 (1978) and Carter's judicial appointments: a lasting legacy, 64 JUDICATURE 344 (1981). Other articles in this series are: Goldman, Reagan's judicial appointments at mid term: shaping the bench in his own image, 66 JUDICATURE 334 (1983); Goldman, Reaganizing the judiciary: the first term appointments, 68 JUDICATURE 313 (1985); Goldman, Reagan's second term judicial appointments: the battle at midway, 70 JUDICATURE 324 (1987); Goldman, Reagan's judicial legacy: completing the puzzle and summing up, 72 JUDICATURE 318 (1989); Goldman, The Bush imprint on the judiciary: carrying on a tradition, 74 JUDICATURE 294 (1991); Goldman, Bush's judicial legacy: the final imprint, 76 JUDICATURE 282 (1993); Goldman, Judicial selection under Clinton: a midterm examination, 78 JUDICATURE 276 (1995); Goldman and Slotnick, Clinton's first term judiciary: many bridges to cross, 80 JUDICATURE 254 (1997); Goldman and Slotnick, Clinton's second term judiciary: picking judges under fire, 82 JUDICATURE 264 (1999); and Goldman, Slotnick, Gryski, and Zuk, Clinton's judges: summing up the legacy, 84 JUDICATURE 228 (2001).
- 2 See THE AMERICAN BENCH (13th edition), WHO'S WHO (national and regional editions), MARTINDALE HUBBELL LAW DIRECTORY, and The JUDICIAL STAFF DIRECTORY.

- 3 Interview with Viet Dinh on January 6, 2003. Other quotes from Assistant Attorney General Dinh are drawn from this interview.
- 4 Interview with Brett Kavanaugh on January 7, 2003. Other quotes from Associate White House Counsel Kavanaugh are drawn from this interview.
- 5 Interview with Nan Aron, President of the Alliance for Justice, on January 6, 2003. Other quotes from Ms. Aron are drawn from this interview.
- 6 Interview with C. Boyden Gray, former White House Counsel to the first President Bush, on January 7, 2003. Other quotes from Mr. Gray are drawn from this interview.
- 7 Interview with Makan Delrahim, Republican Chief Counsel and Staff Director, on January 8, 2003. Other quotes from Mr. Delrahim are drawn from this interview.
- 8 Interview with Elliot Mincberg, Vice President, General Counsel, and Legal and Education Director of People for the American Way, on January 8, 2003. Other quotes from Mr. Mincberg are drawn from this interview.
- 9 Interview with Marcia Kuntz, Alliance for Justice, on January 6, 2003. Other quotes from Ms. Kuntz are drawn from this interview.
- 10 In general, see the data and findings in Goldman, *Assessing the Senate judicial confirmation process: The Index of Obstruction and Delay*, 86 *JUDICATURE* 251 (2003). Also see, Hartley and Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 *POL. SCI. Q.* 259 (2002); Binder and Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 *AM. J. OF POL. SCI.* 190 (2002); Martinek, Kemper, and Van Winkle, *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998*, 64 *J. OF POL.* 337 (2002).
- 11 In general, see Holmes and Savchak, *Judicial appointment politics in the 107th Congress*, 86 *JUDICATURE* 232 (2003).
- 12 For an analysis of the Pickering nomination and its fate in the 107th Congress, see Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 *U.C. DAVIS L. REV.* 695 (2003).
- 13 During the 107th Congress, William H. Steele had been nominated for a position on the U.S. Court of Appeals for the Eleventh Circuit. At the start of the 108th Congress he was nominated for a position on the federal district bench in Alabama (southern district). Thus, technically, that was not a renomination but a new nomination.
- 14 See, generally, Denning, *The judicial confirmation process and the blue slip*, 85 *JUDICATURE* 218 (2002).
- 15 One nominee to the United States Court of Appeals for the Federal Circuit, Sharon Prost, was confirmed but is not included in our statistics, which are confined to lifetime appointments to the federal courts of general jurisdiction.
- 16 See, for example, the most recent report in 35 *THE THIRD BRANCH* 1 at 2 (January 2003).
- 1 Asian Americans and Native Americans are excluded because the number of relevant judges is either too small or nonexistent. Calculations for the First Circuit are done with and without Puerto Rico to get a firmer view of the match between the Hispanic population in the states of the First Circuit and the proportion of Hispanics on the district courts.
- 1 See Barrow, Zuk, and Gyski, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (Ann Arbor: University of Michigan Press, 1996).
- 2 Act of November 2, 2002; 116 *STAT.* 1786.
- 3 The politics of divided government reared its head in Clinton's case as well. The recommendations of the Judicial Conference were for 6 permanent and 4 temporary positions on the courts of appeals, and 30 permanent and 23 temporary new seats on the district courts. The number of judgeships given by Congress to Clinton and thus far to Bush are excepting the short lived Ford administration the smallest since the omnibus format took hold during FDR's presidency.

- 4 Although this Fourth Circuit seat was authorized in 1990, it was not filled for 10 years because “holds” were put on the nominations. In 2000, Clinton made the first judicial recess appointment since 1980 when he placed Roger Gregory, an African American, on that court. In 2001 Bush nominated Gregory for a regular appointment and he was confirmed by the Senate.

86 JUDICATURE 282

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Election 2000: U.S. Supreme Court Hears Arguments Over Florida Recount

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Section: News; Domestic; SHOW

Length: 4138 words

Byline: Wolf Blitzer, Charles Bierbauer

Guests: Brett Kavanaugh, Eugene Volokh, David Boies, Ben Ginsberg

Highlight: For 90 minutes today, the nation's highest court heard arguments from lawyers representing George W. Bush and Al Gore. The decision could potentially determine the next president of the United States. So far, no indication when that decision will be rendered. The issue at stake: whether those tens of thousands of disputed ballots in Florida will be recounted by hand.

Body

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WOLF BLITZER, CNN ANCHOR: Bush versus Gore -- back at the U.S. Supreme Court, the justices had their questions.

(BEGIN VIDEO CLIP)

JUSTICE ANTHONY N. KENNEDY, U.S. SUPREME COURT: Where's the federal question here?

JUSTICE DAVID H. SOUTER, U.S. SUPREME COURT: I think we would have a responsibility to tell the Florida courts what to do about it.

(END VIDEO CLIP)

BLITZER: Lawyers from the Gore and Bush team discuss the answers, and former clerks of two key justices dissect the questions from their former bosses, all ahead in this special edition of THE WORLD TODAY: THE FLORIDA VOTE.

Good evening. I'm Wolf Blitzer reporting tonight from just outside the U.S. Supreme Court here in Washington, as a handful of demonstrators join us in the news media to keep a vigil over the deliberations of the nine justices.

For 90 minutes today, the nation's highest court heard arguments from lawyers representing George W. Bush and Al Gore. The decision could potentially determine the next president of the United States. So far, no indication when that decision will be rendered. The issue at stake: whether those tens of thousands of disputed ballots in Florida will be recounted by hand.

Our senior Washington correspondent Charles Bierbauer takes us inside today's Supreme Court arguments.

(BEGIN VIDEOTAPE)

CHARLES BIERBAUER, CNN CORRESPONDENT (voice-over): The justices looked for a reason the federal court should be involved and seemed to find it in the Constitution's guarantee of equal protection to all citizens.

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KENNEDY: You would say that from the standpoint of the equal protection clause, each -- could each county give their own interpretation to what intent means so long as they are in good faith and with some reasonable basis, finding intent?

DAVID BOIES, GORE CAMPAIGN ATTORNEY: I think...

KENNEDY: Could that vary from county to county?

BOIES: I think it can vary from individual to individual.

BIERBAUER: The equal protection issue, which Bush attorneys wanted before the court, troubled the court's conservatives and liberals alike as they considered Florida's vote-counting procedure.

SOUTER: Why shouldn't there be one objective rule for all counties, and if there isn't, why isn't it an equal protection violation?

BIERBAUER: Justice Ginsburg suggested that might not be practical.

JUSTICE RUTH BADER GINSBURG, U.S. SUPREME COURT: When there are different ballots from county to county, too, Mr. Olson, that's part of the argument that I don't understand.

THEODORE OLSON, BUSH CAMPAIGN ATTORNEY: You are certainly going to have to look at a ballot that you mark one way different than these punch-card ballots. Our point is with respect to the punch-card ballots is that there are different standards for evaluating those ballots from county to county.

BIERBAUER: Justice Breyer repeatedly asked what would be a fair way to count.

JUSTICE STEPHEN G. BREYER, U.S. SUPREME COURT: I would hold that you have to punch the chad through on a ballot. The only problem that we have here is created by people who did not follow instructions.

BIERBAUER: Attorneys for Vice President Gore argued Florida has historically stretched rules to accommodate the will of the voter.

BOIES: The Florida Supreme Court has held that where a voter's intent can be discerned, even if they don't do what they're told, that's supposed to be counted.

BIERBAUER: The justices were troubled by the Florida Supreme Court defining the time and manner for recounts, but they seemed to feel state courts might play a role in the process.

JUSTICE ANTONIN SCALIA, U.S. SUPREME COURT: Is your point that even in close calls we have to revisit the Florida Supreme Court's opinion?

OLSON: No, I think that it is particularly in this case, where there's been two wholesale revisions.

BIERBAUER: In taking a second look at the Florida recount, the justices have forced themselves to play a role.

SOUTER: I think we would have a responsibility to tell the Florida courts what to do about it. On that assumption, what would you tell them to do about it?

BOIES: I think that's a very hard question.

SCALIA: You would tell them to count every vote. You would tell them to count every vote, Mr. Boies.

BOIES: I would tell them to count every vote.

(END VIDEOTAPE)

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BIERBAUER: After arguments, the vice president's attorney said that Justice Scalia had promised to keep an open mind, even though it was Scalia prior to the arguments who had indicated that there were five justices at this court who felt that there was a reasonable probability that Governor Bush would win -- Wolf.

BLITZER: Charles, is there any way of determining at all when this Supreme Court which, according to Supreme Court standards, has acted very quickly in the past, when it will reach a decision?

BIERBAUER: Well, they reached a decision in three days just a little over a week ago. We were told this evening about an hour ago by the public affairs office that there was no -- little likelihood of an opinion being reached this evening, and the public affairs officer was going home and she recommended we do the same, so we will be back in the morning hoping perhaps that tomorrow might be the day -- Wolf.

BLITZER: Charles Bierbauer, one thing is for sure, I'm not going home, but thanks for joining us.

Now for a closer look at the two Supreme Court justices who were very active in today's hearing, Sandra Day O'Connor and Anthony Kennedy. They are considered swing votes, and on a closely divided court, they could hold the keys to election 2000 and the White House.

Joining me now, Brett Kavanaugh, former clerk for Anthony Kennedy, and Eugene Volokh, who clerked for Sandra Day O'Connor.

Thank you to both of you for joining us.

I want to begin with you, Brett. I want you to listen to one exchange that Justice Kennedy had with David Boies, Al Gore's attorney today, get your insight whether we can discern something about where Justice Kennedy may be moving. Listen to this exchange.

(BEGIN VIDEO CLIP)

KENNEDY: Do you think that in the contest phase there must a uniform standard for counting the ballots?

BOIES: I do, Your Honor. I think there must be a uniform standard. I think there is a uniform standard. The question is whether that standard is too general or not. The standard is whether or not the intent of the voter is reflected by the ballot. That is the uniform standard throughout the state of Florida.

KENNEDY: That's very general, it runs throughout the law, even a dog knows the difference in being stumbled over and being kicked in the nose.

(END VIDEO CLIP)

BLITZER: Brett Kavanaugh, what can we learn from that exchange?

BRETT KAVANAUGH, FMR. CLERK FOR JUSTICE KENNEDY: Well, I think there are two issues that were troubling Justice Kennedy and really a majority of the court today. The first is whether the Florida Supreme Court had so departed from the election code previously established by the legislature that it had violated the United States Constitution, which after all, delegates the power to the legislatures of the states.

The second issue, as that exchange reflected, is Justice Kennedy was very concerned, as were at least five, six members of the court, including Justices Breyer and Souter, about the arbitrary standardless nature of the recount process in Florida, an argument that the Bush team has been making led by Ted Olson from day one, and that was affirmed today at least in questioning by it looked like about seven justices.

BLITZER: All right, standby, I want to bring in Eugene Volokh, he is in Los Angeles.

Eugene, you've clerked for Sandra Day O'Connor, listen to what she said in one of the questions that she had today at the Supreme Court hearing, listen to this.

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(BEGIN VIDEO CLIP)

O'CONNOR: That's I think a concern that we have and I did not find really a response by the Florida Supreme Court to this court's remand in the case a week ago. It just seemed to kind of bypass it and assume that all those changes in deadlines were just fine and they'd go ahead and adhere to them, and I found that troublesome.

(END VIDEO CLIP)

BLITZER: Now, Eugene Volokh, since then, the Florida Supreme Court has issued an opinion 6-1 saying that the opinion they reached earlier for which they were slapped on the wrist was based on Florida state law. You know Sandra Day O'Connor quite well, you clerked for her. What do you think are her major concerns right now?

EUGENE VOLOKH, FMR. CLERK FOR JUSTICE O'CONNOR: I know Justice O'Connor too well to ever presume to try to read her mind, especially on a case that is essentially as unprecedented, as close, and as important as this one. I think one of the things we saw from the questioning is that it's very hard to predict which way the justices would lean.

You had some justices who voted against the stay who now seemed to take the view that there is indeed a pretty serious constitutional problem here, especially on the equal protection front. Likewise, it's very hard to draw inferences from the questions that they asked at oral argument how they will ultimately decide.

My sense is that there is some concern about the Florida Supreme Court going too far in its interpretation of Florida state law, but my sense was there is more concern about this equal protection problem of standardless discretion in counting all the ballots. But again, that's just a guess and it's notoriously dangerous -- court watchers know that it's notoriously dangerous to try to predict justices' votes based on questions in oral argument. I wish I could give you something more definitive than that, but sometimes the honest thing to do is to say I don't know.

BLITZER: All right, well, a lot of us don't know.

I want to bring Brett Kavanaugh back in. Justice Kennedy and Justice O'Connor normally would side with states' rights on an issue like this as opposed to bringing the federal courts into the -- what is a state matter. Why do you think this time they may go in the other direction?

KAVANAUGH: Well, I think they're focusing on the wrong issue there. The real issue is what is Article II of the Constitution mean in the first instance, and it delegates authority directly to the state legislatures, and the textualists on the court, led by Justice Scalia, are paying close attention to that language. And I think what we are seeing is more of a divide over how to interpret the Constitution than really political differences. I don't think the justices care that it's Bush versus Gore, or if it were Gore versus Bush, what they care about is how to interpret the Constitution, what are the enduring values that are going to stand a generation from now.

BLITZER: Eugene Volokh, we only have a little time left, but you know Sandra Day O'Connor, how hard would it be for her to turn to the other side? She voted with the majority in staying the manual recount. Do you think it would very difficult for her to join that minority now that would become the majority if the votes stayed firm?

VOLOKH: Not at all. And vice versa, it's quite possible that Justice Breyer and Justice Souter might join with the justices who voted for the stay. That it is well understood that the decision as to the stay is different from the decision on the merits of the case, especially in a case like this where there is so little time for decision on the original stay motion.

They might very well say, now that we have had a little more time, we've read the briefs, we've heard the oral argument, we've talked it over some more with our colleagues, we'll take -- we'll decide differently. That's one of the things that the court is all about, about thinking through the issues given as much time as you can and sometimes making a decision to stay the matter to preserve the status quo while you're deciding what your ultimate decision should be. So there is nothing odd about that.

BLITZER: All right, Eugene Volokh and Brett Kavanaugh, thanks to both of you for joining us.

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Meanwhile in Tallahassee, lawmakers are taking steps to approve a pro-Bush slate of electors. Opponents accuse the Republican-dominated legislature of trying to deliver the White House to Bush regardless of the outcome of the legal challenges. Today, a House committee voted 5-2 on a resolution affirming the 25 electoral delegates certified last month who are pledged to Bush. The full House meets tomorrow to take up the matter. A Senate committee approved a similar measure. The full Senate could act on Wednesday, however, it may hold off until a ruling comes down from the U.S. Supreme Court.

The convergence of politics with the judiciary at the half hour when Greta Van Susteren hosts a CNN special report. When we come back, inside today's arguments with Gore campaign attorney David Boies.

This is a special edition of THE WORLD TODAY.

(COMMERCIAL BREAK)

(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: I've never been to an actual Supreme Court hearing, so it's kind of -- I -- you know, I feel like I'm going to my -- like my first game, but it happens to be like the world championship. So it's a good game to go to.

(END VIDEO CLIP)

BLITZER: And one of the key players in that game at the Supreme Court, Gore campaign attorney David Boies.

I was able to question him earlier today.

(BEGIN VIDEOTAPE)

BLITZER: You were repeatedly questioned on the lack of standards, a uniform standard throughout Florida. Isn't it unfair that in one county this could be considered a ballot, but in another county the same thing is not considered a ballot?

BOIES: Well, remember, there is a uniform standard. The uniform standard...

BLITZER: But it's so vague.

BOIES: It's general, it's very general, but it's no more general here than it is in many areas of the law. For example, this standard is no more general than the standard by which people in criminal trials are put to death.

BLITZER: But several of those justices on the U.S. Supreme Court clearly were concerned about the lack of a uniform standard.

BOIES: I think they were, and they were searching for, is there a way to express this with greater specificity so that you will have more uniformity?

BLITZER: The only way that -- based on the questions that they were asking seems to be if -- and this may be good or bad for you -- for them to send this case back to Florida, to the Supreme Court in Florida to come up with some uniform standards.

BOIES: I think there are two ways it could be handled. One is they could come up with a uniform standard, and one of the questions that was there was suggesting that approach. The other is they could send it back to the Florida courts to specify a specific standard. Now, either of those two to some extent runs into the argument -- another argument that they were concerned about, which is when the Florida legislature sets a general standard like the intent of the voter and the Florida Supreme Court has interpreted it for 80 years to be the intent of the voter, can you now after an election actually make it more specific? So one of the tensions there is the desire to make the general standard more specific.

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BLITZER: Assuming they could do that, wouldn't the clock, though, be ticking? There is this deadline supposedly -- is it a deadline tomorrow, December 12, the safe harbor deadline for Florida to come up with its electors?

BOIES: I think everybody is looking at December 18 as a practical matter. I think everybody would like to have had it done by December 12. I think that particularly given the fact that the count was interrupted on Saturday that, that simply is not going to happen.

BLITZER: You can't, though, blame the Florida legislature, though, for being concerned about the possibility, it's out there, that if there is a dispute, a controversy, Florida's 25 electoral votes could be up in the air and that state's 6 million voters might be disenfranchised?

BOIES: Well, remember, it's more important that those electors go to the winner. If you send them off to Washington to vote for the loser, then you have really disenfranchised the Florida voters.

BLITZER: How confident are you that if there is this manual recount that you seek, that Gore will in the end win, because there were reports coming out with the brief recount that went along on Saturday that things were not necessarily going your way?

BOIES: I don't think anybody knows what the result of that recount will be. I think you know it's going to be close, but I don't think anybody can tell you right now what that recount will show. I think everybody thinks it will show that Vice President Gore won, certainly the Bush camp thinks that, which is why they are trying to stop the recount.

BLITZER: If there is a decisive decision, one way or another, from the U.S. Supreme Court, as far as the Gore legal team is concerned, you've said it ends with the U.S. Supreme Court, you are not going to wait for the Seminole and Martin County appeals to go up the chain in Florida? BOIES: What we've said from the beginning is the United States Supreme Court is the final arbiter of this. That's our contest. Now, if they were to decide, for example, that the Florida courts have no jurisdiction at all to modify a statute, that would mean that the Seminole County and Martin County results would have to be thrown out. So the United States Supreme Court could make a ruling that would, in effect, decide the Seminole County and Martin County cases, and then we'd obviously have to look at that.

BLITZER: Do you take -- did you take any specific comfort on your side from any of the questioning of you by those nine Supreme Court justices?

BOIES: When you are up there answering questions, all you are trying to do is respond, you really don't have a sense of whether you are getting your point across or not, and one of the things that I have learned is it's very hard to predict what a judge is thinking.

BLITZER: You and Antonin Scalia had a few pretty lively exchanges. What was going through his mind, do you think, in asking about the difference, very briefly, between the protest and the contest? He's a very intelligent guy.

BOIES: He is, and I obviously wasn't making it clear enough, because I had to say the same thing several times. And one of the things when you are up there is you are not always able to figure out what is a clean, concise way to answer a question.

BLITZER: David Boies, I know this has been an extremely hectic period for you, thanks for joining us.

BOIES: Sure has. Thank you very much.

(END VIDEOTAPE)

BLITZER: And up next, Q&A with Bush campaign attorney Ben Ginsburg.

(COMMERCIAL BREAK)

(BEGIN VIDEO CLIP)

Election 2000: U.S. Supreme Court Hears Arguments Over Florida Recount

GOV. GEORGE W. BUSH (R-TX), PRESIDENTIAL NOMINEE: I talked to some of our legal team, they're cautiously optimistic.

QUESTION: Have you talked to your brother, Governor?

QUESTION: When do you expect a ruling?

BUSH: I don't know, I don't think anybody knows yet.

QUESTION: Are you nervous?

(END VIDEO CLIP)

BLITZER: George W. Bush commenting earlier today on the Supreme Court arguments.

Now let's hear from Bush attorney Ben Ginsburg, he was here in Washington to hear the arguments himself and to participate in that session with Ted Olson, he's now back in Tallahassee.

Mr. Ginsberg, on the question -- on the speculation, which is widespread as you know, that the Supreme Court may, in fact, send this whole case back to the courts in Florida to come up with some uniform standards for recounting the ballots -- what would that do to your case?

BEN GINSBERG, ATTORNEY FOR BUSH CAMPAIGN: Well, I think the larger question is what it would do to the recount. But part of the argument that pertained to that showed how devilishly difficult it is to be able to come up with a set of uniform standards in which to count these ballots. So far, that has not been done in any of the hand recounts that we have seen. In fact, you saw different standards being applied within counties to similar ballots, and certainly you saw very different and contrasting standards being applied to similar ballots between the four counties that did hand recounts.

So as a practical matter, it's difficult to put in a set of rules right now by which you could count ballots that wouldn't be a change in Florida law from the way things were on November 7, and I think that's the conundrum that the court finds itself in.

BLITZER: Because as you know, the only -- the Florida law stipulates intent of the voter, to discern the intent of the voter, but what if that became more pinpointed by a U.S. Supreme Court decision?

GINSBERG: Well, I think the most compelling bit of argument on intent of the voter was the notion that what you do know of the intent of the voter is when they follow the instructions that are in each voting booth, and that means fully punching through the chad on the ballot as they are instructed to do in the voting booth, and then if there is any hanging chad, breaking it away, so you know that the intent of the voter is that completed ballot and anything else is the detail that's led to the unequal standards that, in fact, have led to equal protection and due process problems.

BLITZER: You heard David Boies suggest that the deadline really is December 18, a week from today, not tomorrow, December 12, for Florida to come up with its electors. He said most people agree with that. Do you?

GINSBERG: Well, it's a little bit of a change of position for the Gore camp now that we're at December 11. The reason that December 12 is an important date is that's the date that guarantees that electors will be within the safe harbor and will be seated and there won't be a cloud on it. If, in fact, there is an attempt to push back the drop-dead date to December 18, then I think all the issues of whether those electors are certain come into play, including the actions of the Florida legislature and how necessary they become.

BLITZER: Late today, you heard from the Florida Supreme Court -- and you are back in Tallahassee -- in a 6-1 decision say that the earlier opinion that they came up with was rooted in Florida state law. Is that acceptable to you? That's the reply they gave to the U.S. Supreme Court.

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GINSBERG: Well, I think by and large it's not terribly relevant at this stage. I mean, that -- the Florida Supreme Court found itself chastised in the U.S. Supreme Court today for not following its directions on the mandate and, in fact, as I read the Florida Supreme Court opinion tonight, what they essentially did was do a universal search on the word processors for Florida Constitution and delete the phrase. But the reasoning that followed the U.S. Supreme Court in the first instance remains, and in point of fact, the addition of dimples and deadlines to Florida law still remains a violation of Section 5 of the U.S. Code.

BLITZER: Mr. Ginsberg, Republicans were sharply critical of the Florida Supreme Court when they came out with their opinions, Democrats have been sharply critical of the U.S. Supreme Court when it came out with its stay of the manual recount on Saturday. How much damage, if damage at all, is being done to U.S. -- the American public's confidence in the judicial system in the United States?

GINSBERG: I think those comments have been unfortunate, and I agree with David Boies' earlier statements that the United States Supreme Court is the law of the land and the final arbitrator. And what you have seen down here, the chaotic environments in the recounts, all the different standards, the problems with time deadlines, the problems of figuring out what a vote is and isn't, can be put to rest by the United States Supreme Court.

BLITZER: Bush attorney Ben Ginsberg, thanks for joining us.

And when we come back, we'll have a brief check of the market. Stay with us.

(COMMERCIAL BREAK)

BLITZER: In tonight's "MONEYLINE" update: stocks turned up again today as investors looked forward to an end to the presidential contest. At the closing bell, the Dow gained 12 points to end at 10725, the Nasdaq climbed 97 points to 3014, the strongest close in nearly a month.

(COMMERCIAL BREAK)

BLITZER: Stay with CNN throughout the evening for more on the Supreme Court arguments in Bush versus Gore. For now, thanks very much for watching. I'm Wolf Blitzer in Washington.

Up next, Greta Van Susteren, and her program begins right now.

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Load-Date: December 12, 2000

Supreme Court Rules on Gay Rights, Abortion, Separation of Church and State

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Length: 3862 words

Byline: Roger Cossack, Greta Van Susteren, Charles Bierbauer

Highlight: The United States Supreme Court allows the Boy Scouts of America to be exclusive. A look at how yesterday's controversial Supreme Court decisions affect the future of gay rights, abortion, and the separation of church and state.

Body

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(BEGIN VIDEO CLIP)

JAMES DALE, FORMER BOY SCOUT LEADER: I'm definitely very disappointed that the Supreme Court did not understand that the Boy Scouts is not about discrimination or about anti-gay prejudice.

REV. ALEXANDER WEBSTER, FORMER BOY SCOUT: The U.S. Supreme Court has courageously upheld the legal and moral right of a private organization to set ethical standards for its own internal leadership.

EVAN WOLFSON, LAMBDA LEGAL DEFENSE AND EDUCATION FUND: There are gay youth in this country, and they need the opportunity to participate. And they deserve a message of welcome. And if the Boy Scouts won't give it to them, if the Boy Scouts is going to fight to label themselves as bigots, there are other organizations like the Girl Scouts, like the Boys Clubs.

(END VIDEO CLIP)

ROGER COSSACK, CO-HOST: Today on BURDEN OF PROOF, the United States Supreme Court allows the Boy Scouts of America to be exclusive. How will yesterday's controversial Supreme Court decisions affect the future of gay rights, abortion, and the separation of church and state?

ANNOUNCER: This is BURDEN OF PROOF, with Greta Van Susteren and Roger Cossack.

COSSACK: Hello, and welcome to BURDEN OF PROOF.

The U.S. Supreme Court handed down controversial decisions yesterday before taking off for a summer vacation. By a narrow 5-4 margin, the court struck down a Nebraska law that banned what critics call partial-birth abortions.

GRETA VAN SUSTEREN, CO-HOST: In a separate ruling, the court upheld a Colorado law that restricts anti-abortion demonstrations outside health clinics. The court also ruled that federal funds could be used to buy computers for religious schools.

Supreme Court Rules on Gay Rights, Abortion, Separation of Church and State

COSSACK: And it said the Boy Scouts of America can exclude adult gay members. And joining us today from New York is James Dale, the former Boy Scout who sued the organization, and his lawyer, Evan Wolfson, of the Lambda Legal Defense and Education Fund.

VAN SUSTEREN: And here in Washington, former Supreme Court clerk Brett Kavanaugh, former Supreme Court clerk and law professor Chai Feldblum, and constitutional law professor Akil Amar. And in our back row: Mindy Mizell (ph), Lauren Davis (ph), and Sarah Taylor (ph).

COSSACK: Also joining us in our bureau is CNN senior Washington correspondent, Charles Bierbauer.

But first, let's go right to James Dale.

James, your reaction to the Supreme Court decision yesterday?

DALE: I'm definitely disappointed that the Supreme Court didn't understand what scouting is really all about. But I'm also very hopeful because I think that this -- some of the decision from the dissent, and also the direction America is going in is the right direction.

VAN SUSTEREN: James, you're not just sort of a casual joiner of the Boy Scouts. You've been in there for an awful long time, haven't you? And how far did you go through the ranks of Boy Scouts?

DALE: I started in scouting when I was eight years old as a Cub Scout, and that was actually -- I wanted to get in sooner to join my father and my brother, but I was a little too young. Then I stuck with it from the age of eight until the age of 19, when I was an assistant Scout master, and I was expelled. During that time, I was an Eagle Scout. I worked on camp staff. I was very, very involved. I think, for some kids maybe, you know, maybe it is football, or soccer. For me, the Boy Scouts is really what made me feel like I was part of a community, and that I belonged.

VAN SUSTEREN: How significant is it to obtain the Eagle Scout status? I mean, how, you know, can you give me some sort of idea of, you know, how many actually attain that status within the group?

DALE: It believe that the percentage is three percent. For me, it was a labor of love, though. It wasn't as though I tiled countless hours in the Boy Scouts. It was something I really enjoyed. And that's why I spent so much time in the program. And I think, because I was a gay kid growing up, it was a program that made me feel good about myself. And that's why I stuck with it. And I think the sad underlying fact here is that there are a lot of kids in the Boy Scouts that are gay now, and people that were in the Boys Scouts that are gay.

And where are they going to turn now that the Boy Scouts have rejected them?

COSSACK: Evan Wolfson, you were the lawyer in this case. What part of your presentation to the Supreme Court do you think that was -- that the Supreme Court didn't get or rejected? WOLFSON: Well, I think the five justices in the majority were quite eager to simply rubber-stamp what the Boy Scouts lawyers said in their briefs, as the dissent pointed out, and they really weren't listening to the arguments. They had their goal in mind and they made their decision. And I think anyone who reads the decision will see that the four dissenters walked through the evidence, just like the unanimous New Jersey Supreme Court did, and they held correctly that scouting is not an organization about bigotry. It's not an organization about discrimination.

And there's nothing in there about gay or heterosexual or homosexual. That's just not what it's about. And, you know, the real losers today -- even though they may have won legally -- but the real losers are the Boy Scouts leaders, because they have taken their organization and fought really hard to win the label of bigot, to win the label of discriminator. And how does that help?

VAN SUSTEREN: Akil, let me ask you a quick question -- I hate to be stuck on this point -- but being a Boy Scout -- three percent, according to James -- are any justices of the Supreme Court, were they Eagle Scouts? And secondly, this case is we call a free association case. What is free association?

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AKIL AMAR, CONSTITUTIONAL LAW PROFESSOR: I think two of the justices at least are Eagle Scouts, Justice Breyer and Justice Kennedy, I believe. I'm actually an Eagle Scout. And it connects to association. I think my friend Evan Wolfson is absolutely right that the Boy Scouts have maybe won a legal victory, but at what price? Those of us who have been associated with this organization, we have the freedom to associate with it, but we also have the freedom to disassociate ourselves from it.

And I think some of us, who have been connected with the organization, now have to distance ourselves from this organization until it changes its practice.

VAN SUSTEREN: Does this mean you are going to quit? I mean, that you're -- are you going to do something formal?

AMAR: It means that I can't have the same kind of relationship with the Scouts that I had day before yesterday. And this meant a lot to me, to be an Eagle Scout, as I think maybe for Mr. Dale. But I think Evan is right. Sometimes you can lose a legal battle, but win a larger political battle. And now the debate moves out of courts and out of law. We, as individuals, have to decide what we're going to associate with, and what we're going to disassociate from.

VAN SUSTEREN: All right, we're going to take a break.

Thanks to James Dale and Evan Wolfson.

And when we come back, the other cases in the United States Supreme Court that came down. Stay with us.

(BEGIN LEGAL BRIEF) On June 29, 1972, the U.S. Supreme Court ruled in *Furman v. Georgia* that capital punishment violated the Eighth Amendment and was unconstitutional. This marked the first time the U.S. Supreme Court ruled against capital punishment. The death penalty was reinstated in 1976.

(END LEGAL BRIEF)

(COMMERCIAL BREAK)

COSSACK: Good news for our Internet-savvy viewers: You can now watch *BURDEN OF PROOF* live on the World Wide Web. Just log on to cnn.com/burden. We now provide a live video feed Monday through Friday at 12:30 p.m. Eastern time. And if you miss that live show, the program is available on the site at any time via "video-on-demand." You can also interact with our show, and even join our chat room.

(BEGIN VIDEO CLIP)

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES: The decision is, I think, consistent with *Roe v. Wade*, and as you pointed out, it was narrowly upheld. I think that is about what the vote for *Roe* is. And I think that in the next four years, there will be somewhere between two and four appointments to the Supreme Court, and depending on who those appointees are, I think the rule will either be maintained or overturned.

(END VIDEO CLIP)

VAN SUSTEREN: Yesterday, the United States Supreme Court struck down a state law banning what critics call partial-birth abortions.

Charles Bierbauer, the president calls it the decision, critics call it partial-birth abortion, some people call it late-term abortions. What is this case about?

CHARLES BIERBAUER, CNN CORRESPONDENT: Well, this case is about whether you can constrict in some form beyond what *Roe v. Wade* has done, beyond what Planned Parenthood versus Casey has done, to start to narrow, and it is a very political issue that it has sort of become the political focus for the anti-abortion folks these

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days to say that this procedure, actually it's pretty much a midterm procedure, because once you hit viability of a fetus, then all abortions are banned except for the life of the mother.

Probably the most interesting aspect of the opinion was in Justice O'Connor's concurrence, where she said, if this had been written, the statute in Nebraska, had been written to just involve what is called the DNX (ph) procedure, and not overlap into the DNE (ph), let's not get into the technicalities. but to limit it to that one procedure, and if it had provided for the health and life of the mother, she said then we might be looking at something very different. So this is not as bold as it might have been. She has sent a very strong signal. Let me add just one other thing, the court today, in a list of orders put out, told the lower courts in Wisconsin and Illinois to take another look at the statutes there, similar, not precisely the same, those statutes had been upheld, whereas Nebraska's had been knocked down. So they're going to keep looking at it.

COSSACK: Chai, this is an interesting decision, because it does not put to rest, as Charles suggests, the notion of late-term abortions. What it really does is say, you know, you didn't right this statute correctly. If you come back with one that is perhaps written a little clearer, and I think this is part of the objection here, you know, we might say: You can go ahead and have these kinds of procedure; correct?

CHAI FELDBLUM, FMR. SUPREME COURT CLERK: Yes, I mean, there is this issue that after viability, the abortions are not allowed, and so it's understandable that someone like O'Connor would say that certain procedures could be prohibited. But it is important that they said, regardless of how you write it, you have to have an exception for the health of the mother, not just life. So that no matter how carefully someone writes these provisions, we will not be seeing sort of really strong restrictions on a woman's right to choose.

BRETT KAVANAUGH, FMR. SUPREME COURT CLERK: What is interest about the case, I think, is how it shows the abortion debate is still front and center in the Supreme Court. I think the court, eight years ago in Casey, thought it was calling an end to the national controversy over abortion. I think the court misperceived that the issue would stay front and center, and I think Justice Kennedy's dissent yesterday indicates some deep unease by him about the course of the court on this issue.

VAN SUSTEREN: Are any of you surprised by the fact that this is five-four, could you have predicted the numbers in the decisions? is this a big surprise?

FELDBLUM: Five-four is not surprising for exactly the reason you said, that this is still a politically-intense issue.

VAN SUSTEREN: Should it be?

FELDBLUM: Of course it is, abortion? I mean, that -- but this is the interesting thing between the two cases, OK? The idea that homosexuality, for example, is immoral is a very strongly held view by some people. Yesterday, the Boy Scouts argued and were upheld that the mission of their organization is to express that belief, the way the mission of an anti-choice group is to express that belief. These things are strongly contested view.

What's interesting about expressive association is that you say I come together as a group in order to picket this clinic. Yesterday, the Boy Scouts were upheld as coming together to say that homosexuality is immoral. And, as Akil said before, how many people, when they join the Boy Scouts, thought that that is what they were joining. VAN SUSTEREN: OK, let me change the topic. Akil, I will go to you, and it is taxpayer money, according to the court yesterday, it can be used in religious school for computer equipment. Are you surprised by that decision?

AMAR: I wasn't surprised by that decision. We're moving away from the metaphor of strict separation, and toward the idea of neutrality. And the idea of neutrality is still quite...

VAN SUSTEREN: How can we just sort of move that way, I mean, we are talking about the Constitution, I mean, it is sort of like -- it's a living document, granted, but boy we certainly doing a sliding (ph).

COSSACK: And interpreted by nine justices.

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AMAR: And some of the justices might think that the earlier interpretations were wrong in the same way that Brown versus Board of Education said Plessy versus Ferguson was wrong.

I actually think that there is a lot to be said for the neutrality vision. Here's the idea, that government shouldn't ever give religion a benefit just because it's a religion, but it shouldn't withhold the benefit from a group just because they are religious, too.

So if a private school that is an atheist institution gets the computer, if a private school that is an agnostic institution gets a computer, then a private school that is a religious institution of whatever religion, Catholic -- also gets a computer.

COSSACK: Let me just bring up on the same line, previously, about a week ago, the Supreme Court came down with a decision that said, public prayer at football -- at public football games, prayer at football games is not allowed. Now, here you have two decisions, one of which they are giving computers to parochial schools, which conceivably...

AMAR: To all schools.

COSSACK: Well, but parochial schools, which conceivably could be used to carry religious message; right?

KAVANAUGH: Right.

COSSACK: And now you also have prayer at football games where the Supreme Court says you can't do that?

KAVANAUGH: The difference in each case is the rights of the person in question. In the prayer case, it was the rights of the listener, the student listener not to be subjected at a compelled event to hear prayer that he or she might disagree with. So it was really respecting the liberty of the listener.

In the voucher, or the computers case, the same kind of principle, the liberty of a religious school to participate, as Akil said, on an equal basis with a nonreligious school. So I don't think the principles are really at war with one another, although, you know, a surface analysis might suggest as much.

FELDBLUM: But the most -- I went to a very religious Yeshiva. I love the idea of maybe that you have the computers. The problem is...

VAN SUSTEREN: Did they have them then?

FELDBLUM: No.

VAN SUSTEREN: That's a different issue.

FELDBLUM: But the problem is that they also said in this opinion that you could convert it to really truly religious use, and I think that some people are concerned that neutrality could start moving over into actual support.

COSSACK: Are we facilitating religious use by giving them...

FELDBLUM: And that would be problematic in this country.

KAVANAUGH: What's important, though, is the school voucher debate, the importance of yesterday's decision for the school voucher debate is that school vouchers I predict are going to be upheld on the basis of yesterday's opinion.

COSSACK: All right, let's take a break.

Up next, the Supreme Court handed down a surprising number of decisions on social and religious issues. Is this a trend? Stay with us.

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(BEGIN Q&A)

Q: How is the Philippine National Bureau of Investigation charging the love bug virus suspect?

A: The Philippine NBI has charged him with credit-card fraud because there are no cybercrime laws on the books.

(END Q&A)

(COMMERCIAL BREAK)

COSSACK: Prayer in school, gays in the Boy Scouts, abortion and pornography, the Supreme Court handled an unusual number of hot-button social and moral issues in its 2000 term.

Well, Charles, you cover the Supreme Court, do you think there are more and more of these kind of social issues that the Supreme Court is delving into?

BIERBAUER: Well, it was really extraordinary how many there were, and they are all sort of unconnected, but came together, and particularly came together towards the end of the term with the Boy Scouts case, the school prayer, the abortion issues. I'm not sure whether that bespeaks a trend or not. But it was certainly the overwhelming nature of this particular term before the court. And there are more to come. Brett just touched on one at the end of the last segment, saying: What does this mean in terms of school vouchers? An issue, a couple of cases have been on the justice's list that they've turned down, but there are certainly more of those coming along as well. I think we're just beginning to scrape away at some of these things.

VAN SUSTEREN: Chai, this is going back to my favorite topic, the election. These decisions, five-four, can you really, sort of -- the next president is probably going to get one, two, three appointments. Can you really pack the court in the sense that you can put justices on who are going to have your agenda?

FELDBLUM: The next president will make all the difference in terms of what this court decides. There is no doubt in my mind that on issues of federalism, issues of equality, on a number of the issues.

VAN SUSTEREN: How do you explain then, and let me throw this to Brett, and then maybe I'll make you explain Chai's point, is that Justice Souter, I think, was a big surprise to President Bush and I also think that Earl Warren was a big surprise. Everyone thought that he was going to be this hugely conservative, and he was very liberal in the court.

KAVANAUGH: Well, and Justice O'Connor, who was the fifth, yesterday, to strike down the partial-birth abortion statute, was appointed by President Reagan. I don't think -- I think presidents can pack the court, but it takes a lot of political capital and will power to do it, and most presidents don't want to expend a lot of political capital on a bloody Supreme Court nomination. We've seen that time and again, to pick the consensus pick who turns out to be more moderate and thus less predictable, that's what's happened.

FELDBLUM: But the more moderate person actually is going to end up being, from my point of view, better on issues of equality and issues of giving congressional power.

VAN SUSTEREN: And let me, and Akil, the idea of moderate certainly is a rather fluid one. What was moderate 20 years ago is a lot different than what's moderate today.

AMAR: The court has shifted. There are justices who come on the court who, because they don't want the court to seem politicized, actually sign on to decisions made by the court before they got on that that they may disagree with. That's what O'Connor and Kennedy and Souter said in the Casey case, that maybe Roe was wrong, but we are going to accept it as a matter of stari decisis because we think the court should make more continuity.

Others could come along and say: No, if the decision was wrong, you should admit you made a mistake. Everyone else in America admits their mistakes.

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VAN SUSTEREN: What do you think should happen? Do you think a court should? AMAR: I actually think that the court has been rather bad over 200 years at admitting its mistakes. Even Brown didn't openly say, you know, we really messed up in Plessy versus Ferguson.

COSSACK: Chai, let me just jump in. In terms of what we originally started off with, the notion of the court handling more and more social issues. As a trend, do you think that that is something that is a good idea, or don't you think these should be handled by the legislature?

FELDBLUM: The Supreme Court is a reflection of America, and America does things in the legislature, and then sometimes the court gets that. I think it's fine for the Supreme Court to be involved in some of these issues. I think that some of the decisions they make, especially for example in the Boy Scouts, are not the right ones. And you know what, the public, at the end, will change those decisions by their actions in the legislature and in their day-to-day lives.

VAN SUSTEREN: Brett, do you want to respond to that?

KAVANAUGH: One of the big issues in the Warren court, or big legacies in the Warren court was in issues such as school prayer, and then right after the Warren court, abortion, the Miranda warnings, the exclusionary rule. What is interesting with the Rehnquist court, which was supposed to be more conservative, is all of those doctrines have gotten more firmly entrenched under the Rehnquist court, which no one would have expected in 1986 when he took...

COSSACK: The exclusionary rule certainly didn't get more entrenched. As the guy who lost U.S. versus Leon before the United States Supreme Court, I beg to differ with you, the exclusionary rule I think is just about gone.

KAVANAUGH: Well, the Miranda case, this term, was probably a very important case, very surprising that Chief Justice Rehnquist would write the opinion strongly reaffirming probably the most well known opinion of Chief Justice Earl Warren.

COSSACK: That's all the time we have for today. Thanks to our guests and thank you for watching.

How much police protection does Braves pitcher John Rocker need? Weigh-in on "TALKBACK LIVE" at 3:00 p.m. Eastern time and noon Pacific.

VAN SUSTEREN: And before we go, on Tuesday, my dear friend Roger Cossack made a crack about me serving on jury duty, he felt sorry for the other jurors. Well, Roger doesn't have a little sister and he may not be familiar with the adage of what goes around comes around.

COSSACK: What am I getting now?

VAN SUSTEREN: I happen to have in my possession the new "People" magazine. It is America's hundred most eligible bachelors. Make sure you go out and get this edition at page 104, and you will see that one of the eligible bachelors is my co-host Roger Cossack. Join us again for our next edition of BURDEN OF PROOF.

COSSACK: I have learned my lesson, I will never say another bad word again as long as I live.

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Load-Date: June 29, 2000

Lawyers look back at impeachment

Chronicle, The (Duke University) (Durham, NC) - February 21, 2000

• Author/Byline: Bill Hatfield

• Section: News

During a panel session Friday at the School of Law, three of the most prominent lawyers from the Clinton impeachment process reflected on their personal experiences in the midst of the presidential crisis.

Tom Griffith, Brett Kavanaugh and Abbe Lowell had widely varying roles in the process and expressed decidedly different views of the appropriateness and historical meaning of Bill Clinton's impeachment.

Lowell, the chief counsel representing the Democrats in the House of Representatives, said the impeachment on one count each of perjury and obstruction of justice was misguided. "The House of Representatives never had an impeachment strategy," said Lowell, explaining that Republicans were pressuring Clinton to leave office. "They had a resignation strategy."

Brett Kavanaugh, who worked in the independent counsel's office under Kenneth Starr, Law '73, said the charges were merited.

He joined the team during Starr's last year as U.S. solicitor general and, during the summer of 1998, Kavanaugh was involved in writing the Starr Report. "[The basis for this investigation] was a deep belief in the sanctity of the law," he said. "You can't go into a legal case and lie under oath.... That's what we thought this case was all about."

Although perjury should be considered an impeachable offense, Kavanaugh said, a president does not necessarily need to be removed from office as a result of perjurious statements.

Griffith, chief legal counsel to the Senate, was nonpartisan during the case, but he said Friday that the Senate could have justifiably convicted Clinton. "I'm not certain that [the Senate has] done right by [saying] that perjury and obstruction of justice don't rise to [the level of removable offenses]," he said.

However, Lowell contended-both Friday and in earlier arguments before the House Judiciary Committee-that the charges against Clinton were not impeachment-worthy.

Moreover, he said the members of the House should have been reminded of the incredible importance of their charge, and acted accordingly. "In 1974, [during the Watergate scandal], the Democrats and Republicans lived up to that expectation," said Lowell, who was not Clinton's personal attorney.

Kavanaugh had mixed reviews of Congress's performance. "[They] decided to defer looking at [the Clinton-Lewinsky case]... until Ken Starr had gathered all the facts," he said, adding that "Congress never should have released [the Starr Report] without checking it beforehand."

Griffith said the Senate's first duty was to respect the House of Representatives by formally receiving the articles and holding a trial. Although such a duty might seem obvious, Griffith said a common question among senators was, "What is the Senate's requirement here?" In Griffith's mind, the Senate was mandated by the Constitution to receive the articles.

He said the Senate's other duty was to protect its reputation. "I think there were heroes.... There were things that [party leaders] Trent Lott and Tom Daschle did that were courageous," he said.

Toward the end of the discussion, Lowell opined that political dynamics dictate that the bipartisanship necessary to remove a president would never actually yield a conviction in the Senate. "Partisanship will allow [the charges] to get to the House," said Lowell. "If it's ever bipartisan, the president will resign."

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BY JEFF SHEAR

THE DEMISE OF THE INDEPENDENT COUNSEL STATUTE

Photography by Rick Kozak

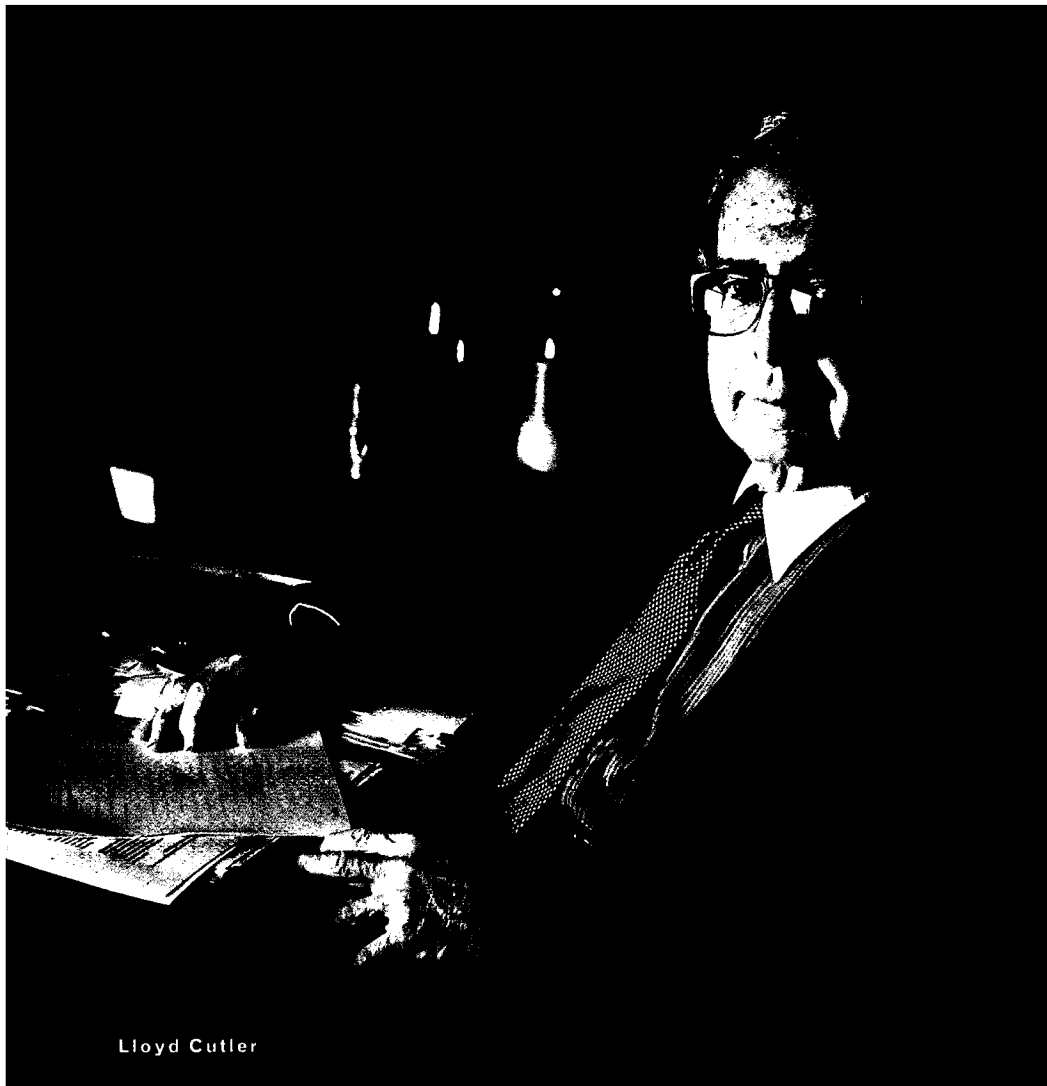
THERE WAS A SIGN next to the coffee machine in the office of the independent counsel that investigated Interior Secretary Bruce Babbitt. It was a large sign, just short of poster-size, that read: "For things to change, I have to change first." It's a nice thought, but the personal pronoun leaps out—not because the Babbitt investigation is over, but because the Office of Independent Counsel (OIC) *changed* this summer. In fact, the statute that created the office died in June.

With the sunset of the independent counsel statute, the Code of Federal Regulations was amended by the U.S. Department of Justice to allow the attorney general to appoint a special prosecutor in cases where an investigation would present a conflict of interest for the Justice Department.

Jeff Shear is the author of The Keys to the Kingdom (Doubleday, 1994).

Joseph diGeno





Lloyd Cutler

"You can make the case that whenever the attorney general has exercised the appointment power for the so-called regulatory special counsel, he or she made a pretty good pick. It's hard to think of a bad pick."

Whether that means that Washington will never see an independent counsel statute again is unclear. But one thing is certain: more than 20 years after the 1978 Ethics in Government Act was signed into law, there is little love in Washington for the lapsed provisions of the statute. Members of Congress are all but heaving audible sighs of relief, as if to say, "Farewell to all that!" Initially, the legislation was cheered as a post-Watergate remedy to protect against abuses of executive power. Over time, however, independent counsel investigations intruded on the political process in unforeseen ways. Perhaps that is because many of the investigations were not as clear-cut as Watergate—a case in which the crimes were serious and the evidence overwhelming. The way in which the Watergate investigation was handled by special prosecutors Archibald Cox and Leon Jaworski provided a reassuring sense that "the system worked." But few would argue that the system created by the independent counsel legislation "works." Today the lapsed statute has few defenders, even among the reform Democrats who championed the 1978 Ethics in Government Act.

Sadly, the independent counsel law has become a demonstration of good intentions lost to unintended consequences. At present, there is no political will to enact new legislation. Both parties have felt "burned" by the wide-ranging powers granted

to the independent counsel, and it appears that the regulations promulgated by the Justice Department last July offer a temporary respite.

Still, the fundamental dilemma that led to the passage of the original 1978 act remains: If power corrupts, how do you police those entrusted with it? Although the attorney general may appoint a special prosecutor, there is no guarantee that he or she will do so absent a statutory obligation. It is hard to imagine, for example, that Robert Kennedy would have appointed a special prosecutor to investigate his brother's dangerous liaison with Judith Exner or of Mafia involvement in CIA covert operations, if evidence supporting such allegations had surfaced during the Kennedy administration. What happens when, in the midst of a future scandal, the attorney general decides that his or her first loyalty is to the president or to some vague notion of "national security," rather than to the Constitution and the rule of law?

Is there an inherent danger in having a department of the executive branch, led by an attorney general handpicked by the president, be responsible for investigating the executive when allegations of wrongdoing arise? If so, should the Congress enact a new law? What were the flaws that rendered the independent counsel statute so dysfunctional? How can public confidence be ensured?

To ponder these questions, *The Washington Lawyer* spoke with several prominent lawyers who have been intimately involved with independent counsel investigations in order to glean insights from the wisdom of their collective experience. While no consensus emerged from their deliberations, they did provide ample food for thought, and they were able to identify several serious problem areas that need to be addressed if a new law is enacted, or that future "special prosecutors" will undoubtedly find themselves tripping over.

THE THREE-JUDGE PANEL

Carol Elder Bruce, the independent counsel who recently completed an investigation that focused on Secretary of the Interior Bruce Babbitt, points to the three-judge panel as one of the worst flaws in the old statute. "With experience and hindsight," she says, "most of the people who originally thought that the appointment power of the independent counsel should lie with the judiciary have changed their minds. It's not a reflection on the performance of the judiciary so much as it is a reflection on the notion of responsibility and where responsibility should lie."

During Watergate Attorney General Elliott Richardson appointed a special prosecutor, Archibald Cox. (After Cox was

fired in the "Saturday Night Massacre," the acting attorney general, Robert Bork, appointed a new special prosecutor, Leon Jaworski.) Although Richardson was under no statutory obligation to appoint a special prosecutor, he was following historical tradition in doing so. Under the post-Watergate reforms the appointment power was taken away from the attorney general and conferred upon a three-judge panel. The idea was that the judicial panel would insulate the executive from having to investigate itself. Rather than having an executive branch official make the appointment, as Richardson and Bork had done, the judges would decide who to appoint. Many now think the reform failed.

By and large, notes Lloyd Cutler, who served as White House counsel to presidents Carter and Clinton, the historical tradition of having the attorney general appoint a special prosecutor was successful. "You can make the case," he says, "that whenever the attorney general has exercised the appointment power for the so-called regulatory special counsel, he or she made a pretty good pick. It's hard to think of a bad pick. It's been Archibald Cox, Leon Jaworski, Paul Curran, and Robert Fiske."

Joseph diGenova agrees. A former U.S. attorney for the District of Columbia who has also served as an independent counsel, diGenova says, "This is not virgin territory for us. This is not rocket science. This was how the Teapot Dome scandal was handled: The attorney general appointed the counsel."

THE LAWYER ON HORSEBACK

The question of who appoints an independent counsel is only the beginning. Either way—if appointed by a panel of judges or by the attorney general—the problem of accountability for the supervision of the prosecutor opens a potential political minefield as soon as the investigation begins.

One of the biggest flaws in the expired law, says Cutler, "is what I call, 'the lawyer on horseback.' If an overzealous prosecutor with political ambitions is selected, he has almost unlimited power. To sustain the constitutionality of the statute, the independent counsel has to be under the supervision of the attorney general. But in reality, the attorney general couldn't do anything to an independent counsel unless he went crazy or robbed a bank."

The relative powerlessness of the attorney general under such circumstances had political consequences. It would be professional suicide for an attorney general to fire the prosecutor for anything but the most flagrant transgressions, because no attorney general would want to risk a reenactment of the

Saturday Night Massacre. As a consequence, the attorney general had no control over an overzealous prosecutor.

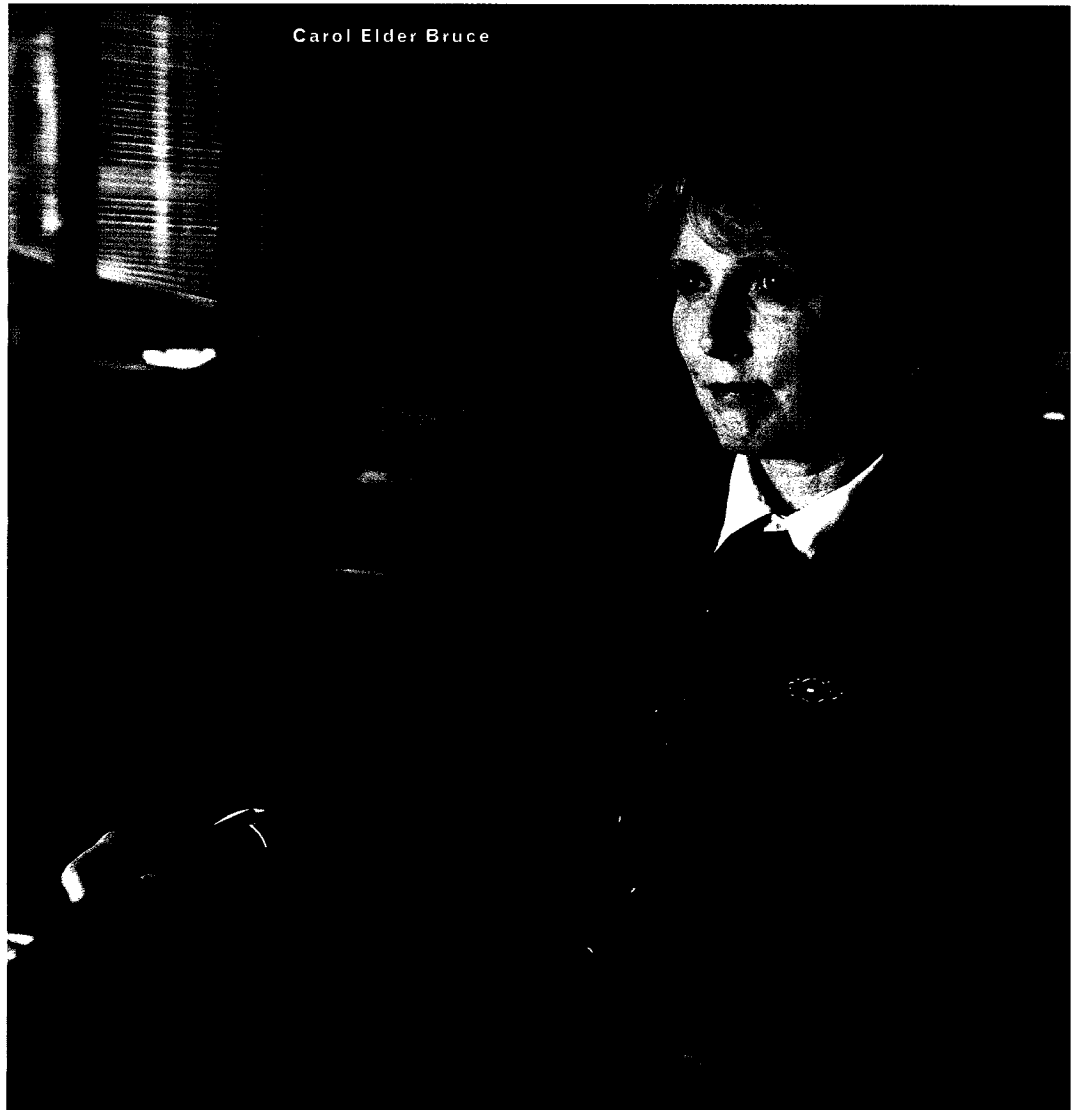
Cutler points out that the lawyer on horseback is an old and deeply held concern. "In the original draft of the bill creating the independent counsel, the person named to assume this post was to be called the independent prosecutor," Cutler says. The title was deliberately changed. "It became 'independent counsel' in order to convey that here was a person to be trusted, and not an overzealous prosecutor."

But semantic tinkering failed to solve the problem of accountability. Testifying before a House Judiciary subcommittee, Robert S. Bennett, one of President Clinton's personal attorneys, made the concern starkly clear. "In a case where I have a problem with an assistant U.S. attorney, I usually can get a review by his superior, or a review by the United States attorney. When you're dealing with an independent counsel, it just doesn't work that way. There's almost no right of appeal."

Despite the presumed oversight authority of the attorney general, in reality no one was in charge of an independent counsel investigation except the independent counsel. "You have no system of accountability," says Carol Elder Bruce. "With the three-judge panel having chosen the prosecutor, the Justice De-

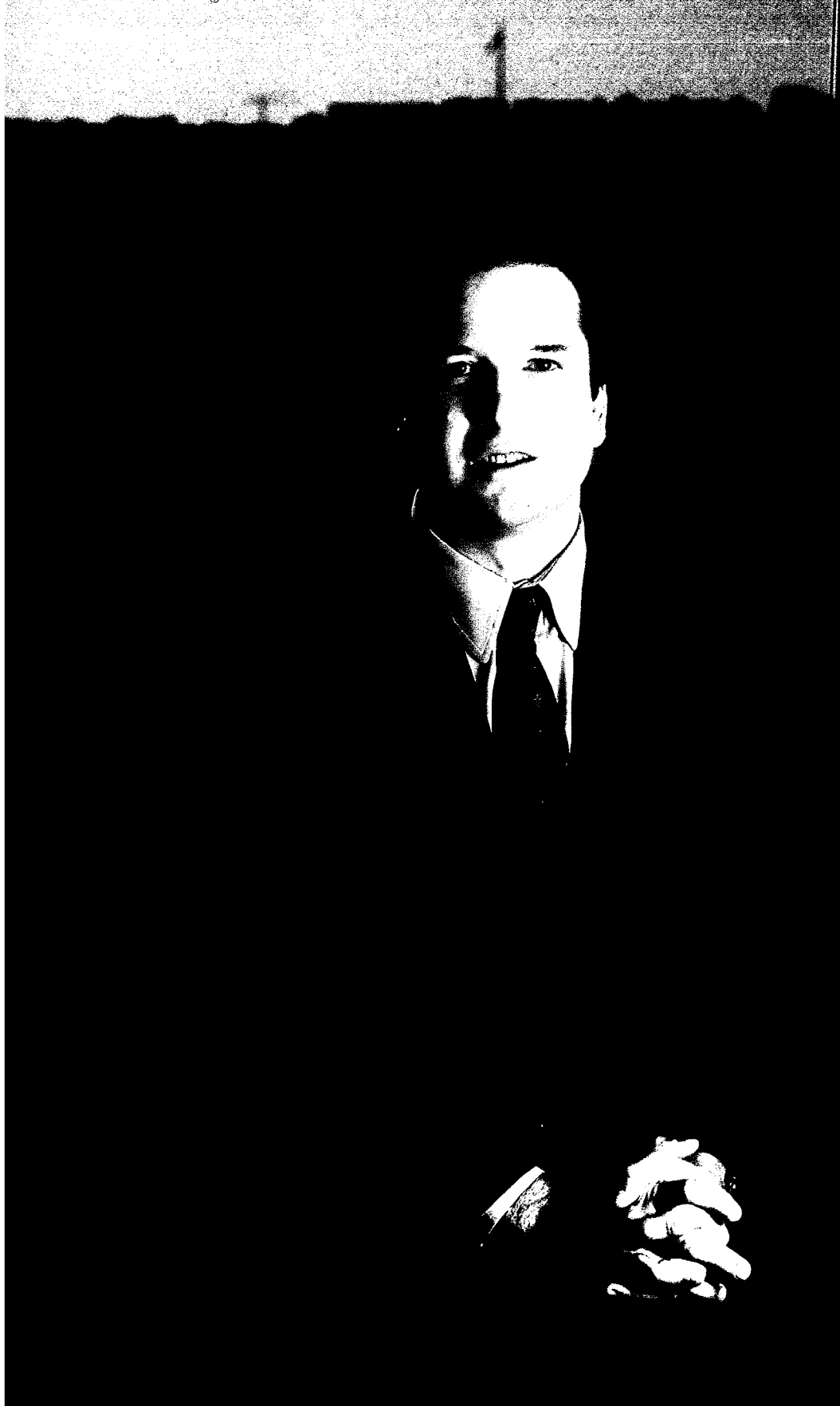
"I don't think that people want to see a system where there is an enormous amount of supervisory control over the special counsel. That defeats the whole notion."

Carol Elder Bruce



"Time limits are a disaster. The Justice Department isn't assigned arbitrary time limits on their investigations and there's no reason to hamstring a special prosecutor."

Brett Kavanaugh



partment can wipe its hands and say it has no responsibility. Congress will say that it has only limited oversight because this is—after all—an *independent* counsel and they don't want to interfere. So everyone in the normal chain of responsibility—Justice, Congress, the executive—no longer has any viable connection to the independent counsel."

While Bruce favors some form of accountability, she also calls for a light touch. "I don't think that people want to see a system where there is an enormous amount of supervisory control over the special counsel. That defeats the whole notion. But you do want to have some links between Justice and Congress that exist in statute, regulation, or in practice."

PULLING THE TRIGGER

The problem of how to appoint and monitor a special counsel presumes that the need for such an appointment has become manifest. But the question of how to determine that need poses its own dilemma. When should the power of investigation be invoked? What constitutes a triggering event?

Joseph diGenova says the answer is simple and has been in place ever since the Teapot Dome scandal. "The regulations that determine when the attorney general appoints a special prosecutor go back to the 1920s. As soon as there's an investigation where the attorney general has a personal, professional, financial, or political conflict of interest, it's time."

But what about questions of degree? At what point does the attorney general say that a public official has violated the public trust? Says diGenova, "According to the independent counsel statute, the issue of degree was solved by position. If you were within a certain pay level of the government, you were automatically conflicted out of being investigated by the Justice Department because you were a political appointee. That included most deputies who were confirmed appointees."

At the same time, he thinks that the bar set for invoking an independent counsel investigation was too low. A gift of cufflinks should not call for the same level of public scrutiny, say, as tens of thousands of

dollars in free travel. "We have trivialized the important things by concentrating on everything," says diGenova, "Everything is bad, therefore nothing is acceptable. The answer is that you have to be rational about this. Making everything criminal is stupid."

So how big must an alleged crime be in order to invoke an independent investigation of an executive branch official? Where do you set the bar? Brett Kavanaugh, who served as a deputy to Kenneth Starr during the investigations of President Clinton, says, "The trigger should be within the total discretion of the attorney general, influenced by public and political opinion. When there are public doubts about the credibility of Department of Justice to do the investigation and the attorney general is under congressional pressure, the attorney general will either appoint a special counsel or will face a substantial amount of criticism. The system will work, although the number of special prosecutors will depend on the credibility of the attorney general. If you have an attorney general with bipartisan support, the calls for special counsel will be infrequent. Without that support, you'll hear more cries for someone outside the Justice Department's influence."

If that sounds like an invitation to partisan political warfare, it may be prudent to remember that the attempt to invoke a bright line standard resulted in a process that the *New Republic* decried as the "criminalization of politics." The original intent of the independent counsel statute was to insulate the process from partisan political warfare, but too often the opposite occurred. Perhaps partisan pressure can be used to provide a balancing leverage in a process where the bright line has been replaced with an attorney general's discretion.

HIGHWAY ROBBERY

In the last years of the independent counsel statute, one issue that caught public attention was the amount of money spent on the investigations. Thoughtful questions were raised. How much is too much? Do unlimited budgets encourage independent counsels to spread their investigations beyond the scope of their initial purview? How much is an independent counsel's prosecution worth? What is the price of justice?

Joseph diGenova is quick to point out that the Justice Department routinely spends big bucks to prosecute big cases. That's true. But it is also true that federal prosecutors do not have access to *unlimited* amounts of money.

"I was an assistant U.S. attorney for 10 years," says Carol Elder Bruce. "No one ever told me, 'Carol, you only have x



Frank Carter

"We cannot allow any part of the government to go off with an unlimited budget, unlimited time constraints, and an unlimited agenda to do whatever they want to do."

number of dollars to spend on this case.'" However, she did work within the constraints of an office-wide budget. "When the travel budget was exceeded," she says, "that was it. No more travel. Unless we begged for more money." When appropriate, the money was forthcoming. "Offices do have budgets, and the people in charge of those sections and divisions have to be in tune with what they're spending, so they stay within limits."

Can such procedures be brought to bear on a prosecutor involved in a high-stakes investigation of a cabinet officer or the president of the United States? Both dangers and advantages loom large. "It would be inappropriate," says Bruce, "for an independent counsel to go to Congress and say I need \$2 million for my first year because I expect that I will be interviewing the following people. You don't want that level of detail about your investigation out there, and I don't think Congress wants that level of detail. Nor the Justice Department."

Bruce says there's another way: account for the process without describing the substance of the investigation. "I could go to Congress and say that I'm looking at the referral papers, and I see what this investigation is going to take. My best estimate is that I'm going to be doing a serious amount of investigating in the states of Wisconsin and Minnesota. So there's going to be travel.

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continued from page 29

And in order to be efficient about this, I probably want to set up an office out there. So I can do a calculation of what it will take."

Setting budgets would help to restore public trust in the special prosecutor's office, says Bruce. "Under the current system you can have a member of Congress make an allegation against an administration official and then wash his or her hands of the problem. By having the Congress involved in some form of budgeting, members of Congress would not be able to turn around and say that the prosecutor was spending too much money."

THE OTHER SHOE

The unlimited budgets enjoyed by independent counsels have another effect: the money and power supporting an independent counsel can overwhelm a defendant. It costs a lot to defend yourself from the U.S. government—and it's not just the target of an investigation who pays. It's frequently dedicated public servants around that official who get swept up into the investigative net. The legal bills that innocent bystanders are forced to absorb can be huge. In addition, the human and emotional toll is often steep, particularly when a case is played out in public as a long-running story on the evening news.

In his 1988 dissent from the Supreme Court decision that upheld the constitutionality of the independent counsel law, Justice Antonin Scalia wrote, "How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgements usually hinge on, competing responsibilities."

Or as the American Bar Association put it, defendants in these cases are often forced to "mortgage their lives."

Republican political consultant Lynn Nofziger, who worked in the Reagan White House, was convicted of breaking lobbying laws in an independent counsel prosecution, but the decision was overturned on appeal. In between, Nofziger spent \$1.5 million. "It paralyzes you when you know you're under investigation, when you know you've been indicted, when you know you're facing trial," he says. "It takes away your clients, destroys your business. It leaves you personally embarrassed. It came close to

bankrupting me. My independent counsel had 13 lawyers, along with all the powers of the FBI and the IRS."

Nofziger felt that the cannons had been loosed. "You never know when they're going to drop the next shoe because they have an unlimited hunting license. They go through papers and memos—in my case, both in the White House and in my business papers."

For Nofziger the other shoe proved more significant than the original charge. The initial charge quickly grew to four. He was convicted on the three new charges, but on the first one that had prompted the investigation the jury found him not guilty. Says Nofziger, "If the independent counsel had stayed within his original jurisdiction, I would have been acquitted and that would have been the end of it."

The fact is the other shoe has become a common feature of many independent counsel investigations. An allegation against an executive branch official is not necessarily an open-ended hunting license—although it frequently can become one. How one determines and maintains appropriate parameters for an independent counsel remains an ongoing concern.

WRAPPING THINGS UP

Apart from placing limits on money, time limits have been suggested as a way to contain the power of a special prosecutor or an independent counsel. While this has some political appeal, experienced attorneys who have been involved in the process chafe at the notion. "Nobody who is a good investigator would allow time limits," says Joseph diGenova. "All that does is to play into the hands of the people being investigated."

Brett Kavanaugh is just as uncompromising. "Time limits are a disaster. The Justice Department isn't assigned arbitrary time limits on their investigations and there's no reason to hamstring a special prosecutor. Recommendations such as this would make the special prosecutor's investigation less effective than a Justice Department investigation."

But there is an important distinction in the case of a special prosecutor who has authority beyond the norm. Francis D. Carter, who had his scrape with the independent counsel's office when he became Monica Lewinsky's first attorney, suggests, "It's reasonable to start with a flexible time line where the counsel could come back and report and ask

for more time for one reason or other. In every court system there is some limitation on the time in which the prosecutor can investigate a crime."

Carter believes that the prosecutorial power must be restrained. "If you've got a system of government based on checks and balances, then there must be oversight. The independent counsel's office developed with virtually no financial oversight and no mission oversight." The result, Carter says, is an investigatory process that has the potential to concentrate huge amounts of time and resources on one individual who is accused of a relatively minor transgression. "We are not a government of enlightened despots," he adds. "We cannot allow any part of the government to go off with an unlimited budget, unlimited time constraints, and an unlimited agenda to do whatever they want to do."

A TEST CASE?

So where do we go from here? At present, the only special prosecutor appointed under the new Justice Department guidelines is former senator John Danforth, who is investigating the FBI assault on the Branch Davidian compound in Waco, Texas. It has been suggested that Danforth's investigation will provide a test case for the new guidelines. Certainly, the ingredients are in place for the office of the special prosecutor to work. There is, for example, a clear-cut, unequivocal conflict of interest between Attorney General Janet Reno and her charge, the FBI. The investigation is narrow in scope, focusing only on the Waco controversy. There is wide public support for Senator Danforth and a recognition of his integrity. As a Republican, he is from the "other party."

Commenting on the implications of Danforth's mandate, Frank Carter concludes, "I think a lot of people will be looking to see what Danforth does, and what the attorney general may or may not do in the way of giving him a free rein. Thus far, Reno has said, 'Here, this is your investigation, so go do it.' A lot of people will be looking at this situation to see how the mechanics and the relationships work. Maybe they'll conclude that there is not a need for a new law."

Joseph diGenova is a strong advocate of allowing the attorney general to take responsibility for the special prosecutor, and he is a strong opponent of any new law. "It's impossible to write a law," diGenova says, "in an area where your ultimate goal is to confound the basic con-

stitutional scheme. This was a bad idea from its inception, born out of a typically naive sense of reform in the post-Watergate era. It is silly to think that we should fool around with the fundamental structure of the Constitution, when you're talking about something that is as powerful as the investigative and prosecutorial authority of this government."

Lloyd Cutler takes an opposing view. He still believes that a statute is needed, and that the post of independent counsel should be written into law, but that the new law must be based on past experience. He proposes a baseball-styled remedy: a deep bench. Cutler would have the president pick a team of 10 prosecutors, all of whom are players above reproach. When the call for a special prosecutor arrives, the attorney general would call up the designated hitter. Over time, new presidents would appoint replacements and a political balance would evolve through the process of succession. It is an interesting solution, but given the current mood on Capitol Hill, one that is unlikely to be incorporated into legislation anytime soon.

Generalizations about either an independent counsel or a special prosecutor come easily: in whatever manner the process is invoked there are dangers; the process is at once necessary and flawed; virtues can too easily turn to vices; questions of partisanship will inevitably arise; media mongering is unavoidable; politics and law will commingle in unexpected ways.

Under the new regulations promulgated by the Justice Department, the appointment burden has once again been placed on the attorney general. The Danforth investigation of Waco will be the first test case, but by comparison with Watergate it will be little more than a shakedown cruise. By no means will it offer an acid test. Neither the Constitution nor the survival of the republic is at stake. Still, it must be remembered that the test posed by Watergate did not require a statute for the rule of law to prevail. All that was required was the presence of sincere public servants in positions of prosecutorial authority, and the corresponding will to do the proper thing.

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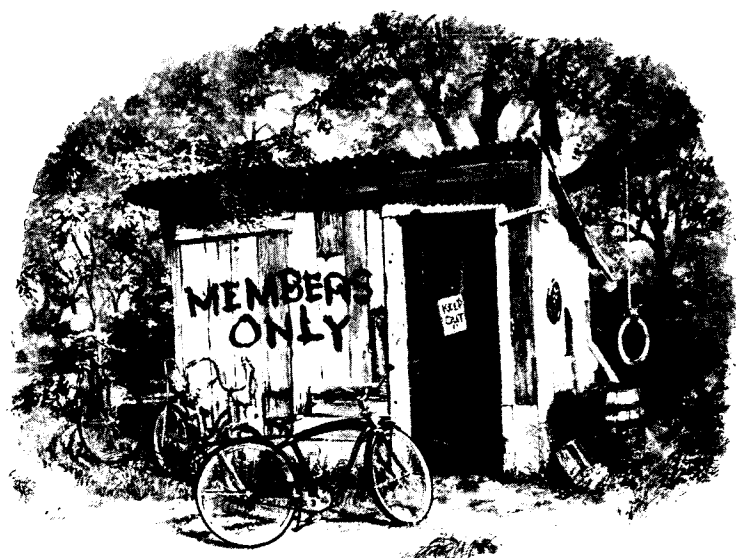
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New case may clarify court's stand on race

Christian Science Monitor (Boston, MA)

October 6, 1999, Wednesday

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Length: 938 words

Byline: Warren Richey, Staff writer of The Christian Science Monitor

Dateline: WASHINGTON

Highlight: Supreme Court considers whether Hawaii can exclude nonnatives from

Body

The conservative wing of the US Supreme Court has long expressed its distrust of the use of racial preferences to carry out government policies.

From the drafting of voting districts, to affirmative-action hiring and admissions plans, to minority contract set-aside programs, a thin majority of justices has made clear that any use of race to distribute government benefits will face a skeptical and suspicious court.

On Oct. 6, the issue once again comes before the high court as the justices consider whether a special-purpose election, open only to native Hawaiians, violates the constitutional rights of Hawaiians of other races who complain they are excluded from the polls because of the color of their skin.

Some analysts are hopeful the court will use the case to take an even stronger stand against racial classifications and preferences. They warn that race-based programs like Hawaii's, if upheld, could lead to the "wholesale racial balkanization" of the US.

Other analysts argue that Hawaii's exclusive special-purpose elections have nothing to do with racial preferences. They are merely a mechanism to ensure that a government program set up to compensate native Hawaiians for historic injustices is ultimately run by native Hawaiians.

These analysts see the case as a novel test of whether the court will adopt a flexible approach and include native Hawaiians within the same framework of constitutional protections and privileges enjoyed by American Indian tribes.

At issue in the Hawaii case is a state law that set up a \$ 300 million public-trust fund for the benefit of native Hawaiians. The fund was established by Congress and administered by the state in an attempt to compensate the living ancestors of the people who lost much of their land and culture to an expansionist United States in the 1800s.

The trust fund is administered by a board of trustees selected in a statewide election open only to blood relatives of the Polynesian people who populated the islands prior to the arrival of Western ships.

New case may clarify court's stand on race

Not all Hawaiians support the concept. Harold Rice is a fifth-generation Hawaiian rancher whose family traces back to missionaries in the islands in the 1800s. Mr. Rice has lived his entire life in Hawaii, but cannot vote for members of the trust-fund board because he is white.

Rice sued in federal court, citing the 15th Amendment, which bars the exclusion of anyone from an election because of the race of the potential voter. He lost, appealed to the Ninth US Circuit Court of Appeals, and lost there too.

But in the process, his plight caught the attention of a cadre of conservative lawyers and right-wing civil rights groups who saw in the case an opportunity for the high court to take a clear stand toward adoption of a completely colorblind approach to constitutional law.

"This case is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government," says Brett Kavanaugh, a Washington-based lawyer who filed a friend-of-the-court brief in the case.

Hawaiian elections, if allowed to continue, would undermine fundamental concepts of equality in America, says Linda Chavez, former director of the US Civil Rights Commission in the Reagan administration and president of the conservative Center for Equal Opportunity.

"If states are allowed to make distinctions between persons on the basis of race in elections it would be one of the most serious assaults we've seen in many years on colorblindness," Ms. Chavez says.

Others say there is nothing wrong with designing a government program to help compensate native Hawaiians whose ancestors were treated unfairly. If the trust fund is established to benefit only native Hawaiians, then only native Hawaiians should vote to elect members of the board, they say.

"From Mr. Rice's viewpoint, this is a case about racial discrimination and voting," says Harry Sachse, a Washington-based lawyer who filed a friend-of-the-court brief for several native Hawaiian organizations. "From the native Hawaiian viewpoint, it is a case about a very decent program set up for no other purpose than to help native Hawaiians."

Mr. Sachse says the same constitutional provisions that permit Indian tribes to conduct Indian-only elections and receive federal aid for Indian-only projects also apply to native Hawaiians. "The word American Indian in the constitutional sense never referred to any particular group other than the people who were here before the Europeans came," he says.

Lawyers for Rice insist native Hawaiians are not the Indians the founding fathers mentioned and protected in the Constitution.

The US Solicitor General's Office says the case is not about race. "Congress does not extend services to native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation," the government's brief says.

New case may clarify court's stand on race

Others see a great danger if Hawaii wins. "If the state of Hawaii can identify indigenous people for the purpose of holding special elections, then Texas, Louisiana, Arizona, New Mexico, and others would be able to look at their own indigenous people and allow them special privileges at the voting booth. This is clearly not the direction that America should be going in," says Edward Blum, chairman of the Houston-based group Campaign for a Color-blind America.

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Graphic

PHOTO: DISCRIMINATION? Harold Rice, a fifth-generation whiteHawaiian rancher, sued the state for the right to vote for board members who will distribute state benefits to native Hawaiians. BY BRUCE ASATO/HAWAIIAN ADVERTISER/AP

Load-Date: October 5, 1999

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The Starr Report: One Year Later

CNN CNN BURDEN OF PROOF 12:30 am ET

September 9, 1999; Thursday 12:30 am Eastern Time

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Section: News; Domestic; SHOW

Length: 4435 words

Byline: Greta Van Susteren, Roger Cossack

Highlight: One year ago today, the Office of the Independent Counsel delivered by armored guard evidence about the president to the United States Congress. Those documents, culminating a four-year investigation of President Clinton, would become known as the "Starr Report," and the ripple effects of its contents made history. Also, Attorney General Reno appoints a special counsel to investigate the Branch Davidian fire in Waco.

Body

THIS IS A RUSH TRANSCRIPT. THIS COPY MAY NOT BE IN ITS FINAL FORM AND MAY BE UPDATED.

(BEGIN VIDEO CLIP)

CHARLES BAKALY, INDEPENDENT COUNSEL SPOKESMAN: As required by the Ethics in Government Act, and with the authorization of the court supervising independent counsels, the Office of Independent Counsel submitted a referral to the House of Representatives containing substantial and credible information that may constitute grounds for impeachment of the president of the United States.

(END VIDEO CLIP)

(BEGIN VIDEO CLIP, September 11, 1998)

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES: I don't think there is a fancy way to say that I have sinned. It is important to me that everybody who has been hurt know that the sorrow I feel is genuine.

Others are presenting my defense on the facts, the law and the Constitution. Nothing I can say now can add to that. What I want the American people to know, what I want the Congress to know, is that I am profoundly sorry for all I have done wrong in words and deeds.

(END VIDEO CLIP)

GRETA VAN SUSTEREN, CO-HOST: Today on BURDEN OF PROOF, it is the referral which led to the impeachment of a president and a subsequent Senate trial: the Starr Report, one year later.

Plus, the attorney general appoints a special counsel to investigate dark questions surrounding the Branch Davidian fire in Waco.

ANNOUNCER: This is BURDEN OF PROOF with Roger Cossack and Greta Van Susteren.

VAN SUSTEREN: Hello and welcome to BURDEN OF PROOF.

One year ago today, the Office of the Independent Counsel delivered by armored guard evidence about the president to the United States Congress.

The Starr Report: One Year Later

ROGER COSSACK, CO-HOST: Those documents, culminating a four-year investigation of President Clinton, would become known as the "Starr Report," and the ripple effects of its contents made history.

VAN SUSTEREN: Joining us today are Abigail Beethé (ph), former House chief minority impeachment counsel Abbe Lowell and former deputy to the independent counsel Brett Kavanaugh.

COSSACK: And in the back, Patricia Flanagan (ph) and Nisha Nair (ph).

Brett, let's go right to you. You had a great deal to do with putting this referral/report together. Tell us about how you made decisions about what went in that report and what stayed out of that report.

BRETT KAVANAUGH, FORMER DEPUTY TO KEN STARR: Well, it was really a group reject, Roger, with Judge Starr leading it, and he wanted to get a group of experienced prosecutors, professors, lawyers together to make a professional judgment about what our statutory obligations were and what we had to do. We assessed the evidence and put together in a -- by consensus a report that said there were substantial and credible information that may constitute grounds for impeachment. When we did that report, our goal was to be thorough, it was also to be fair, and we think we accomplished both of those goals.

COSSACK: All right. Now let me ask you this question: Did you see that report as a partisan report or an objective report? When you were putting it together, were you selling a particular story, that is, obviously you believed that these were documents that said Congress that should impeach the president. So, did you put it together with that in mind.

KAVANAUGH: It never said that Congress should impeach the president.

COSSACK: No, I know it didn't say that, but when you were putting it together, were you putting it together to sell a story, to sell your particular view?

KAVANAUGH: We were putting it together to comply with our statutory obligations. We did not want the report to be overstated. We also didn't want the report to be understated. The facts here were overwhelming, and it was our job to present those facts and to comply with our statutory obligations.

As far as partisan, what's important here is that report has been the basis for the first contempt ever of a president of the United States, she didn't conduct, Judge Wright, an independent investigation based on the Starr Report; for the second impeachment of a president of the United States based on the Starr Report, not on an independent investigation; for 50 senators to vote to remove the president based not on their own independent investigation, based on the Starr Report; and finally, and this is important, Senator Feinstein's proposed censure resolution, which was very harsh, far harsher in its criticism of the president than the Starr Report, was based on the Starr Report. So all sides agreed in the end that the Starr Report was factually, legally accurate. VAN SUSTEREN: You know, Brett, I'll tell you, I never had any problems. Some people said that it was a piece of advocacy, and frankly, I didn't have any problem with it being a piece of advocacy, because Abbe Lowell and the Democrats did have a chance to respond. But the thing that really I thought was unjust, and it wasn't the Office of Independent Counsel but it was the House Judiciary Committee, was the release to the Internet before there could be a response. What was the discussion in your office? Did you have any discussion at all about whether or not that would end up on the Internet?

KAVANAUGH: Let me turn first to the one-sided point. Again, the report was not one-sided; the evidence in this case was overwhelmingly one-sided, as Richard Posner's new book details, that's the...

VAN SUSTEREN: Yes, well, you and I can argue about that forever...

KAVANAUGH: Yes, I know. As for the discussion...

VAN SUSTEREN: ... and I think -- I actually -- I think it was an advocacy. I will tell you, I think it was an advocacy document, but I think that's what lawyers do, that's your job, you were investigating. I don't have any problem, and

The Starr Report: One Year Later

you and I can quibble about whether it was or wasn't, but I don't have any problem with that. My problem was the fact that it ended up to be sort of an ambush...

KAVANAUGH: Right.

VAN SUSTEREN: ... without the other side being able to respond, which is the way we typically do things.

KAVANAUGH: That was a mistake on the part Congress, I believe, how they handled the report, and no one has spoken more eloquently about that than Judge Starr himself, saying that it really was a mistake for Congress to take this sensitive information, to put it on the Internet before they even read it. They had not even read the report, and obviously, given the nature of the case, there were going to be some sensitive details. I think that was a mistake, that was unfortunate, it redounded to our detriment. But it's not Judge Starr's fault in any way at all; it's really a mistake caused a little bit by the unprecedented nature of all of this, a mistake by the Congress, both parties -- it was a bipartisan decision, so I don't want to single out any particular group.

VAN SUSTEREN: Let me ask Abbe about that. Abbe, what about the release to the Internet by the House before the Democrats could respond? What's your reaction to that?

ABBE LOWELL, FORMER HOUSE DEMOCRATIC IMPEACHMENT COUNSEL: Well, it came about because we had these pre-meetings prior to the referral as to what would happen if a referral occurred, and that was just the first of about 20 decisions made by the Republican majority based on the sheer number of their votes in power without regard to what was the right thing to do. Democrats wanted a chance for the president to see it, Democrats wanted a chance for Democrats to see it, Democrats wanted a chance for the Republican members of Congress to see it before it was just dumped out, because we didn't know what was in it. But the Republican majority voted both in the Rules Committee, and Speaker Gingrich and others basically decided, no, simultaneously we're going to put it on the Internet, simultaneously we're going (OFF-MIKE)...

(CROSSTALK)

VAN SUSTEREN: It's so interesting. They both think it's unfair, though.

COSSACK: But let me just...

KAVANAUGH: Greta, actually that's not -- that's not what the committee report says. I mean, the committee report says it was actually Congressman Conyers and Congressman Gephardt, both Democrats, were in a disagreement about who should release it, and the committee report, which may be wrong...

VAN SUSTEREN: But the interesting thing...

LOWELL: One nice thing about this is that I happened to be there...

KAVANAUGH: Yes, but...

LOWELL: ... and I have to tell you that what happened was Speaker Gingrich and Henry Hyde and Mr. Solomon decide that this was going out.

VAN SUSTEREN: And what I like most of all is that both of you think it was unfair. I think you said it was unfair, Brett, that it got released by the House, not by your office but by the House...

KAVANAUGH: Right.

VAN SUSTEREN: ... before the other side got (OFF-MIKE).

COSSACK: Speaking of fairness, let's talk about something that's been criticized about, the notion that there -- that Monica Lewinsky testified that no one paid her to say anything and no one offered her a job to change stories...

KAVANAUGH: Right.

The Starr Report: One Year Later

COSSACK: ... and that wasn't included in your report, but it was included in the testimony. There came a time when that decision had to be made. How was it made, and why was it made?

KAVANAUGH: I think at the end of the day, after all the hundreds of pages of documentation, the meticulous reporting, that the biggest complaint about the report is that it says Monica Lewinsky said that no one asked me to lie, instead, you want it to say Monica Lewinsky said, colon, quote, "no one asked me to lie." If that's the biggest mistake in the report, I think we did a pretty darn good job of being fair and being accurate, and it stood the test of time. VAN SUSTEREN: Wasn't the objection, though, Brett, not that it wasn't in the report, because it was someplace in the appendix...

KAVANAUGH: It was -- twice -- it was twice in the report itself.

VAN SUSTEREN: Was it in the recitation of the facts, that she specifically testified under oath that no one asked her to lie...

KAVANAUGH: Yes.

VAN SUSTEREN: ... and no one promised her anything?

KAVANAUGH: That's both in the narrative section and in Ground VI, in the Ground section of the referral. It's not in quotation marks, again. That really is a testament to Judge Starr at this point...

VAN SUSTEREN: That's -- the quotation marks don't bother me, if they're there or not.

COSSACK: All right, let's take a break, and then we're going to give Abbe Lowell a chance to respond. As the Democratic counsel crafted their rebuttal before the House, how involved was the president himself, a lawyer? Stay with us.

(BEGIN LEGAL BRIEF)

Of the 35 clerks who will work for the Supreme Court this term, five are minorities: two blacks and three Asian Americans. There are 23 men and 12 women clerks.

(END LEGAL BRIEF)

(COMMERCIAL BREAK)

(BEGIN VIDEO CLIP)

BAKALY: We have just -- Mr. Bittman has delivered a transmittal letter to both the speaker and to the Democratic leader of the House. The Independent Counsel Statute requires that the independent counsel advise the House of Representatives, if the independent counsel receives substantial and credible information of potential impeachable offenses.

The office has fulfilled its duty under the law. Responsibility for the information we have transmitted today, and for any further action, now lie with the Congress as provided for by the Constitution.

(END VIDEO CLIP)

COSSACK: One year ago today, the Office of the Independent Counsel delivered evidence to Congress, which led to articles accusing the president of high crimes and misdemeanors. The minority defense was commandeered by our guest, attorney Abbe Lowell.

Well, Abbe, let's start right at the beginning. Should the independent counsel have written a referral, or should they just sent over boxes of evidence?

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LOWELL: Well, lots of people debate this. I have a very strong view that under the statute, and under the Constitution, what they should have done is they should have boxed up what they thought were the grounds for impeachment, in the evidence, could have been the transcripts, the documents; they could have had an index to it, and saying this is where you'll find it, and send it to Congress, send it up to Congress, in this case, the House, to do the investigation and decide, in fact, whether there were grounds for impeachment.

But for them to have a charging document, which they did, it was called "Grounds for Impeachment," and for them to assemble it in some sort of a story order, and for them to take an advocate's position, I think violated the Constitution.

COSSACK: But, why -- what is the difference between the way you described it, in terms of having the evidence with an index, and, in fact, perhaps a summary that Brett and his associates wrote, in fact, saying: This is what our opinion is.

Do you think that the Congress was less able to reflect that because of this document?

LOWELL: I think a few things. Let's talk legally and then we'll talk politically. Legally, I think the difference is: Look at what Leon Jaworski did in Watergate. He did not write what people say was an advocate's piece or, as some people say it, a referral with an attitude, as if Mr. Starr's was called. He basically bundled the information, gave a road map of where the transcripts say this, where the documents say that, sent it to Congress. It then went to the Judiciary Committee which did a very thorough, quiet, confidential, painstaking investigation leading to what we know happened in 1974.

The difference is, is when you have the independent counsel, who some people say are objective, and some people say not objective, make the decisions, conclusions, summaries, decide that somebody lied, somebody cheated, somebody obstructed; you are taking from Congress what is it. Now, that's legally.

Politically, it was a terrible PR move for Ken Starr and those Republicans who disliked the president, because it allowed Ken Starr to become the focus: He concluded, he summarized, he decided, if you had left it to the Judiciary Committee, you might have had the same conclusions, but formed in a bipartisan way.

VAN SUSTEREN: You know what, Abbe, I'm very, sort of, heavy-handed about the House Judiciary Committee because I think that they made serious mistakes in terms of, certainly, releasing it to the Internet. But, I've got to tell you, one of the things that bothered me most, if there was going to be a report, what you have here is the Congress abrogating its responsibility to determine what are high crimes and misdemeanors, and farming it out to the independent counsel. I mean, that's the problem, is that, frankly, we still don't know what high crimes and misdemeanors are, but they totally abrogated and said: Independent counsel, you decide what it is and pass it up here.

LOWELL: As it turned out, with him making that kind of referral, with that kind of summary, with that kind of conclusion, it was an abrogation, but I disagree, Greta, that any independent counsel had to do it the way that this independent counsel decided to do it. And I'm sure there were debates in the independent counsel's office as to the right way to do it. As it turned out, it was an abrogation; it did not have to be such an abrogation, but, the Independent Counsel Statute is dead. You know, long live the Independent Counsel Statute.

VAN SUSTEREN: What about the actual report itself? Do you have any objection to the way the report -- I mean the way that Brett and his colleagues laid it out.

LOWELL: Yes, I think very much so. I think they both legally made a mistake and I think politically made a mistake. Legally, I think what you do is you say we did this investigation. You uncover possibilities of perjury, obstruction of justice, and you will find this in the transcripts of the following people. You decide whether it does, thank you very much, signed, independent counsel. Send it over. Look, David Schippers...

COSSACK: Let me just jump in here a second. In light of -- Abbe brings out the Jaworski example, but there was no independent counsel law then.

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KAVANAUGH: He said that there's a referral with an attitude; well, the attitude was that there's serious evidence of possible crimes, and I think time proved that we were exactly right in saying just that.

COSSACK: Well, I don't think that's relevant whether you were right or wrong, the issue is: Should you have written a report, I mean, you could have been wrong, you could have been right. It doesn't just -- you think it justifies you because, perhaps, you agree, or you believe you were right?

VAN SUSTEREN: I mean, actually, I think the Senate showed it wrong, by the Senate vote, I mean, you know, ultimately.

KAVANAUGH: Well, the judgment whether to remove someone is not solely whether the person is guilty of the alleged offenses, and I think the Senate made that quit clear, including Senator Feinstein's censure resolution, which says that the president gave false testimony.

LOWELL: Wait, one senator voted a censure resolution that never even got submitted. I don't know that that vindicates the process.

KAVANAUGH: It was joined by about 30 Democrats, including Senators Kerrey, Moynihan.

COSSACK: Under the independent counsel, do you think you had any choice but to write that report?

KAVANAUGH: Our judgment, in the office, after a professional judgment that Judge Starr made, with everyone's input, is that you had to right a report. The Jaworski model was pre-statute, so that doesn't really work. And, Congress did not abrogate its role to determine whether there were high crimes and misdemeanors. They voted; they didn't just say the presidents is now impeached because Judge Starr sent a referral. They had debates, lots of debates that Abbe was present for, and substantial and important debates with professors...

VAN SUSTEREN: Actually, the problem with that is, Brett, is that you laid out 10 or 11 grounds for impeachment; you could have had some members of Congress voting: This is what I think are high crimes and misdemeanors, but not enough to meet the criteria. Then you've got some voting on another one, not enough to meet the criteria, add them together and you do meet the numerical number. So, frankly, I mean, you know, I'm a little bit troubled by that.

KAVANAUGH: Well, in the end, I think the statute is the problem there. I guess I agree, in the end, that Congress should have jumped on this in January or February of 1998, and not waited for a referral. But they didn't. And, ultimately, Judge Starr had to comply with the statutory obligations, and I think he did so, and did it well.

LOWELL: I don't know if this is a big point anymore, maybe history will make it such, I disagree that the statute, as written, required the kind of report that independent counsel Starr decided to write. I think it had to be sent, I think materials had to be sent, but for Brett, and others, to say: Oh, Jaworski did it one way because there was no statute, and we did it another way because there was statute. There was plenty of room in the statute to interpret what his responsibility was. But, look, in the end, he did himself as disservice by the way he brought it over, because it was laden with all of his choices, and he didn't come here baggage free.

KAVANAUGH: It was a legal judgment, however. Judge Starr is not a politician. Abbe says that Judge Starr made a political mistake. He's not a politician; we know that. He is a lawyer, and a very good lawyer. His job was solely to get the facts and the evidence.

VAN SUSTEREN: And maybe the real problem is with Congress who wrote the statute because they weren't clear enough in their directive.

But we need to take a break. Are there lessons to be learned from the trial of the president? Well, stay with us.

(BEGIN Q&A)

Q: Before he was a senator, what did newly-appointed Waco investigator John Danforth do for a living?

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A: He was Missouri's attorney general and a lawyer in private practice.

(END Q&A)

(COMMERCIAL BREAK) VAN SUSTEREN: The delivery of "Starr Report," by itself, made history, but not to the same degree as the impeachment and subsequent trial of the president.

Brett, 20/20 hindsight is a very powerful tool if you could sort of go back. Is there anything you would do a little bit differently on the report?

KAVANAUGH: No, I don't think so. I think Judge Starr handled his obligations exactly right to get the information to Congress. As Abbe says, maybe he suffered politically by what Congress subsequently did in releasing it. But as far as Judge Starr complying with his obligations in our office, I'm thoroughly satisfied with how he did it.

VAN SUSTEREN: Abbe, if you could rewrite history a little bit on this report, how do you think it should have been held -- done differently?

LOWELL: I wish Congress would have taken a big gulp and decided, first of all, not to immediately release it and have the chance to digest what it said. And then I think there should have been a lot more deliberation in the beginning on what was the standard for impeachment, what is a high crime and misdemeanor, so that there was some common ground to measure the evidence by.

COSSACK: Brett, the independent counsel law is dead and -- but yet we see Janet Reno appoint Senator Danforth to investigate what happened at Waco. It's a different kind of investigation than you worked under. Is it better or worse?

KAVANAUGH: I think it's better because the attorney general and, ultimately, the president have full supervisory control, which is the way the Constitution set up. But this shows -- and it's funny to happen so soon after the death of the statute -- when a serious investigation of the administration is needed, people are going to seek out a respected member of the opposite political party to conduct the investigation, whether it's the court appointing him or the attorney general. The same things that are said about Senator Danforth were said about Judge Starr in 1994: a very respected legal figure by both sides.

COSSACK: But why won't Senator Danforth fall into the same kinds of criticism that Ken Starr fell under? I mean, suppose this goes on for a long time, or suppose a lot of money is spent: Why won't he get those kinds of criticisms.

KAVANAUGH: He easily could be subject to that kind of criticism. The thing that made the criticism of Judge Starr so intense during the past year is that he had uncovered evidence of serious potential criminal wrongdoing by the president, and that made the political heat higher than anything we've ever seen before, I think.

VAN SUSTEREN: Abbe, if Senator Danforth -- former Senator Danforth called you up for advice -- you've done a lot of these investigations -- what's your advice for him? LOWELL: I think he knows the advice he's pretty much going to say, based on his own experience as attorney general and a Senate -- Republican member of the Senate.

I mean, first of all is to define his scope of his inquiry up front as narrowly as possible so it isn't rambling; second of all, to show that he's not on a wild detour of his own, but he's basically staying to that mandate, whatever it is; and the third is to hire the best people he can that are professionals; and the fourth is to let them do their job and not be concerned about what the media is saying, what Congress is yelling at him about.

I mean, the issue is not going to be, Greta, so much what Senator Danforth does, it's going to be what the Congress does, whether or not they're going to sort of decide they have to get in this one, they got to get in it early, they got to get in it loud. I hope that's the lesson that's learned here is there's a role for Congress and it ought to be to wait a bit.

VAN SUSTEREN: Abbe, the thing that disturbs me about this investigation is under the new rules that came into effect at the Justice Department on July 1. And one of the provisions is that the report will be kept secret because,

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what the rules suggest, if the report is made public, that there's incentive to over-investigate, perhaps taking a little slap at your former boss -- the rules -- Brett.

But what about this report. Wouldn't it be...

LOWELL: Well, I'm not sure that Senator Danforth is being appointed in the same way and the same procedures if he was the next new special prosecutor at the end of the independent counsel statute.

VAN SUSTEREN: Should it be public, then?

LOWELL: This is an internal -- Should his results be public?

VAN SUSTEREN: No, his report be public. Whatever he says to the -- after all is said and done, what he has discovered or not discovered should be public.

LOWELL: And that is the point. I don't think can you tell that until you understand the nature of his investigation and what concludes it. I don't think you have a pre-rule that says everything is public. I think you have to wait and see. Not every grand jury investigation gets dumped out to the public. Innocent people are protected, law enforcement techniques are protected. Until we know what he's doing and what he concludes, let's all keep our powder dry.

COSSACK: Brett, what about the problem that Danforth is going to -- has been appointed by Attorney General Reno and part of his investigation is to investigate the Justice Department? Isn't that a conflict?

KAVANAUGH: Well, the important thing in the selection process is to select a person who is viewed as fair and professional by both sides. Senator Danforth obviously meets those qualifications. What's important in these investigations, however, is that the American people, at the end of the day, have confidence that the person was dogged at getting at the truth; that the person was not restricted by a narrow mandate, as Abbe says, but the person really went after it hard.

And that's what Judge Starr did in his investigation. For example, a similar one was the Vince Foster matter: a lot conspiracy theories, a lot of controversy. He took the time and made the effort to do -- turn over every stone, to find the truth.

COSSACK: Brett, I'm sorry I have to interrupt you because that's all time we have for now. Thanks to our guests, and thank you for watching.

VAN SUSTEREN: Join us again next time for another edition of BURDEN OF PROOF. We'll see you then.

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Death of the Independent Counsel Act: Two Former Starr Deputies Look Back

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Highlight: Eighteen months ago, Monica Lewinsky opened the final chapter on the Independent Counsel Act. Tonight, at midnight, the Independent Counsel Act dies. Two former deputies of Ken Starr discuss the ending of the independent counsel law.

Body

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(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: The independent counsel is unchecked, unbridled, unrestrained, and unaccountable.

UNIDENTIFIED MALE: When you have an unlimited budget, that is real power. Also, subpoena power. You have a power to hire as many people as you want. That's not a wholesome situation.

KENNETH STARR, INDEPENDENT COUNSEL: While the Justice Department does not command an independent counsel, the Justice Department and its values and its culture guide the moral independent counsel.

(END VIDEO CLIP)

GRETA VAN SUSTEREN, CO-HOST: Eighteen months ago, Monica Lewinsky opened the final chapter on the Independent Counsel Statute. Tonight, at midnight, the Independent Counsel Statute dies. Today on BURDEN OF PROOF, two former deputies of Ken Starr look back.

ANNOUNCER: This is BURDEN OF PROOF with Roger Cossack and Greta Van Susteren.

VAN SUSTEREN: Hello and welcome to BURDEN OF PROOF.

The idea was to take the conflict out of sensitive prosecutions. But the Independent Counsel Statute actually gave us one of the more turbulent legal episodes of the decade. Independent counsel Ken Starr's now-famous probe of President Clinton and the impeachment proceedings that followed were a death sentence for the 20-year-old IC law.

ROGER COSSACK, CO-HOST: Attorney General Janet Reno wants the Justice Department to assume responsibility for naming special prosecutors, rather than a panel of judges.

VAN SUSTEREN: Joining us today, here in Washington, are Stephanie Cucoro (ph) and two former deputies to independent counsel Ken Starr: Brett Kavanaugh and Solomon Wisenberg. And in our back row, Jerry Sisk (ph) and Neil Coleman (ph).

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Let me go first to you, Brett. Two questions: What's the best thing about the Independent Counsel Statute, and what's the worst thing about it?

BRETT KAVANAUGH, FORMER KEN STARR DEPUTY: Well, I think the best thing about the Independent Counsel Statute is that it takes the Justice Department away from the position of having to investigate people within the Executive branch, which places an enormous conflict on the attorney general and reduces confidence in the investigation.

The worst thing about it is also what's the best thing: It takes the power away from the Justice Department, therefore it's easy for people in the administration to say: Look, they've appointed someone outside the administration who's a political opponent of mine. Even if that's not true, once you get that spin started, it's very difficult to stop and really has the effect of politicizing the process, making it easy to do so.

COSSACK: Solomon Wisenberg, is it possible to ever create this kind of an overview, if you will, and take politics out of it?

SOLOMON WISENBERG, FORMER STARR DEPUTY: Recent history has shown that it is not possible. The last two independent counsels to really seriously get close to very high people in an administration were savaged by the party of the incumbent president.

VAN SUSTEREN: Brett, before we had an Independent Counsel Statute, which was created in 1978 and which lasted until now with a short hiatus in the early '90s, we had the Watergate investigation where we had a special prosecutor. Did the Independent Counsel Statute -- was that a better idea than the special prosecutor we had during the Watergate days?

KAVANAUGH: I don't think so. I think the best system is to have the administration, itself, pick the person who is going to be the special prosecutor. And the reason I think that is that makes it impossible for the administration or the people under investigation to then turn around and say: That person's my political opponent; because they will have picked the person. So, it really takes some of the politics out of the system. And I think it's better to go back to something resembling that system.

COSSACK: Sol, let me just say: You said -- you mentioned -- you said the people in the independent counsel office were savaged by those that they were investigating. But why is that any different than what happens to prosecutors who defend people all the time? Perhaps maybe not as personally, the defense fights back, but they fight back. Isn't that just what happened in this case? Didn't the administration just fight back?

WISENBERG: This is different because you never had a situation where you have an entity as powerful as a presidential administration that can use all of its...

COSSACK: But by definition, that's what the job is. I mean, you're going to take on the president -- you're going to take on the administration. I mean, these are big guys you're fighting.

WISENBERG: Well, the job isn't to take on the administration. The job is to do a fair job of investigating somebody according to law. And what nobody anticipated was that a president who was under investigation and had engaged in wrongdoing would engage in such a massive well-coordinated effort to send his people out to utterly destroy a fair-minded person doing his job, which is what Ken Starr was. If I could -- could I say one...

VAN SUSTEREN: Well, you know what, Sol? Let me just add one -- let me just ask -- you mean the issue raised about, sort of, the power of the presidency versus independent counsel. How do you...

WISENBERG: There's no comparison.

VAN SUSTEREN: You're right. Let me make another comparison.

The office of independent counsel with all its resources against Susan McDougal who was held for 18 months because she wouldn't talk to the independent counsel, and then when she was released, she was turned around

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and indicted. Yes, lawful. Unusual, yes. Most lawyers would say they've never seen anything like that. The entire power of the Independent Counsel Statute versus Susan McDougal. Can you respond to that?

WISENBERG: It was very important to do because this was a person who was openly, very publicly, in an unprecedented way, defying the law and saying: I'm above the law. And many people in the administration, including, implicitly, the president of the United States in a live television interview, seemed to be giving her support for that. So, I believe her open defiance of the law of a judicial order from a United States district court necessitated that.

VAN SUSTEREN: So, when she did her...

COSSACK: But isn't Greta's point, though, the exercise of power? And isn't your argument back, sort of, who's ox gets gored when the president fights back in a way you consider to be overwhelming, you then point the finger and say: He should don't that? And, yet, Greta's point is: Look, the independent counsel's office is, perhaps, overstepping its boundaries in what it did.

WISENBERG: There's a critical difference. The independent counsel's office was using the processes of the law, subject to judicial supervision. In the case of the administration, you had, basically, conduct that was ethically akin to obstruction of justice. They said, basically: We're being investigated, they're getting close, and we're going to go out and we're going to attack, and we're going to spread lies about the prosecutors, we're going to dig up things in their personal lives. That's completely different.

VAN SUSTEREN: Well, I tell you, it's too bad, Sol, we don't have you here for a couple hours someday when we can really delve into those very issues because, frankly, I've never found it to be unethical to raise, for instance, privileges in the court. I've never found it unethical.

WISENBERG: I didn't say that.

VAN SUSTEREN: I've never found it unethical to go into motives of why someone is being prosecuted. In fact, there are even...

WISENBERG: Nothing wrong with that, but there is a -- Greta, there is a...

VAN SUSTEREN: There are even lawful motions about prosecutorial misconduct in which you actually go in to see what the motive is of the prosecutor, but that's for another day. Let me go...

WISENBERG: But, Greta, is it -- but, Greta, can I just ask...

VAN SUSTEREN: Sure.

WISENBERG: Is it proper to spread lies about a prosecutor, to take a prosecutor who is on detail from the United States Department of Justice -- on detail from an organization controlled by your own attorney general, and to spread information that we now know was false. I'm talking about information that was spread about Mike Emmitt (ph), that he was sanctioned by a judge.

COSSACK: And the answer to that, of course, is no, it's never proper to do that.

VAN SUSTEREN: And let's even, like, get down to, you mean -- did the president of the United States do that? The answer is no; that somebody did that, it ended up in the public domain, but you are going to make the jump and say it's the president of the United States.

COSSACK: Well, the buck stops somewhere.

VAN SUSTEREN: No it doesn't. You can't -- now, wait a second. Oh no, if someone is spreading something unlawful, it's the very person who did it, not, sort of, the entity.

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WISENBERG: The president could have called off the attack dogs at any time.

COSSACK: All right. Let's take a break.

Should the Independent Counsel Law be abolished, amended, repealed, retooled or rejected? Some suggestions when we come back.

(BEGIN LEGAL BRIEF)

On this day in 1870, Ada Kepley graduated from Chicago's Union College of Law. She was the first American woman to earn a law degree.

(END LEGAL BRIEF)

(COMMERCIAL BREAK)

COSSACK: Welcome back. No, I didn't do anything to Greta. She had to leave to catch a plane.

But, Attorney General Janet Reno thinks the Justice Department should have more say over special prosecutor appointments, while Senator Fred Thompson wants the Congress to have more authority.

Brett, if we -- now we're going to replace this independent counsel law, this law that died without anybody mourning it. How should we replace it?

KAVANAUGH: Well, I think, the best system is to have the special prosecutor appointed by someone in the administration, either the attorney general...

COSSACK: The very same people that it may be investigating?

KAVANAUGH: Well, I think...

COSSACK: The law may require investigation.

KAVANAUGH: The cure for that is to also add a new wrinkle, which would be Senate confirmation of the special prosecutor. I think that process in addition to presidential appointment would give bipartisan support to the person at the beginning, that would give him or her the credibility he needs to fend off the assaults, the political assaults that he or she, no doubt, will face just as Judge Starr did. Judge Starr would have been confirmed 100 to nothing. He's one of the most respected legal figures of his time, in 1994, before all the political assaults started on him and taken their toll on at least his public rating.

COSSACK: Brett, the more you dip into the politics; the more you require confirmation; the more you require appointments; you know, isn't that become sort of the self-defeating part of these kinds of laws, that you involve politicians in it and by definition you're going to create these kinds of issues?

KAVANAUGH: Well, I think there's no way to avoid some political overtones to what's being done. But what you want to avoid is the perception, the public perception that there's some kind of political assaults being conducted on the administration. If the special prosecutor is confirmed by the Senate; appointed by the administration, I think that would take a lot of the public, make a lot of the public assaults less credible as they occurred over time.

COSSACK: What about a division of the attorney general's office, the office of professional responsibility, and you hired prosecutors that had tenure, if you will, and almost set up a wall between the traditional attorney general's office and the office of the public responsibility, prosecution section, and you had those people be the ones that investigated the president?

WISENBERG: Well, I think it might be a good idea, but the problem is if it's statutorily mandated, I have the same separations of powers concerns about, Congress telling the attorney general, somehow, you have less authority over this division. If the attorney general had full authority, I think that would be fine. Of course, you already have a

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couple of divisions like that. You have an OPR that looks at prosecutorial misconduct. You have an office of public integrity, which is generally been seen at certain historical periods as too weak to take on that assignment. COSSACK: Yes, but what if you beefed up that particular division. I mean, you -- what I'm trying to get at is, is I think the downfall of all this is because you have sort of a hybrid political/legal law. And you end up in trouble by definition. I think if you can get it out of that political part, you have chance.

WISENBERG: I think you're right. I think that'll work, but no system is going to be perfect. Don't forget, Archibald Cox was a inferior officer to Elliott Richardson, and he was still attacked. He was subject to many of the same kind of attacks that Judge Starr was. They said, you got a bunch of old Kennedy people working for you. They said, you're going beyond your authority. So, it's still going to happen, but I think Brett's right. It's going to be a lot tougher to successfully attack somebody who's got the protection of the attorney general, but you need an attorney general who will stand up for his independent counsel like Elliott Richardson.

COSSACK: Now we're back into the contact/political argument.

KAVANAUGH: One of the things that's happened here with the independent counsel statue is in the pre-statute days, Congress would exercise aggressive oversight of the president and the executive branch. Congressional hearings in Watergate were very influential in bringing about the final results. With the independent counsel statute, Congress can say, we don't need to do that; we'll pass the buck; we'll advocate our authority to an independent counsel; and really, let the independent counsel do the dirty work. So, I think one of the good results of not having a statute is that Congress will again be exercising a little more aggressive oversight, which I think is a good thing.

COSSACK: All right. Janet Reno says that under her plan, the attorney general would have veto power over indictments that an independent counsel or special prosecutor may want to bring, over appeals and the investigation. Good idea to have an attorney general to have the ability to veto an indictment that the independent counsel's office -- what would have happened if, for example, if Reno would have said -- been able to say to you this time, you know, come to think of it, I don't want you to do it, stop.

KAVANAUGH: Well, I think one of the good results of this is that the attorney general again has the authority to make such decisions. She'll have to be accountable. She'll have to explain to a Senate Judiciary Committee, why did you obstruct Judge Starr's investigation? Why did you interfere with the investigation? Instead of saying oh, my hands are tied, which is the current approach of the White House and the Justice Department. We can't do anything. It would make them, when they're complaining about an independent counsel, either put up or shut up.

COSSACK: Go ahead.

WISENBERG: Well, see, I don't like the plan idea. I think it's much better if you have a situation where there's a scandal brewing and the public demands an independent counsel, or a special counsel within the Justice Department. And then the attorney general, at his or her own will -- it's a question of them deciding to do it -- they come in and say, I'm going to appoint a special counsel, like Janet Reno did with Bob Fiske, originally. She let Bob Fiske write his own charter. So, he had a lot of independence. She wasn't going to review what he did, but it was her decision to say, I'm going to give you this power. That would have made it much more difficult to attack Bob Fiske in the way they attacked Ken Starr.

COSSACK: So, your suggestions than, would have been, that perhaps, we don't -- the independent counsel's office or law should not have been written. It should have always been with the power of the attorney general to put that person in.

WISENBERG: As a historical, constitutional matter, I think that's beyond question.

COSSACK: All right. Let's take a break. What began as Whitewater, widened to include the White House travel office, the death of Vince Foster, misuse of FBI files and finally, the president's relationship with Monica Lewinsky, may soon be coming to an end. Looking back at the Starr investigation, when we come back.

(INTERRUPTED BY BREAKING NEWS)

Death of the Independent Counsel Act: Two Former Starr Deputies Look Back

(COMMERCIAL BREAK)

COSSACK: After more than four years, \$45 million, 12 guilty pleas and three guilty verdicts, as well as four cases ending in mistrials or hung juries, Ken Starr's investigation of the Clinton administration is wrapping up.

Sol, let me start with you. Looking back, if I had to do it all over again -- let me ask you about the Monica Lewinsky investigation, the obstruction of justice investigation; something that should have been done, or not?

WISENBERG: Oh, yes, I think there was no choice. If I had to do it all over again, I think we should have been more cognizant of the public relations onslaught that was going to be unleashed against us, and we should have had that more in mind.

COSSACK: And therefore, you would have done what?

WISENBERG: Oh, I don't know. I think we would have just anticipated it, maybe had somebody earlier on handling maybe a live a live weekly briefing with reporters. I just think we weren't prepared for, basically, the onslaught that we got.

For James Carville to come -- for the first lady to go on the "Today Show" and say, it's a right wing conspiracy, and then for James Carville to go on to say, this is war, and what that unleashed, the incredible resources the administration put into vilifying Judge Starr -- I don't know if there's anything you can fully do about that, because you've got a little prosecutor's office against the vast power of the presidency, but I think if we had known ahead of time we would have...

COSSACK: You know, Sol, my heart bleeds for you, but not quite. I can tell -- that much.

Brett, you know -- he Sol says perhaps you should have been better prepared. What I'm -- in terms of being able to respond. But what I'm suggesting is, you know, perhaps it wasn't so important, this obstruction of justice, in the big picture to take on this particular case, which I think most people will agree is the death knoll of the independent counsel law.

I think, though, the reason you're in trouble is because the American public says: Hey, we don't want to know about this.

KAVANAUGH: That may be, but you say it wasn't that big a deal. It led to the impeachment of the president of the United States; it led to 50 senators, including people like Fred Thompson and Orrin Hatch, saying the president should be removed from office; it led to a contempt of court citation by a United States district judge. It was a serious investigation, and what it required was a tough and fearless prosecutor.

And Judge Starr may look like an appellate lawyer, but underneath it all, he's proved he's a tough and fearless prosecutor, who's willing to do what it takes to get to the facts, to overcome obstacles, and I'm glad he took on this investigation, because he's the kind of person that was needed to do it right.

COSSACK: All right, but what about the words "prosecutorial discretion?" You know, not every case is prosecuted.

KAVANAUGH: That's right. And in fact, Judge Starr never gets credit. Remember, in 1996 -- he mentioned this in his House testimony, Susan Thomases -- everyone in the country was ready to indict her. But one person in the country, one person, said: I'm going to look at the facts and the law and see what's fair and what's right.

And Susan Thomases -- if you want to talk about Judge Starr's fairness, ask her lawyer what he thinks of Judge Starr. He's quite fair.

COSSACK: All right, let's take a break.

Would 20/20 hindsight have improved the vision of the highest court?

Death of the Independent Counsel Act: Two Former Starr Deputies Look Back

Stay with us.

(BEGIN VIDEO CLIP)

WEBSTER HUBBELL: After five years, it's over. The Office of Independent Counsel has finally agreed to leave me, my family and my friends alone. And our lives can begin again.

For the first time in five years, I am not under criminal investigation, and even more important to me, my wife and my friends are no longer in jeopardy.

(END VIDEO CLIP)

(COMMERCIAL BREAK)

COSSACK: When the Supreme Court upheld the independent counsel law a decade ago, Justice Antonin Scalia was the only one to take exception. If the High Court had it to do over again, knowing what they now know, would Scalia have had company in his dissent.

Brett, it was 7-1 opinion. And Scalia wrote a scathing opinion, saying that we are establishing a fourth branch of government, an independent counsel that knows no boundaries.

Do you think if this case was taken up again that it would be still 7-1?

KAVANAUGH: Well, I think the case was part of a much larger issue that people forget about in retrospect, namely the constitutionality, not just of one independent counsel, but of the entire independent regulatory state, that's really existed since the New Deal, all being dependent agencies, and I think that's why the vote was so lopsided. I think the court probably feared that if they said this was unconstitutional, what about some of these independent regulatory agencies.

COSSACK: All right, now let me eliminate that part of your answer, and get right down to asking you again. Now, take out the regulatory agencies and say, if they just had to decide on an independent counsel again, knowing what Scalia wrote last time, how do you think they'd come out this time?

KAVANAUGH: Well, I don't -- if there were the same justices on the court, I think they would all probably vote the same way. Justices rarely change their minds over time. But there's been a lot of change in membership on the court, and I think without stare decisis concerns, this court now, 10 years later, is much more attuned to -- or concerned about separation-of-powers issues. And I think it would probably come out differently with this current court. But there are stare decisis issues, so I wouldn't wait for it to be overruled.

COSSACK: OK, Sol, let me ask you this: If we had it do it all over again, what about Secret Service privileges in your office, something that should have been done? Or if you had to do it over again, would you rethink that?

WISENBERG: Oh, absolutely, there was no such privilege. It was considered to be extremely unlikely that they would prevail on that.

COSSACK: Well, I'm not talking about whether or not you would win, and you did win, and I think legally, you were on firm grounds. The issue of should you now have an exception to the law where the president -- the people that guard the president now can be called in to perhaps testify against the president. Is that the state of the law that we want?

WISENBERG: Roger, they are law enforcement officers. Don't tell me that a law enforcement officer doesn't have the duty to come in and tell the truth when there's a properly authorized criminal investigation.

KAVANAUGH: The president only has to worry about it if he's committing crimes.

Death of the Independent Counsel Act: Two Former Starr Deputies Look Back

COSSACK: Well, I understand, and that's certainly the argument that we made. But. you know, George Bush, former president Bush, other former presidents, the head of the Secret Service came in and said: Look, this is bad idea; these are people of good will. I mean, they -- obviously, these were people who felt about this. In light of that, something you would rethink?

KAVANAUGH: No, not at all, not in the slightest. No one likes to testify. I perfectly understand the feelings of the Secret Service agents and officers, but they are, as Sol says, ultimately law enforcement officers, and people have to testify when they don't like to every day.

COSSACK: Sol -- 15 seconds -- is there any part of this investigation that in your -- as you think back, that you would have done differently?

WISENBERG: I would have tried to spend more time with my family.

COSSACK: All right, that's all the time we have today.

Thanks to our guests. Thank you for watching.

We'll be back next time with another edition of BURDEN OF PROOF. We'll see you then.

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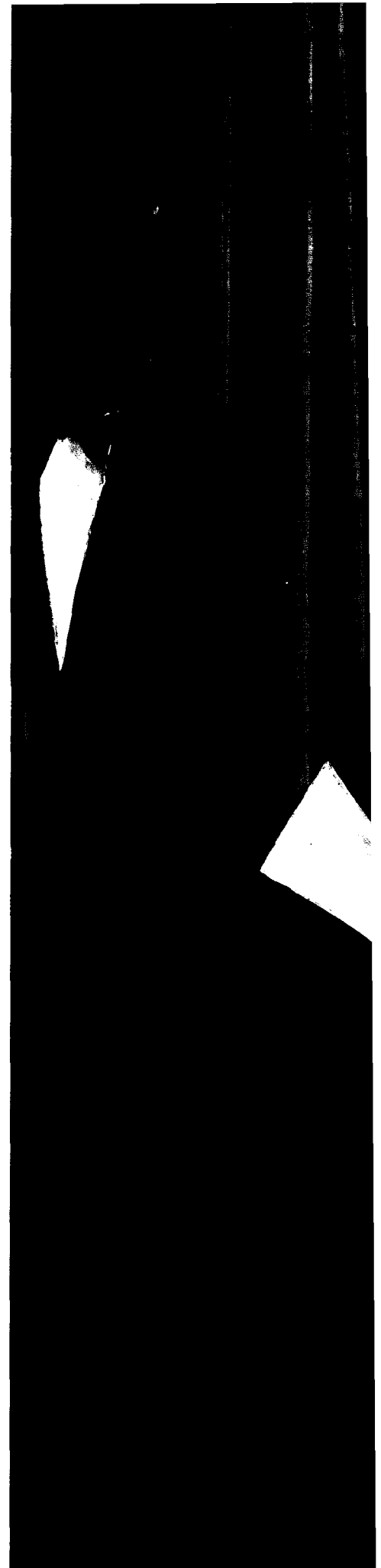
ATTORNEY-CLIENT PRIVILEGE

Does it
Pertain
to the
Government?

THE INVESTIGATION OF PRESIDENT CLINTON by the Office of the Independent Counsel that resulted in the impeachment of the president by the U.S. House of Representatives on December 19, 1998, generated precedent-setting litigation that dealt with the issue of the government attorney-client privilege. Recently *The Washington Lawyer* invited six prominent Bar members (including four who were involved in the litigation) to explore the status of the government attorney-client privilege in the aftermath of the legal skirmishing that took place between the Clinton administration and the Office of the Independent Counsel.

The participants in our roundtable discussion included Andrew L. Frey, a former deputy solicitor general who is a partner with Mayer, Brown & Platt, and who represented the Office of the President before the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*; James Hamilton, a member of Swidler Berlin Shereff Friedman, LLP, who represented former deputy White House counsel Vincent Foster and successfully argued before the U.S. Supreme Court that Foster's attorney-client privilege survived his death; Brett Kavanaugh, who has been a partner at Kirkland & Ellis, and served as associate counsel in the Office of Independent Counsel; Paul R. Rice, a professor of law at the American University Washington College of Law, who is the author of two treatises on the attorney-client privilege, *Attorney-Client Privilege in the United States* and *Attorney-Client Privilege: State Law*; and Jane Sherburne, a partner at Wilmer, Cutler & Pickering, who served as special counsel to the president from 1995 to 1997 and was responsible for managing the White House response to various investigations of Whitewater and related matters (her notes of Mrs. Clinton's grand jury debriefing were the subject of the Eighth Circuit case discussed by the panel).

Illustration by Mark Ulriksen





The Lawyers' Roundtable was moderated by Philip A. Lacovara, a partner at Mayer, Brown & Platt, who was counsel to the Watergate Special Prosecutor and argued the executive privilege case *United States v. Nixon* in the Supreme Court. Mr. Lacovara was president of the District of Columbia Bar for the 1988-89 term.

PHILIP LACOVARA: To begin the discussion, let's focus on two recent government attorney-client privilege cases: *In re Grand Jury Subpoena Duces Tecum*, which was heard before the Eighth Circuit where the First Lady's communications with White House counsel were at issue, and *In re Bruce R. Lindsey (Grand Jury Testimony)*, which was argued before the D.C. Circuit and involved confidential communications between President Clinton and deputy White House counsel Bruce Lindsey. As I understand it, the courts have held that a government lawyer who is called before a federal grand jury does not have an attorney-client privilege to assert in the face of a prosecutor's demand for oral testimony or for the documents the lawyer generated in the course of advising a government employee. That includes advising the president of the United States. Professor Rice, is that a fair statement of the law?

PAUL RICE: Yes, and the decision to eliminate the privilege in this context raises a lot of questions. Traditionally, the courts have drawn a parallel between the government attorney-client privilege and the corporate attorney-client privilege. But the two decisions you have cited raise a very serious question as to whether the corporate analogy is going to be followed in the future. Consequently, we are left in doubt about the standards by which the government attorney-client privilege will be measured and applied.

PHILIP LACOVARA: That raises the question, Who is the client? The courts in the two cases under discussion have suggested that "the client" is an institution called "the office of the president," and not the president personally. Jane, as a lawyer performing your duties in the White House, is that the client you understood you were serving?

JANE SHERBURNE: Yes, that's the client I understood I was serving. For the purposes of attorney-client privilege, I thought the corporate analogy worked quite well. As is true in representing a corporation, I had an institutional client that was personified by certain individuals, in this instance by the president and the official staff of the White

House. I was quite comfortable with the corporate model as it related to issues of privilege and never understood myself to be representing the personal interests of the president or staff members.

PHILIP LACOVARA: Move outside the White House and go to the Department of Agriculture. Assume that you are a lawyer on the staff of the office of general counsel of the Department of Agriculture. Who is the client there?

JANE SHERBURNE: The Department of Agriculture is part of the executive branch, and the corporate model continues to be applicable. The client is not a person. It's not the secretary of agriculture. The client is the entity that is charged with implementing the official duties, policies, and positions of the Department of Agriculture.

PHILIP LACOVARA: Professor Rice was mentioning the corporate analogy, where the corporation owns the privilege and the chief executive can decide whether to invoke it or waive it. But in the government context we have to decide who owns the privilege.

ANDREW FREY: I think we should be clear that nobody in either of these two cases was contending that anyone in the White House had a personal privilege. The privilege we asserted before the Eighth Circuit was an institutional privilege, and the analogy we drew was specifically to the corporate privilege. Now in the case of the Department of Agriculture you can think of the Agriculture Department as the entity that holds the privilege, but the secretary of agriculture is not actually the CEO of the Agriculture Department. The CEO of the government is the president. Ultimately, it would be the president who would have the responsibility to decide whether a privilege should be exercised or waived.

BRETT KAVANAUGH: The problem is that the corporate analogy may not be appropriate. The Eighth Circuit said you can follow the *Nixon*¹ track or you can follow the *Upjohn*² track. In other words, is the appropriate model for the government attorney-client privilege the executive privilege or the corporate attorney-client privilege? The Eighth Circuit and the D.C. Circuit found the *Nixon* executive privilege analogy more compelling. President Nixon had argued that executive privilege was fundamental to the operation of the government. The Supreme Court acknowledged the privilege, but nonetheless ruled that it could be overcome in criminal proceedings. How can any

government attorney's communications with his or her client be stronger than a president's communications with his cabinet or vice president? Both the D.C. Circuit and the Eighth Circuit found that logic compelling. Both relied on *Nixon* in rejecting a government attorney-client privilege in criminal proceedings.

PHILIP LACOVARA: That raises the question of whether the privilege is absolute. In the *Nixon* case the Supreme Court—somewhat to our surprise in the special prosecutor's office—ruled that there is such a thing as executive privilege and that it is constitutionally based. The Court also ruled, however, that the privilege can be overcome by the prosecutor's showing of special need for the privileged material.

ANDREW FREY: If the Eighth Circuit had applied the qualified privilege logic of *Nixon*, then the White House would have won. There was no basis for believing that the information sought—which included notes of Mrs. Clinton's grand jury testimony and a debriefing of her—contained any evidence of a crime. In Watergate the tapes were the corpus delicti: you could actually hear the crime, you could listen to the obstruction of justice that took place. But in regard to Mrs. Clinton the independent counsel was on a fishing expedition. Our position was that you cannot overcome a qualified privilege with a fishing expedition.

PHILIP LACOVARA: Brett, from a policy perspective, what is wrong with treating the government attorney-client privilege as one that can be balanced by a showing of need?

BRETT KAVANAUGH: The problem is endless procedural skirmishing. You fight battles in court and you engage in time-consuming litigation. Regarding the independent counsel's investigation of White House officials, I can guarantee you that is precisely what would have occurred.

JAMES HAMILTON: When the Supreme Court has frowned on the balancing test, the reason has been because it creates uncertainty. The logic is that clients will be hesitant to talk to their lawyers if there is uncertainty about whether the privilege pertains. The language used in *Upjohn* was to the effect that an uncertain privilege is little better than no privilege at all. In the attorney-client context, I think that's the policy reason a balancing test has been frowned on.

BRETT KAVANAUGH: Although *Upjohn* speaks to that, I've never thought encouraging employee

candor makes sense as a justification for the corporate attorney-client privilege. The person who is communicating to the lawyer has no control over the privilege. Instead, *Upjohn* seems designed to encourage corporations to conduct internal investigations, but it provides no guarantee whatsoever to the corporate employee. Even with *Upjohn*, how can a corporate employee be sure when she's talking to an organizational lawyer that what she says isn't going to be used against her in some future criminal proceeding?

ANDREW FREY: You can't be sure, but you have a lot more than nothing. At some point we need to get to the practical side of this. Privileges exist because they serve practical goals that, in circumstances in which the privilege is recognized, are thought to outweigh the value in a judicial proceeding of having the evidence.



JAMES HAMILTON: In focusing on the practical effect of encouraging candor, I thought there was a very interesting quote in the Secret Service case.³ In his dissent Justice Breyer said that "the complexity of modern federal criminal law codified in several thousand sections of the United States Code and the virtual infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law make it difficult for anyone to know in advance when a particular set of statements might later appear to a prosecutor to be relevant to some investigation." The point is that if a president or a government official knows that in the criminal context—as opposed to the civil context or the Freedom of Information Act context—a grand jury might have access to the conversation the person is hav-

ing with his government lawyer, there really is going to be a chilling effect.

PHILIP LACOVARA: That "chilling effect" argument was made in both the Eighth Circuit and D.C. Circuit, and was the subject of some affidavits, as well as some amicus submissions. In the D.C. Circuit all three judges on the panel had been government lawyers at some point in their careers: Judge Rogers is a former D.C. corporation counsel, Judge Randolph served in the solicitor general's office, and Judge Tatel is a former executive department counsel and administrator. Two of the judges on the panel did not give much credence to the chilling-effect argument. If you look at the makeup of the Supreme Court, you'll see that most of the justices also served as government lawyers, and yet they voted not to grant cert in two rounds of litigation. Is there reason to doubt

that the president's counsel should be able to go prying into those communications, and the privilege is not qualified so that a showing of need is not required, then that's precisely what is going to happen. It's what is happening right now. As a result of these decisions, the president has to rely on his private lawyers for candid and confidential advice on matters that may implicate both personal and official interests. But his private lawyers are not representing the office of the presidency and can let personal interests overwhelm institutional interests in the absence of the lawyer responsible for protecting that interest. I think that's bad policy. It's bad for the country. It's bad for the institution.

BRETT KAVANAUGH: The Justice Department disagrees completely with that view, which undercuts the argument that the independent counsel is to blame. In the D.C. Circuit lit-

As a result of these decisions, the president has to rely on his private lawyers for candid and confidential advice on matters that may implicate both personal and official interests. . . . I think that's bad policy. It's bad for the country. It's bad for the institution.

their assessment of how weighty the chilling-effect argument is?

JANE SHERBURNE: All you have to do is look at what has happened since the Eighth Circuit decision. You have official lawyers in the White House trying to advise the president on a crisis post-Eighth Circuit decision. In order to do so they made the judgment that they were not going to permit communications to be chilled; that they would risk the consequences. And look at what happened. The communications were had, and our friends at the Office of Independent Counsel seized on the opportunity, demanding their disclosure. The White House was told quite bluntly in the series of appeals that followed that this was a risk they should not have taken. Official lawyers would be foolish now to provide advice to the president with any expectation that it could remain confidential.

PHILIP LACOVARA: Do you really suggest, Jane, that White House lawyers and White House officials will not discuss legal issues simply because of the prospect that there will be a grand jury demand for testimony?

JANE SHERBURNE: Yes, I do. As long as there are unchecked opportunities for indepen-

dent counsel, the Justice Department said it's been rare historically for a government agency to withhold government attorney-client communications from the Justice Department. Indeed, as the Office of Independent Counsel pointed out, the Justice Department didn't identify a single case where that had happened. It's easy and in fashion to attack the independent counsel, but the Justice Department has had criminal investigations into campaign finance and so on, where they now and historically have obtained these communications.

PHILIP LACOVARA: Is it your point that government officials never should have expected complete confidentiality when consulting with government lawyers, because Justice Department investigators have gotten access to the exchange of communication?

BRETT KAVANAUGH: That's correct. The issue is not unique to independent counsel. When you have a Justice Department investigation of someone in the White House, the Justice Department prosecutors are going to try to obtain that information, and historical and contemporary practice demonstrates that the Justice Department would obtain that information.

PAUL RICE: Under the parallel with corporate law that historically has been drawn, no government official could ever have reasonably expected that her communications with government counsel would remain confidential and within her control. Right now President Clinton, as a successor-in-interest to Ronald Reagan, could waive the attorney-client privilege protection for communications between President Reagan and his White House counsel on all matters relating to the Iran-contra affair. Conversely, when President Clinton, or any government official, for that matter, leaves office, his successor could disclose all of his confidential communications with a government attorney on any topic. From this reality the recent circuit decisions also gave prosecutors the power to breach that confidentiality.

PHILIP LACOVARA: But we are talking about government officials' exposure to criminal liability.

There is a long tradition of attorney-client privilege in our society. It's not very reassuring to government lawyers to know that when you have an adversarial relationship with an independent counsel you get situations where those protections are not meaningful.

PAUL RICE: The point to be made is that it doesn't happen very often. It's not common for government officials who are committing criminal acts to consult with government attorneys in order to be assisted in the commission of those criminal acts.

JAMES HAMILTON: But so many things can be criminalized now. Take, for example, "conspiracy to defraud the United States." In 1910 that was interpreted as a conspiracy to interfere with the lawful functioning of government.⁴ I've never known precisely what that means. The language is so amorphous that all sorts of behavior could be declared "criminal." Given the broad powers that prosecutors have, seemingly innocuous conversations between government officials and government attorneys might be pried into by a prosecutor who decides, "Gee, these conversations might be relevant to some conduct that we've just decided is criminal."

PHILIP LACOVARA: The position of the Office of Independent Counsel and of the

two circuits so far is simply that this is a consequence of doing the public's business. The public has the ultimate interest in finding out what the truth is, and government lawyers should not be obstacles to that pursuit.

ANDREW FREY: The government does not have that interest at the expense of the functioning of the government. Like everything else in the privilege area, you're balancing competing interests. It seems to me that the ability of the Department of Justice to get information from government employees is analogous to the general counsel of a corporation. It's still in the family when the Justice Department is looking at it. One hypothetical that occurred to me in thinking about this is as follows: Suppose that the deputy assistant secretary of agriculture was accused of sexual assault on a staff member. There are questions about security, there are questions about whether the accused and the person making the allega-

but the feeling there is that you cannot do what lawyers normally do because of the risk that down the road there will be an independent counsel coming along fishing for information.

PHILIP LACOVARA: Executive privilege is merely a qualified privilege, and there is no absolute protection for the disclosures that cabinet secretaries and the vice president might make or the advice they give to the president. In light of that fact, is it only a lawyer's conceit to suggest that absolute candor in talking with lawyers deserves more protection?

ANDREW FREY: There is a long tradition of attorney-client privilege in our society. It's not very reassuring to government lawyers to know that when you have an adversarial relationship with an independent counsel you get situations where those protections are not meaningful.



tion should remain employed, and there are questions about the Agriculture Department's internal policies. That's a lot for a government lawyer to deal with. The assistant secretary is going to face the possibility of a law suit, removal from his position, and a possible criminal prosecution. Meanwhile, the government has an interest in finding out what happened. The secretary of agriculture and the general counsel are going to want candid information. The attorney-client privilege is very important in getting people to be talk candidly—to tell all that they know. The privilege is important for the lawyer to perform the lawyer's job of advising the agency.

I had lunch recently with the general counsel of one of the executive departments, and he said that they no longer keep notes when they talk about anything sensitive. That is an insane way to run a law office. It is an insane way to run a legal operation in the government. This department is not under an independent counsel investigation, nor is it threatened with one,

JAMES HAMILTON: And it is not just limited to independent counsel. My experience is that the Office of Public Integrity in the Department of Justice has a great deal of independence. So even when you don't have an independent counsel in place, this issue will arise. I read an editorial in the *Washington Post* the other day that said that, when the independent counsel statute expires, this issue will go away. I don't think that's true.

BRETT KAVANAUGH: I think you're right on that. The Justice Department is aggressive in seeking government attorney-client information when the information is important to a criminal investigation.

ANDREW FREY: In the Eighth Circuit case involving the First Lady, our perception was that the independent counsel was going after material that was not important to the investigation. One of the reasons the White House chose that case to assert attorney-client privilege was so that nobody could accuse the White House of trying to withhold evidence that had a material bearing on the independent counsel's investigation. We thought the government attorney-client privilege implicated a vital principle. And there's something very important that has been missed here. When you have evidence of a crime, the practice in the government has always been to turn the evidence over to the attorney general. Evidence of criminal activity by a government employee is made available for use in criminal investigations. Therefore, what we are dealing with is the small number of cases where the head of the agency made the judgment that the information being sought is not important to a criminal investigation, and where the head of the agency has also made the determination that it is important to preserve the confidentiality of the communications.

PHILIP LACOVARA: Andy is raising the issue that we posed earlier. Who is the client? Whose privilege is it? If the "head of the agency" is the person under investigation and is the client, then in a purely private setting the client would be entitled to prevent his or her lawyer from being called to testify about their private communications. In the government context, though, if the client is the head of the agency, then his invocation of the privilege will frustrate the government investigation.

ANDREW FREY: There's only one circumstance in which that's really a problem, and that is where the client agency is the White House. In every other circumstance the president would call the shots. The way it would work is that the Justice Department or the assistant U.S. attorney would make the case for production, the agency head would make the case for confidentiality, and the president would decide. Now, when the president is the one who is under investigation, constitutionally you have to assume that the president will properly execute the powers of the office. Even though we may all think that the president will succumb to the human temptation to protect himself, I'm not sure the Constitution is set up so that we can indulge that assumption.

PHILIP LACOVARA: That is the argument President Nixon made in the Nixon tapes case. His argument was that under the Con-

stitution he is the chief executive and no one, either in the executive branch or in the judiciary, may lawfully challenge his decision to prevent White House information from being released.

BRETT KAVANAUGH: This question is actually very interesting. I believe that the government attorney-client situation in which we find ourselves stems directly from *Nixon*. Andy has not argued that *Nixon* was wrongly decided. But maybe *Nixon* was wrongly decided—heresy though it is to say so. *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently. Andy has suggested that we should assume that the president will act in the official interest of the country, but in *Nixon* the Supreme Court apparently had the sense that was not happening. And the Court said, "We're going to take away that right." Maybe the tension of the time led to an erroneous decision.

PHILIP LACOVARA: In the D.C. Circuit case, the majority of the panel held that the independent counsel stands in the shoes of the attorney general, whom the court identified as the "country's chief law enforcement officer." Using this constitutional premise, the D.C. Circuit went on to say that the independent counsel was entitled to pursue evidence contrary to the direction or preference of the president. Do you accept the proposition that the attorney general, or the independent counsel, is the country's chief law enforcement officer?

BRETT KAVANAUGH: I do not. The president is the chief law enforcement officer. That is one of the bedrock principles that has gotten lost since *Nixon*. The power of the president in these situations has diminished dramatically. There should be more focus on the merits of *Nixon* than there has been. A lot of people are concerned about the government attorney-client decisions and the Secret Service decision, and if you listen to their arguments, they are the exact same arguments that President Nixon made. President Nixon even argued that he was facing a prosecutor and grand jury operating as the arm of the House Judiciary Committee. That was same argument we heard in the *Lindsey* privilege case. I'm curious to know what people who are upset by the recent privilege decisions think about the

Supreme Court's ruling in *Nixon*. Should *United States v. Nixon* be overruled on the ground that the case was a nonjusticiable intrabranch dispute? Maybe so.

JAMES HAMILTON: In *Nixon* the special prosecutor was not operating under the independent counsel statute because there was no statute. Jaworski and Cox were both appointed by the attorney general.

ANDREW FREY: My problem is not with what we think about the constitutionality of the independent counsel at some abstract theoretical level. As a matter of political reality, the independent counsel operates outside the effective control of the president much more than the Justice Department does. In real world terms, I think what has happened is an adversarial relationship developed between Judge Starr and President Clinton that was unfortunate. As it evolved each side may have done things that they would not have done had the relationship been different. Now we are in a situation where government lawyers look at what has transpired, and they see practical consequences. As a result of what they see, they're not keeping notes. They're not behaving the way lawyers should behave.

I suppose we could say, "Well, the same rules that applied in *Nixon* should apply in regard to the First Lady, Bruce Lindsey, and the Secret Service." That would mean we would have a qualified privilege. If a compelling showing was made of a need to overcome that privilege, then the privilege could be overridden. Maybe that should be true in civil litigation as well. Why don't we just turn attorney-client privilege into a qualified privilege in both the government and corporate contexts?

PAUL RICE: The *Garner v. Wolfenbarger*⁵ authority would have given the kind of protection you want. It would have provided everything that you want in that it has judicial intervention, and there has to be a showing of good cause to obtain the privileged communications. It would have limited the absolute power of the prosecutor to require the production of the confidential communications—the power that was granted by both the D.C. and Eighth Circuit opinions. Those courts, however, chose to ignore the corporate parallel. The only reason given by the D.C. Circuit for ignoring the *Garner* authority was the need to have an absolute rule, rather than a balancing test. The specious reason given by the court for shunning the balancing test was the fact that balancing had been rejected by the Supreme Court in the Vince Foster case where an individual's

privilege was at stake. That decision, of course, was not authority for the interpretation and application of the same privilege in the corporate context.

Now I think it can persuasively be argued that Congress should also have a right to obtain privileged information from government agencies in the conduct of congressional investigations because Congress is dealing with legislation that affects all the people in the country and not just a single criminal defendant. The logic of the D.C. and Eighth Circuit's decisions leaves this possibility open.

PHILIP LACOVARA: Jim, you've done as much thinking about congressional investigations as anybody in the country. What are the implications of these decisions for the government attorney-client privilege in the congressional context?

JAMES HAMILTON: Because both of the opinions are limited to the context of a request by a prosecutor in a criminal investigation, I don't think there is a direct ramification. Obviously the argument can be made that Congress has needs and interests that are just as strong as an independent counsel. Frankly, I think it would be horrifying if the Congress had the authority to break the privileges in the executive branch. That's just a prescription for mischief. Congress has become more and more partisan, and it would really open up the floodgates if Congress could gather all types of information that it shouldn't have and doesn't need to have.

PHILIP LACOVARA: Am I correct in suggesting that Congress has not conceded that an attorney-client privilege exists that is a barrier to obtaining congressional information?

JAMES HAMILTON: That position is taken more strongly on the House side than on the Senate side. As a practical matter many committees have recognized the attorney-client privilege. Certainly the Watergate committee did, and the Iran-contra committee did. But on the House side there are members who have taken the position that there really is no privilege as of right. They claim that recognition of the privilege is solely at the discretion of Congress. I think that idea is absolutely berserk because it undercuts the purpose behind the privilege. If you follow that logic, it means that if I'm representing a witness before a congressional committee one day, the next day the committee can subpoena me and demand to know what my witness said to me in our private conversations. That's obviously a crazy notion.

PHILIP LACOVARA: If that has been the traditional assertion by congressional committees on the House side, why hasn't that had a chilling effect on government attorney-client communications?

JAMES HAMILTON: Because there is no court decision that upholds the House side. There is a feeling that if push came to shove, the House would back down. They wouldn't push it to a court proceeding. The other reason is that, in the House, there's no jurisdictional basis for bringing a suit against an executive official. Under the Ethics in Government Act the Senate can sue a private individual for information, but the act does not allow even the Senate to sue a government official. There's no statute of any sort regarding the House. So to enforce a subpoena for information, you have to go through the criminal contempt process. A vote of the full House would be needed to send the matter to the U.S. attorney in the District of Columbia, and then she would have to make the decision to put it before the grand jury. If the grand jury indicts, a decision has to be made about whether to sign

full Senate. So in recent years we are seeing a much greater willingness for the Congress to disregard traditional privileges.

PHILIP LACOVARA: Jane, you've identified a pattern of increasing aggressiveness on the part of congressional committees in going after privileged government communications. These efforts haven't gone to litigation yet, but under the threat of litigation, political embarrassment, or contempt, the White House has generally caved in. Why hasn't that pattern of concession had the kind of chilling effect that you and Andy have suggested the D.C. Circuit and Eighth Circuit decisions will have?

JANE SHERBURNE: There has been a chilling effect, but the issue plays out differently in the political arena. White House lawyers don't want their advice revealed to Congress any more than they want it disclosed to an independent counsel. Having said that, there is another card to play in the Congress, which may have political reasons of its own for not abandoning privileges altogether.

A lot of people are concerned about the government attorney-client decisions and the Secret Service decision, and if you listen to their arguments, they are the exact same arguments President Nixon made.

the indictment, and then to prosecute with vigor. The process is very difficult.

JANE SHERBURNE: But the House and the Senate both have pushed this issue harder over the last few years in regard to materials withheld by the White House pursuant to claims of both the executive and attorney-client privileges. As you will recall, when the president claimed executive privilege in withholding certain documents from Chairman Clinger's committee investigating the travel office matter, the committee reported out a contempt citation. The White House gave up the documents before the contempt was voted on by the full House. On the Senate side, D'Amato's Whitewater committee refused White House claims that notes of a White House lawyer were claims of attorney-client privilege. There was a nasty confrontation with D'Amato and threats to bring a resolution to the full Senate to compel production of the notes. Again, we reached a compromise that involved a nonwaiver agreement and turned over the notes before the issue reached the

The attorney-client privilege is recognized in ethics committee investigations in both the House and the Senate. When you've got Senator D'Amato refusing to waive his own attorney-client privilege before the ethics committee that is investigating him, he risks attention to his conduct if he refuses to honor privileges asserted by others that he is investigating.

BRETT KAVANAUGH: You're comparing apples and oranges. Senator D'Amato was asserting the personal attorney-client privilege with the private lawyers that he had retained.

JANE SHERBURNE: That's true, but that's a distinction without a difference in a political environment.

BRETT KAVANAUGH: Not a *political* difference, perhaps, but there is a huge *legal* difference.

JAMES HAMILTON: The assertion by Congress is not that it's just a governmental at-

torney-client privilege that is subject to congressional discretion, but that it's everybody's attorney-client privilege that is subject to the discretion of Congress. I think the reason they haven't pushed it to a judicial confrontation is that they will lose it. I've always said I want to be the lawyer that's put under subpoena by a congressional committee and asked to reveal what my client told me.

PHILIP LACOVARA: It wasn't enough that you were under subpoena by a grand jury? [Laughter]

JAMES HAMILTON: I said that *before* Brett put me under subpoena.⁶ [More laughter] I'm not so sure I'd want to go through it again. But I do think that ultimately the lawyer would win on that issue. I think in that circumstance the court would rule that the attorney-client privilege of the client outweighs the power of Congress.

PHILIP LACOVARA: Let's talk for a moment about whether the Supreme Court of the United States has behaved responsibly in dealing with these issues. On three occasions the Court was presented with certiorari petitions to determine the existence or scope of the government attorney-client privilege, and on all three occasions the Court denied cert. Is it responsible for the Supreme Court to leave these issues in doubt when the president of the United States, through his counsel, has said that it is not in the interest of the government to leave them in doubt?

BRETT KAVANAUGH: I don't think the Court thinks the issue is in doubt, especially after the D.C. Circuit agreed with the Eighth Circuit decision on all fronts. I'm speculating here, but my guess is that at least seven of the justices don't feel there's a whole lot of doubt.

ANDREW FREY: As a disappointed petitioner on behalf of the White House, I think it's important to note that there have been strong dissents in every decision. If the Supreme Court confronted the issue, there's no telling how it would go. After the Supreme Court denied cert from the Eighth Circuit, I remember discussing it with a colleague, who said, "Who do they think they are?"—by which this person meant that when the president of the United States tells the Court that this is an important issue that significantly affects the operations of his office and of the government generally, the

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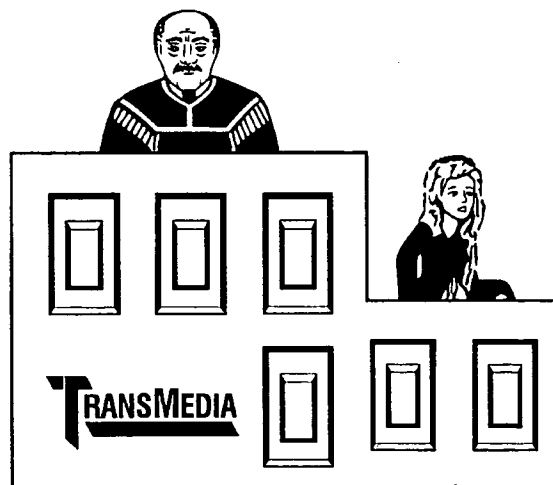
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Court ought to take the case. I agree with that, unless there's a very powerful reason for them not to do so—which I don't see.

BRETT KAVANAUGH: In the Secret Service case the White House petition to the Supreme Court said that the decision of the D.C. Circuit would increase the risk of presidential assassination. The Court's denials of cert in that case and in the government attorney-client case send a very powerful signal as to the Court's view of these claims of privileges and immunities.

PAUL RICE: I think it was incredibly irresponsible for the Supreme Court not to take these cases. The chief justice has made it clear to the past and present chairs of the Advisory Committee on the Federal Rules of Evidence that they are expected to propose only minimal revisions to the evidence rules. As a consequence, the advisory committee has not touched the rules in article 5, the privilege article. As a consequence, we have seen Congress jumping into the fray and dotting the landscape with privilege proposals. Most recently Congress has enacted the tax practitioner privilege in the Tax Reform Act that has lawyers up in arms. The D.C. and Eighth Circuits have now rendered decisions on attorney-client privilege that are completely inconsistent with established precedent. This atmosphere leaves lawyers and those who consult them in a quandary—it injects uncertainty into an area of the law that can successfully encourage open communications between attorneys and clients only if it is predictable.

I never would have anticipated that the Supreme Court would have denied cert in both of these cases in light of the importance of the issues that were involved. The government is a very complex entity doing very important and complicated things, and people who work for the government need legal advice. They need direction. They need to know what the ground rules are. Brett may say, "Well, it's obvious." I don't think so. There are 12 circuits. Just because two have gone this way doesn't mean the issue has been resolved in terms that are clear and certain.

PHILIP IACOVARA: But one of the court decisions was from the D.C. Circuit in the nation's capital, where most of the federal government is located. Does that not provide reasonably clear guidance for government lawyers and their clients?



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PAUL RICE: Not necessarily. There can be grand jury investigations anywhere in the country. This issue isn't limited to special prosecutors working in the District of Columbia. The subpoenas can be issued wherever an agency has a regional office with documents and lawyers. This issue can arise wherever the government is subject to a subpoena.

JAMES HAMILTON: I think Phil's point was that the D.C. Circuit has more experience dealing with government lawyers than any other court in the country. That a knowledgeable court has spoken might have been a reason for the Supreme Court to deny cert. I'm not saying I agree with that. In fact, I don't. But it's an argument that can be made. My own view is that the Supreme Court should have taken the *Lindsey* case. The Secret Service case is different because the White House was trying to create a new privilege, and the Court is very reluctant to do that. But in the *Lindsey* case the issue involved the application of an established privilege, and a lower court decision that was contrary to what a lot of people thought the law should be.

ANDREW FREY: In talking about these issues, I don't think we are giving much weight to the president's privacy interests and to the

importance of having a sane president. Gradually, we have stripped away every element of privacy. There's only a qualified privilege for the president to talk to his closest political adviser. We now know that there is no Secret Service privilege. Yet, there may be many things that presidents do that do not impair their ability to function, but that they don't want to have discussed on the front page of the *New York Times*. I worry that we are creating a set of rules that in the future, when a president is in a situation of tremendous pressure, will increase the pressure brought to bear upon him to the point where we've destabilized him as an individual. That's a very worrisome development that I see.

JAMES HAMILTON: I'm not denigrating the fact the Secret Service petition raised a serious issue. I think it is an issue that the Congress ought to look at, not the Supreme Court.

BRETT KAVANAUGH: If it's true that we've stripped away elements of the president's privacy, that's because the president doesn't have the power to control the release of privileged information, which is due not to the subpoenas issued by the Office of Independent Counsel, but comes as a direct result of the decision in *Nixon*. President Nixon

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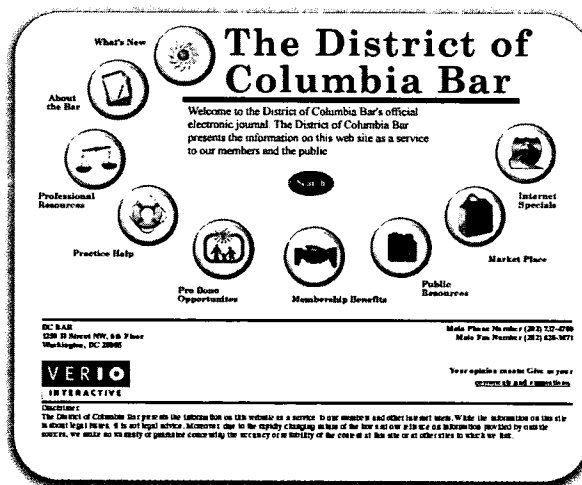
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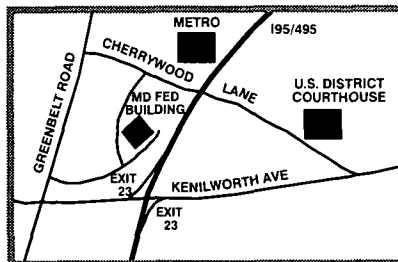


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made the privacy argument in trying to prevent the release of the tape recordings of his Oval Office conversations. He even cited *Griswold v. Connecticut*, the landmark privacy decision, in support of his argument. But President Nixon lost when he went to the Supreme Court.

In discussing the Supreme Court's denial of cert in these current cases, maybe we're overlooking the fact that the Supreme Court doesn't like to be toyed with. In June the independent counsel sought expedited consideration of three privilege cases at once. We could have had it all resolved quickly and neatly, but the Justice Department and the White House came in and argued strenuously in opposition, saying that the D.C. Circuit should handle these issues. Then the administration came back with their petitions to the Supreme Court when they discovered they didn't like the results they obtained in the D.C. Circuit. I doubt that the apparent gamesmanship was lost on many of the justices.

PAUL RICE: I'm not sure it's fair to say that the White House was arguing that the D.C. Circuit could take care of it. They were arguing that the D.C. Circuit needed to take it first so that the issues could be adequately briefed by the litigants and interested third parties. The issues involved were so important that an expedited schedule simply wasn't appropriate. The issues needed deliberation.

JANE SHERBURNE: I agree with that. But I also had concerns that the Supreme Court might refuse the *Lindsey* case because of the mixture of political and legal advice that was involved in the president's conversations with Bruce Lindsey. As a consequence, the case wasn't presented to the Court in a perfectly clean way. I was, however, deeply disappointed and surprised that the Court did not take the Eighth Circuit case.

PHILIP IACOVARA: With respect to Bruce Lindsey's testimony, it is probably fair, as Jane says, to recognize that the dual status that Mr. Lindsey had as political adviser as well as lawyer may have provided a reason for suggesting that the issue was not squarely framed. Nevertheless, the majority of the panel certainly felt comfortable ruling that there is no attorney-client privilege in the grand jury context. That is a plain and clear rule of law now that government lawyers and officials have to live with—at least until somebody else has the temerity to challenge a subpoena.

BRETT KAVANAUGH: One thing that we have not discussed is the importance of the



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rhetorical force of the competing arguments. I think rhetoric helps to explain *Swidler & Berlin* and *Lindsey* as much as the esoteric policy or law. In *Swidler & Berlin* the argument was that an individual's attorney-client privilege is sacrosanct. That was a tough principle for the independent counsel's office to overcome. And in *Swidler & Berlin* the ruling went against the independent counsel. In the Lindsey government attorney-client matter, the independent counsel prevailed. I think that's because the court recognized that government attorneys are paid with taxpayer dollars. That is significant to a lot of people. When you read the opinion, you see it on the first page, where two sentences into the opinion, the court says, "To state the question is to suggest the answer." You might argue that it's not obvious, but that was a pretty strong statement by the D.C. Circuit. The sense that government lawyers are not the individual's lawyers but the taxpayers' lawyers, that they are "our" lawyers, is something that has been tough for the White House to overcome. Just as in *Swidler* it was tough for the Office of Independent Counsel to overcome the sacrosanct privilege when an *individual's* private attorney is involved.

JANE SHERBURNE: That's a good point, and I think it's true. To explain who the client is, what the official interest is, and why it is a White House lawyer should be in a grand jury debriefing—these are all difficult issues. But I don't think one should underestimate the vastly different significance these issues take on when pursued by an independent counsel. Unlike the Justice Department, which is part of the executive branch, the "independent" counsel simply cannot be so regarded. Brett, years ago you and I had our first discussions about this issue, and they were related to your theory of the unitary executive: the theory that the independent counsel's office was part of the Justice Department, and therefore we were all part of the same executive branch family. But the independent counsel is plainly an adversary, by design in ways the Justice Department is not. I remember saying to you then, "I don't know what kind of family you come from, but my family doesn't subpoena me." [Laughter]

ANDREW FREY: The difficulty with vesting the power that would normally be vested in the president is that the independent counsel has a one-dimensional focus. His focus is on conducting his investigation, on gathering his evidence and arriving at his conclusions. It is unlikely that he is going to give a lot of weight to the institutional interests that underlie the government attorney-client

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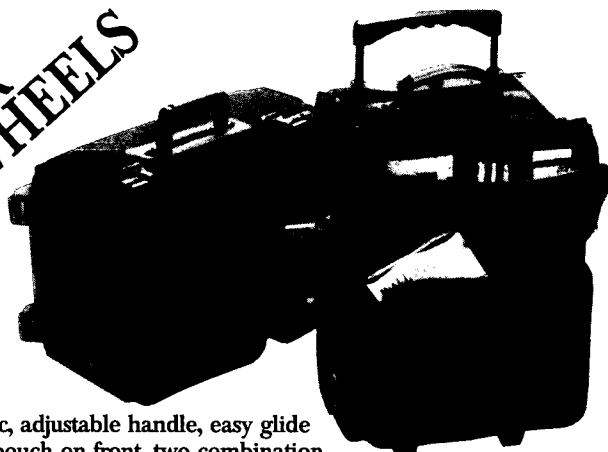
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privilege. He ought not be the one who is conducting the balancing. As Paul said earlier, if you have a court conducting the balancing, then you have a judge who can step back and say, "Wait a minute, the government has interests too." Maybe that would work. There are a lot of reasons why the attorney-client privilege has been considered absolute in the past, and we ought not lose sight of the fact that government lawyers are lawyers for their clients.

PAUL RICE: The balancing test, had the courts agreed to do it, would have resolved the congressional issue, too. It would have provided an automatic standard. If Congress wanted a White House counsel to testify, and that lawyer raised the privilege, Congress could go to court where it would have to demonstrate a compelling need to override the privilege. This is a procedure that could work in all contexts—grand jury subpoenas, congressional investigations and otherwise. It should not have been rejected by the circuit courts, since it would have brought decades of case law to the resolution of the issue. Instead, we are left not knowing where the courts are going to go with the government's attorney-client privilege. We're left sitting in the dark.

PHILIP IACOVARA: Because we've run out of time, I'm afraid that's where we're going to have to keep on sitting.

Notes

¹ In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court explicitly recognized the doctrine of executive privilege for the first time, but ruled that the privilege had to give way to the need for evidence in a criminal proceeding.

² In *United States v. Upjohn*, 449 U.S. 383 (1981), the Supreme Court held that the protection afforded by the corporate attorney-client privilege covered all employees who spoke with a corporate attorney on matters related to their corporate responsibilities.

³ In *In re Sealed Case* the D.C. Circuit rejected the Clinton administration's claim that the Secret Service had a special "protective privilege," and ruled that Secret Service officers could be compelled to testify before a federal grand jury. The Supreme Court denied certiorari in *Rubin v. United States*.

⁴ *Hass v. Henkel*, 216 U.S. 462 (1910).

⁵ In 1970 the Fifth Circuit ruled in favor of a "fiduciary duty" exception to the corporate attorney-client privilege in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert denied*, 401 U.S. 974 (1971). The widely followed decision established that the corporate attorney-client privilege may be overridden upon a showing of "good cause."

⁶ Hamilton was subpoenaed by the Office of Independent Counsel in its attempt to obtain the notes of conversations he had with his client, former deputy White House counsel Vincent Foster. The Supreme Court ruled that those conversations were protected by the attorney-client privilege in *Swidler & Berlin v. United States*, 66 U.S.L.W. 4538 (1988).

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KEN STARR

ABC NEWS ABC 20/20 (10:00 pm ET)

NOVEMBER 25, 1998

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Section: NEWS; PACKAGE

Length: 7379 words

Byline: DIANE SAWYER, DIANE SAWYER

Highlight: THE INDEPENDENT COUNSEL SPEAKS OUT

Body

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KENNETH STARR, Independent Counsel: There is no excuse for perjury. Never, never, never.

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(on camera) So to the people who say you're a prude, you're a puritan, you're the sex police, you say what?

(voice-over) A country has been in crisis over a 22-year- old intern. Can the prosecutor justify what he has done?

KENNETH STARR: We didn't create these facts.

DIANE SAWYER: (voice-over) But he did create the referral with its lurid details, igniting that firestorm of controversy and criticism.

(on camera) You've been compared to Saddam Hussein, Nero, to Torquemada, who was the head of The Inquisition.

KENNETH STARR: Yeah, I had to learn who Torquemada was. That was a new one to me.

KEN STARR

DIANE SAWYER: (voice-over) We will take you for the first time inside the prosecutor's war room to meet some key members of his legal team, including one of the men who grilled the President for the grand jury.

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(on camera) Do I have a right to ask you about your sex life?

KENNETH STARR: If you're going to ask, go ahead.

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(on camera) When is this going to be over?

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(Commercial Break)

ANNOUNCER: From ABC News in New York, Diane Sawyer.

DIANE SAWYER, ABC News: Good evening. And welcome to 20/20 Wednesday. Sam is away tonight.

In a recent magazine article, a friend of the President claims Mr. Clinton once said this about independent counsel Kenneth Starr, "That man is evil. When this is over, only one of us is going to be standing, and it's going to be me."

The President versus the prosecutor. They are two powerful men locked in a bitter battle. Yet, until his congressional testimony last week, few people had heard Starr speak. We only knew that his investigation has polarized a nation and that most everybody says it's time for him to stop.

And something else -- a question about him. Has he really been pursuing the President to enforce the law, or because of his private view of personal morality? Tonight, as you meet the independent counsel in his first interview, that's exactly where we begin.

KEN STARR

(interviewing) As you know, you have been cast in the role of a moral crusader in an ambiguous world, that you are self-righteous, sanctimonious, that you have moral certainty into areas where other people have doubt and humanity. What do you think about extramarital sex? What do you think about extramarital sex?

KENNETH STARR, Independent Counsel: Well, I think it's -- I think it's wrong. I think it's wrong at a moral level, and I just also think it's, you know, unwise. I think it is injurious to one's self.

DIANE SAWYER: Is it a grave sin?

KENNETH STARR: You know, at a moral level, it's each person's determination about what kind of life he or she is going to live.

DIANE SAWYER: So to the people who say you're a prude, you're a puritan, you're the sex police, you say what?

KENNETH STARR: I say they are both wrong and that the point is entirely missing what it is that I was assigned to do, and I was assigned to do a job by the attorney general, and that was to find out whether crimes were committed in this sexual harassment lawsuit.

DIANE SAWYER: Because you know one of the questions people sitting at home have is, "When is he going to fold his tent and leave town?" When is this going to be over?

KENNETH STARR: We would like to fold our tents and leave town. We have to get the job done. And fortunately, we are coming to the point where we are making our final decisions in terms of any actions that we may be taking.

DIANE SAWYER: What do you think of Bill Clinton?

KENNETH STARR: I'm going to leave out all aspects of the investigation. Extraordinarily talented, wonderfully empathetic, and I've been with people in the course of this work who -- who are very close to him, and I think he inspires just tremendous affection and loyalty by, you know, a wide range of -- of people.

DIANE SAWYER: So you like him?

KENNETH STARR: He is extraordinarily likable as a person, and the issues that we have had to face have been issues that, you know, are difficult. Let's say that.

DIANE SAWYER: Do you think it's eerie the parallels in your life and Bill Clinton's life? That you were both born in the summer of '46, that you were both the smartest kid in the class, that when you come to Washington -- in fact, at various stages in your lives, you have been within hundreds of feet of each other on parallel tracks?

KENNETH STARR: We were actually in the same elevator together...

KEN STARR

DIANE SAWYER: When?

KENNETH STARR:...years ago.

DIANE SAWYER: You remember?

KENNETH STARR: Mm-hmm, yeah. I think he had recently been elected governor.

DIANE SAWYER: (voice-over) It was his first sighting ever of the gregarious young Clinton charming even the strangers in the crowd.

KENNETH STARR: I vividly remember being in the elevator with him.

DIANE SAWYER: (on camera) Do you feel that you have a lot in common?

KENNETH STARR: Yes, I do, because I spent time in Arkansas. I was in college for a year and a half in Arkansas.

DIANE SAWYER: What's the major way you're different?

KENNETH STARR: Well, I can't -- I can't speak -- but no, I think we have a tremendous amount in common.

DIANE SAWYER: Someone said, who had worked for you, "He would just die if you told a dirty joke in front of him." True?

KENNETH STARR: No, I'm -- I -- I have heard a lot of dirty jokes, and I'm still, thank goodness, alive and well.

DIANE SAWYER: Do you hate R-rated movies?

KENNETH STARR: I've seen -- I've -- I've seen any number of movies with -- with that -- with that kind of rating. So do I -- and I've enjoyed a lot of those movies.

DIANE SAWYER: What's your favorite movie?

KENNETH STARR: A movie that I just found extraordinarily riveting was -- was "Saving Private Ryan." That was really extraordinary.

DIANE SAWYER: What did that kid want most when he grew up?

KEN STARR

KENNETH STARR: I was really torn between some form of public service, and I really didn't have a clue as to what it would be, and then the ministry.

DIANE SAWYER: You almost went in the ministry?

KENNETH STARR: Well, I thought about it.

DIANE SAWYER: (voice-over) He grew up in the Bible Belt in Texas. The fundamentalist evangelical world of the Church of Christ.

(on camera) Your father was a barber who also was a minister, right, in the Church of Christ Church?

KENNETH STARR: Right, mm-hmm.

DIANE SAWYER: No dancing, no movies?

KEN STARR: Oh, no, that's not true.

DIANE SAWYER: No?

KENNETH STARR: Well, there were no movies. We -- it was...

DIANE SAWYER: I thought dancing was a sin.

KENNETH STARR: Well, it was viewed as not the wisest thing to do.

DIANE SAWYER: Did you do it secretly? Did you sneak and dance?

KENNETH STARR: No, in fact, when I was junior class president in high school, it felt -- my weighty duties included planning the prom.

DIANE SAWYER: But you didn't go and didn't dance?

KENNETH STARR: That's right.

DIANE SAWYER: You believed that strongly?

KEN STARR

KENNETH STARR: No. It was really more out of respect for my parents. People understood in my class that I had feelings about things, and I tried to live by what I thought was the right thing to do.

DIANE SAWYER: So did you think it was wicked?

KENNETH STARR: No, no.

DIANE SAWYER: Because a childhood friend was quoted as saying of you alls life then in the church, "If it was fun, you couldn't do it."

KENNETH STARR: Oh, that's absolute nonsense.

DIANE SAWYER: What did you do for fun?

KENNETH STARR: Oh, we just did all kinds of things. What did we do.

DIANE SAWYER: Because we keep reading about your polishing shoes.

(Laughter)

KENNETH STARR: My mother made one comment. You know I did, in fact, do that, but the idea that that was fun -- no. I had a tremendous amount of fun activities throughout growing up. But I didn't have to go around, you now, carousing and living some sort of -- what shall I say -- more typical teenaged life in order to have, you know, a really good time. And I did. I loved my high school friends. I had a ton of friends.

DIANE SAWYER: What was the most rebellious thing you did?

(Laughter)

KENNETH STARR: I'd have to stop and think. I was not rebellious. I really was not. Sorry.

(Laughter)

I kind of played by the rules, and that's the way I lived my life.

KEN STARR

DIANE SAWYER: (voice-over) He's been living in the same house for 21 years. He's been married to the same woman for 28 years. The former Alice Mendell, who was a well-educated career girl from the suburbs of New York City and not of his own faith.

(on camera) Alice Mendell -- I think it would surprise a lot of people that her family was Jewish.

KENNETH STARR: Yes, uh-huh.

DIANE SAWYER: (voice-over) They have three children together. She taught him to dance, though he says he doesn't do it very well. And as for the religious differences, all he would say is they worship together.

(on camera) I think one of the things that makes people uneasy...

KENNETH STARR: Yeah.

DIANE SAWYER:...is the concern that your religious principles...

KENNETH STARR: Uh-huh.

DIANE SAWYER:...are an "engine" fueling your legal work. And they read that you jog and sing hymns and pray. And I think they wonder. Do you think God is on your side?

(Laughter)

KENNETH STARR: I hope that all of us try to do the right thing. And no, I can only say that I am a person of faith, and I don't in any way shy away from being a person of faith.

DIANE SAWYER: Because, again, people -- people wonder if you understand human frailty.

KENNETH STARR: I've got plenty of frailties. I have plenty of frailties and -- and...

DIANE SAWYER: But human frailty in this area, this strange continent of marriages...

KENNETH STARR: Right.

DIANE SAWYER:...and sexual relations.

KENNETH STARR: And I'm not passing judgment on that in my role as independent counsel.

KEN STARR

DIANE SAWYER: But does it motivate you? Can you -- can you separate the way you feel from the -- the extent to which you think it's important?

KENNETH STARR: Absolutely. It's the very job of a law officer or a judge to try, as best he or she can, to set aside personal feelings and to say, "Look, I've got to be guided by the rules."

DIANE SAWYER: So again, to go back and try to be very careful here. If the President had an affair with an intern in the White House and had never testified about it under oath...

KENNETH STARR: Right.

DIANE SAWYER:...is that something the public should know about?

KENNETH STARR: I have no interest whatsoever in that.

DIANE SAWYER: I cannot tell you how many people have said to me, "Ask him." Do I have a right to ask about your sex life?

KENNETH STARR: Well, I suppose anyone can ask, but if you're going to ask, go ahead. The answer to the big question is, no, I have not been unfaithful to my spouse. I try to, and I, you know, I'm not trying to pat myself on the back, but I have tried to live by what I believe is my -- my obligation and my responsibility.

DIANE SAWYER: (voice-over) So what happens when this man becomes independent counsel and begins investigating a President charged with covering up, lying under oath about a sexual relationship?

(on camera) Do you think in that sense, you were out of touch with the political judgment of the American people who say everyone was covering up sex. There was gambling in the casino in Casablanca...

(Laughter)

DIANE SAWYER:...and you are the only one who is shocked. We are not shocked.

KENNETH STARR: No, I'll tell you who was shocked. Let me rephrase that. It wasn't my professional judgment, but it was the professional judgment, the senior leadership of the Department of Justice, including the Attorney General of the United States, that this has to be looked into.

What the Supreme Court has said emphatically, it said it repeatedly, you cannot perjure yourself. There is no excuse for perjury. Never, never, never.

KEN STARR

DIANE SAWYER: So the Monica Lewinsky investigation is about to begin. We have that and much more when we come back.

ANNOUNCER: Next - inside the war room. For the first time, prosecutors from Starr's team talk about their controversial tactics and what it was like to grill the President, when 20/20 Wednesday continues.

(Commercial Break)

DIANE SAWYER: The special prosecutor. Bear with me, if you will, for a quick note about his power and how we all got here together.

In 1978, thanks to Richard Nixon and Watergate, Congress passed a law which triggers the appointment of a special prosecutor and staff to investigate possible crimes in certain suspicious situations.

So, fast forward to 1994. Kenneth Starr becomes the 17th person to hold that title. And back then, even some people in the White House noted his reputation for balance as a constitutional lawyer, former judge, even though unabashed Republican.

So with the approval of the Attorney General, he took up Whitewater and three other subjects. He got 14 convictions, but none in the White House. And the investigation had pretty much hit a wall last year when the Paula Jones case geared up.

As we resume, this is what Starr and his more than two dozen prosecutors say that you may not like them or that Paula Jones harassment case, but the law in the case was that the President could be asked about other women, including one named Monica Lewinsky. And they say if prosecutors don't care about the law, who will?

(interviewing) Monica Lewinsky. When you first heard that there was a woman named Monica Lewinsky and that there were tapes and discussion about the President in a relationship in the White House, what did you think?

KENNETH STARR: Well, I was...

DIANE SAWYER: Did you think, "Oh, no?" Did you think, "Let's go?" What did you think?

KENNETH STARR: Certainly not, "Let's go." I just thought, "Oh my," sort of, you know, "Do we really need this?" A little bit of "let this cup pass from me," but that we have a responsibility.

DIANE SAWYER: Did it make you angry?

KENNETH STARR: I wouldn't say angry. I would say our concern-o-meter went off the charts because we thought this was dreadfully serious.

ROBERT BITTMAN, Deputy Independent Counsel: I mean, we didn't sit around here and say, "But it's just about sex."

KEN STARR

DIANE SAWYER: (voice-over) For the first time, members of Starr's prosecution team are speaking out. Bob Bittman, a career prosecutor who, for years, specialized in sex crimes, heads up the Lewinsky investigation.

ROBERT BITTMAN: We looked at it, as prosecutors, as this is abhorrent to the criminal justice system that somebody can go in and lie and then try to get other people to lie and then take other steps to thwart justice.

DIANE SAWYER: (on camera) Are you saying that there was no one in this office who said this is not of sufficient gravity to investigate and report?

BRETT KAVANAUGH, Associate Independent Counsel: No one -- no one...

DIANE SAWYER: (inaudible) a man -- and a woman?

JULIE MYERS, Associate Independent Counsel: And a woman.

DIANE SAWYER: And a woman.

JULIE MYERS: Include us.

CHARLES BAKALY, Assistant to Independent Counsel: And so did the Attorney General, as Ken has pointed out.

BRETT KAVANAUGH: It wasn't our choice. The question and the debate was what should we do about it, but no one said -- approved of what was described in the referral or said it never should have been investigated.

DIANE SAWYER: You said last Thursday that you had never met Monica Lewinsky?

KENNETH STARR: That's right.

ROBERT BITTMAN: The reason Ken did that was he was criticized, as you may remember, at the beginning of the investigation for not having any prosecutorial experience.

DIANE SAWYER: (voice-over) Bittman says the boss wanted the career people to determine the credibility of witnesses.

(on camera) What did you have to teach him about prosecuting a case?

ROBERT BITTMAN: Well, he was a little naive or -- not really naive -- ignorant of some of the processes that go -- that are involved, and some of them are not all that clean in terms of what -- the work prosecutors will do.

KEN STARR

DIANE SAWYER: Clean -- clean?

ROBERT BITTMAN: Well, some of the methods. Some of the deals you have to make, for example.

DIANE SAWYER: (voice-over) Which brings us to the question of the team's highly criticized tactics. Did they cross the line? First with Monica Lewinsky, when nine federal officers took her to a room at the Ritz-Carlton and put pressure on her to turn on the President?

(on camera) People see a young girl who was in tears, who was threatened with 27 years in prison possibly, who was told that her mother might be prosecuted based on things she had said about her mother, who was to wire herself or tape the President or Vernon Jordan. And they say this isn't John Gotti. This isn't Timothy McVeigh.

KENNETH STARR: Well, Diane, a number of your premises are wrong, and I'd be here a long time in challenging a number of them. But in terms of basic fairness, let's leave the legalities aside. It was fair and right to go to someone who is in the midst of a very serious thing. She was in the process of committing serious offenses.

DIANE SAWYER: (voice-over) Prosecutors say she had not only signed a false affidavit denying an affair with the President, she was trying to get another witness to skip town and lie under oath.

ROBERT BITTMAN: Oh, I'm sure Monica would have preferred to have been somewhere else, but -- and she could have gone somewhere else had she wanted, but this was -- it's not a pleasant experience in that she finally realized that federal law enforcement officers now were aware of her criminal activity.

DIANE SAWYER: (on camera) Had she been asked to wire or tape the President or Vernon Jordan, would that have been appropriate?

ROBERT BITTMAN: Well, it's standard prosecutorial practice to do exactly that.

DIANE SAWYER: And should there be something, though, that says with the President, we have to be a little more careful?

ROBERT BITTMAN: We didn't do it.

DIANE SAWYER: (voice-over) But there's something else they did. Lewinsky wanted a lawyer right away. Was their attempt to delay it, however legal, the right thing to do?

(on camera) But you're a prosecutor. Is this troubling?

ROBERT BITTMAN: We had actually discussed this with the Department of Justice what we were going to do.

KEN STARR

DIANE SAWYER: Monica Lewinsky's mother comes streaming out of her grand jury testimony, obviously broken, and we hear that she's been broken down inside the grand jury room.

ROBERT BITTMAN: I think she was primarily upset about what was going on with her and her daughter's involvement. I think that's what it was. It was an emotional breakdown, rather than something that we caused.

DIANE SAWYER: And calling a mother to testify about her daughter?

JULIE MYERS: That's done all the time.

ROBERT BITTMAN: It's done all the time.

JULIE MYERS: And in this instance, we had evidence on phone conversations with Monica Lewinsky that her mother may have engaged in some sort of illegal activity.

DIANE SAWYER: (voice-over) In fact, her daughter implicated her on tape, saying her mother would give Linda Tripp half a condominium in Australia as an inducement to lie.

LINDA TRIPP: I understand that there has been a great deal of speculation about just who I am and how I got here. Well, the answer is simple. I'm you. I'm just like you.

DIANE SAWYER: (voice-over) Which brings us to Linda Tripp, the woman people love to hate, and the accusation that Ken Starr was not what he had seemed.

(on camera) Are you part of a right-wing conspiracy?

KENNETH STARR: No. I don't know that there is one.

DIANE SAWYER: (voice-over) His key witness, Linda Tripp, is now a recognized soldier in the army of Clinton haters -- among them Tripp's friend and svengali, Lucianne Goldberg. Among them, the lawyers for Paula Jones. Before he became independent counsel, Starr gave them advice. And among them, millionaire Richard Mellon Scaife, who hired people to dig up dirt on Bill Clinton and funded a chair at Pepperdine University for Ken Starr. Starr says he's never met or talked to Scaife.

(on camera) This one degree of separation, lawyers in your firm to the Paula Jones attorneys, Richard Mellon Scaife and Pepperdine University, and these are the President's enemies. And they're just outside your door, some people think inside. Do you at least see what that looks like?

KENNETH STARR: What I see is how easy it is to find one or more connections, as in six degrees of separation, that you and I are probably third cousins, you know, five times removed. What counts ultimately are facts.

KEN STARR

DIANE SAWYER: But people have argued that with the President, you have many circumstantial facts and that you always read them as suspicious. But in your own case, the facts are above suspicion.

KENNETH STARR: I've been living in this town a long time. My life has been open for people to see in this community for a long time. And I think that a fair observer would say, "He's a lawyer. He's a former judge" -- too many formers.

DIANE SAWYER: A conservative, a Republican?

KENNETH STARR: Oh, that -- in terms of political affiliations and the like, each of us has our views. But, Diane, again, is he or she succeeding, or is he allowing his political philosophy or personal beliefs to intrude into the way he or she is conducting himself as a judge or as a lawyer?

DIANE SAWYER: (voice-over) Exactly. So why did Starr's office let Tripp run straight from them to lawyers for Paula Jones?

(on camera) Linda Tripp -- Linda Tripp, leaving your office and going home and talking to Paula Jones's attorneys that night. I mean, at the very least, is this control of your witness?

KENNETH STARR: I think we could have had better control of her.

DIANE SAWYER: Should have?

KENNETH STARR: Yeah. In fact, I think, in retrospect, it would have been a better thing to have said...

DIANE SAWYER: You really had no idea that she was going...

KENNETH STARR: My people did not. My people have assured me, and I credit this, that they had no indication whatsoever of any involvement.

DIANE SAWYER: (voice-over) And Starr insists this is all a distraction, exploited by the White House, a distraction from what the President did when faced with a difficult choice.

Like it or not, the Supreme Court told him Paula Jones could proceed with her sexual harassment lawsuit. And like it or not, the judge said the law required him, like everyone else, to answer questions about sex with employees.

(on camera) But people believe that if Bill Clinton misled in that deposition, it was because he was being asked about something he shouldn't have been asked about in the first place.

KENNETH STARR: They're wrong.

KEN STARR

DIANE SAWYER: It doesn't matter that it was legally correct.

KENNETH STARR: They're -- they're absolutely wrong.

DIANE SAWYER: But fairness. Fairness to be asked about all of the people that you slept with?

KENNETH STARR: Well, then we should -- Diane, if that is unfair, then we should, in fact -- and society is free at any time to change the law.

DIANE SAWYER: Is lying about sex different from lying about murder?

KENNETH STARR: In a legal sense, if it's in court, the answer is no.

DIANE SAWYER: But I mean a prosecutorial judgment level, a discretion level, because prosecutors have discretion.

KENNETH STARR: A witness comes and says, "I have additional information and, by the way, I am being importuned to commit perjury. I am being offered financial assistance if I will submit a perjurious affidavit."

Any prosecutor would say this is serious. This is weighty. It would have been a dereliction of duty to just say, oh, well, you know, who cares? Go right ahead and do whatever you think you need to do.

DIANE SAWYER: Think sometimes you're too literal...

KENNETH STARR: No.

DIANE SAWYER:...in reading the statute?

KENNETH STARR: I don't. I think one can be too literal. But I think it would be wrong to say, gee, how is this going to play in Peoria? That's wrong. And my colleagues and I have to do what we think is the right professional responsibility in the discharge of our duty.

DIANE SAWYER: Do you think you love the law more than the American people do?

KENNETH STARR: I do love the law. I'm not going to say what the American people...

DIANE SAWYER: But love the "letter of the law" more than the American people do?

KEN STARR

KENNETH STARR: Well, I love the letter and the spirit of the law, but it's the letter of the law that protects us all. And, you know, St. Thomas Moore, Sir Thomas Moore put it so elegantly, you know, in "A Man For All Seasons." He took the law very seriously and said, "That's what protects us. It's not the will of a human being. It's not Henry VIII's will. Henry VIII is under the law. We are all equal under the law."

DIANE SAWYER: Last week before Congress, Starr was questioned about a number of other issues relating to fairness. For instance, did he know about the existence of a young woman and tapes before he said he did? He had nothing to add to his testimony.

And what about the investigation of Ken Starr and his office for leaks to the press? His office points out there is still a gag order on discussing the case.

And finally last week, Starr's only ethics adviser Sam Dash quit, saying Starr had testified as an advocate on the Hill. The prosecutors in Starr's office say they're mystified, since they claim it was Dash who frequently pushed hardest to toughen up their written report to Congress.

So, at this point, the prosecutor's office is on a collision course with the President. The two dueling parties finally meet when we return.

(Commercial Break)

ANNOUNCER: Did Kenneth Starr go too far?

DIANE SAWYER: I think there were 62 mentions of the word "breast," 23 of "cigar," 19 of "semen." This has been called demented pornography, pornography for puritans. Were there mistakes made in including some of this?

ANNOUNCER: The tables are turned. Now it's the prosecutor's turn to be grilled, when 20/20 Wednesday continues after this from our ABC stations.

(Station Break)

ANNOUNCER: 20/20 Wednesday continues. Now, Diane Sawyer.

DIANE SAWYER: Over and over again, everyone asks why has Starr's investigation gone on so long and cost more than \$40 million? Well, there are more accusations than answers.

The White House says it's because Starr will stop at nothing to get the President. Starr's office says from the beginning, from Whitewater, the White House stonewalled and blocked him.

And it became all-out war in 1996 when the prosecutor subpoenaed Hillary Clinton to appear at a courthouse before a grand jury, and White House lawyers said the respectful relationship was over.

KEN STARR

By last summer the two sides were dug in, with the President using tortured semantics to talk about Monica Lewinsky. And Starr's office, perhaps in anger, pushing hard. Was it too hard?

(interviewing) Driving to the White House that day, for what was -- for all intents and purposes -- a lot of people think your trial, the only trial you were going to get. Did you think to yourself, here is a man who has to deal with Saddam Hussein and bin Laden and what's going on in Russia, and we're putting him through this?

KENNETH STARR: Yes, I thought it was sad.

ROBERT BITTMAN: It was very eerie, of course, just driving up there and there were a number of people along the road going up obviously. It was very well publicized that we were going to be there.

And once there you're in the majesty of the White House, obviously not the typical scene of a grand jury inquiry. And then you're facing the President of the United States who, of course, in person is a very personable, nice man. And then you have to ask him these questions.

(Clip from testimony)

ROBERT BITTMAN:...disclose these embarrassing facts of this inappropriate intimate relationship that you had. Is that correct?

Pres. BILL CLINTON: Well, I did not want her to have to testify and go through that, and of course, I didn't want her to do that. Of course not.

DIANE SAWYER: (voice-over) That's Bittman asking the questions.

(on camera) Were you nervous?

ROBERT BITTMAN: We were very well prepared. Just the whole momentous occasion, you know. A lot of pressure obviously. But -- and disappointing.

DIANE SAWYER: How?

ROBERT BITTMAN: That the President did not tell the truth. In fact, the two lowest moments of the investigation -- one was the President's grand jury testimony. And the other was when we were informed about what had occurred with Betty Currie. We were very somber about that when we heard what the President had done.

(Clip from testimony)

KEN STARR

Pres. BILL CLINTON: Betty was always around, and I believe she was always around where I could basically call her and get her if I needed her.

ROBERT BITTMAN: When you said to Mrs. Curry, "You could see and hear everything," that wasn't true either, was it, as far as you knew?

ROBERT BITTMAN: That he had tried to influence her testimony.

DIANE SAWYER: Why was that particularly low?

ROBERT BITTMAN: Because we never thought that the President of the United States would do something like that.

DIANE SAWYER: To his secretary, you mean?

ROBERT BITTMAN: Yes.

(Clip from testimony)

ROBERT BITTMAN: Did you speak with your secretary, Mrs. Currie, and ask her to pick up a box of gifts that were - or some compilation of gifts -- that Ms. Lewinsky would have?

Pres. BILL CLINTON: No, sir, I didn't do that.

DIANE SAWYER: And she stayed there. She doesn't seem to feel betrayed.

ROBERT BITTMAN: Well, you should talk to Mrs. Currie. If you remember, though, after that happened and after she was subpoenaed, she left the White House and she went into seclusion.

DIANE SAWYER: She's back now.

ROBERT BITTMAN: She's back.

DIANE SAWYER: (voice-over) Not only that. The videotape that the prosecutors thought exposed the President, backfired on them. Congress released it. The public was outraged.

And outraged even further by that referral, Starr's report to Congress -- a document denounced for its advocacy and, even more, its voyeuristic detail.

KEN STARR

(on camera) I want to turn to the one other issue with respect to the referral that, and I -- that seems, to me, to be truly key to the public's perception of what was going on here.

(voice-over) We handed him three pages of excerpts from the referral -- some apparently gratuitous moments, some graphic and intrusive at a level no one could believe.

KENNETH STARR: It's very uncomfortable.

DIANE SAWYER: (on camera) I'm trying to imagine you -- deciding to include in those footnotes...

(voice-over) Footnotes you will not hear on TV.

(on camera) ...that cannot be denied that they are there to outrage and they are there to shock.

KENNETH STARR: I totally disagree.

DIANE SAWYER: You put them in a referral as narrative, as story telling. Everybody knows how a soap opera reads, and it reads like a soap opera.

KENNETH STARR: Diane, we didn't create these facts. These were...

DIANE SAWYER: But the tone was created. Sixty-two mentions of the word "breast," 23 of "cigar," 19 of "semen," and that there is a way of summarizing these things and talking about the dates and the times.

KENNETH STARR: Right.

DIANE SAWYER: And you had the dress.

KENNETH STARR: Diane.

DIANE SAWYER: You had the dress.

KENNETH STARR: Diane, there were other aspects that are outlined in the referral, other aspects of the testimony to which this is germane. So I think we can, you know, agree to disagree, without being disagreeable and just say, "Look, we came to our judgment."

DIANE SAWYER: (voice-over) The judgment that the President's linguistic gymnastics...

KEN STARR

Pres. BILL CLINTON: It depends upon what the meaning of the word is.

DIANE SAWYER: (voice-over) ...gave him no choice but to attack detail by lurid detail.

(on camera) Let me ask you this. Do you think it's possible that the President believes that oral sex is not sex?

KENNETH STARR: I don't want to comment on that.

DIANE SAWYER: But when you're dealing...

KENNETH STARR: But don't blame -- may I say this?

DIANE SAWYER: Yes.

KENNETH STARR: Don't blame the messenger because the message is unpleasant.

DIANE SAWYER: So this is "the President made me do it."

KENNETH STARR: This is the statute called on us to do our duty.

DIANE SAWYER: But explain to me what possible relation it has to anything, that the President discussed whether a woman was small-breasted or not.

KENNETH STARR: Diane, I think you could keep going, and I don't think that it serves any purpose to continue to -- to read things that makes us all uncomfortable.

JULIE MYERS: I think at the end of the day we agreed that that detail was necessary, given the President's testimony. And Ken, who is the ultimate, I mean, the ultimate decision, and he signed off on every word, every footnote, every sentence. And I think we agreed with him that the tone used was appropriate.

DIANE SAWYER: I still don't understand what a cigar has to do with whether the President should be impeached.

KENNETH STARR: It has to do, and you may just disagree with this, but this was a professional judgment by men and women that these issues go to credibility. Who is telling the truth?

DIANE SAWYER: Were there mistakes made in including some of this?

KENNETH STARR: We felt, and we made a professional judgment.

KEN STARR

DIANE SAWYER: But looking back...

KENNETH STARR: No.

DIANE SAWYER: I want to ask you about doubt, because it seems to me, listening to you, that you have no doubt that what you did in the referral was the right thing. You have no doubt that proceeding against the President in the way you have proceeded is the right thing. There is something about certainty that scares a lot of people.

KENNETH STARR: Sure.

DIANE SAWYER: Any doubts at all that you went too far?

KENNETH STARR: I don't think that we went too far.

DIANE SAWYER: But on the subject of the referral, a footnote. After the interview, Judge Starr and I spoke again by telephone. He gave me this to say. He said of the referral, "While we took some steps, I regret we did not do more to communicate to Congress to try to prevent the total and immediate public release of the details."

ANNOUNCER: When we come back, the Starr investigation - where does it go from here? And what about the First Lady?

DIANE SAWYER: If she's no longer being investigated, shouldn't -- just in human, for humanity if nothing else, shouldn't we know it?

ANNOUNCER: When 20/20 Wednesday continues.

(Commercial Break)

DIANE SAWYER: There was a time that Kenneth Starr was a name on the short list for Supreme Court. In fact, it was always said to be his great ambition. But that was before this wrenching episode in which it seems everyone loses -- the prosecutors who have been vilified; the President, who has been so deeply embarrassed, despite his resilience and strength in the polls.

And as for Starr himself, who has been booed and the object of threats, in a speech earlier this year, he invoked the model of Atticus Finch, the lawyer in "To Kill A Mockingbird," who bravely defends a black man in a racist town. Because Finch, he says, didn't let what other people say alter his idea of duty.

(interviewing) Why did you take this job?

KENNETH STARR: I was asked.

KEN STARR

DIANE SAWYER: But you could have said no.

KENNETH STARR: I -- yeah, I could have. Could have, should have, but no. No, I should -- I should not have because I -- I do think it's important to respond to the call of duty to public service.

DIANE SAWYER: Do you feel, in some way, that you were trapped, too? Trapped into doing a job people, in the end, didn't want you to have done?

KENNETH STARR: It's not a question of trapped, but some end up being more pleasant tours of duty than others. There's a book in Washington called the "prune book," which is, you know, lousy jobs in government. And the point is there are prune jobs, but the prune jobs have to be done as well.

DIANE SAWYER: You've been compared in the polls to Saddam Hussein, Nero, to Torquemada, who was the head of The Inquisition.

KENNETH STARR: Yeah. I had to learn who Torquemada was. That was a new one to me. I knew about the others. I knew about the other comparisons. Yeah.

DIANE SAWYER: What do you want the sentence, the topic sentence to be of the paragraph written 30 years from now about this episode this year?

KENNETH STARR: It's a hard question. It's been, and we're still in the episode. At a -- at a personal level, I would say that let it sort of be said about the episode that the men and women of the Office of Independent Counsel tried their very best to do their duty.

DIANE SAWYER: (voice-over) For a moment, thinking about that staff, he paused with emotion.

KENNETH STARR: I feel that they are my colleagues, but they are my friends. And when we were trying the -- the very difficult case in Little Rock, the McDougal-Tucker case, we had a banner in the trial room, and the banner began, "We're honored by our friends."

DIANE SAWYER: (on camera) What happens when you meet people, and they say, "Where do you work," and you tell them?

BRETT KAVANAUGH: It depends who the person is.

JULIE MYERS: Exactly. All kind of things. Sometimes you get very encouraging comments, and sometimes you're hurled insults.

KEN STARR

ROBERT BITTMAN: But I will say this. I bet you there is not anyone among us who would say that he or she would not have wanted to do this job.

DIANE SAWYER: Would you still like to be on the Supreme Court?

KENNETH STARR: I don't think there's any lawyer who loves the law, who would not be honored by that kind of service. So I guess the answer is yes. But I also know that there's a time and a season, and I think that time, had there been one, has long since passed.

DIANE SAWYER: (voice-over) Instead, Starr's place in history will probably be that of a man who pursued the President of the United States and his wife, a pursuit still under way.

(on camera) Would you want to prosecute this case after he left office?

KENNETH STARR: Oh, I'm not going -- not going to comment on that.

DIANE SAWYER: Do you believe the President, his apologies? Do you believe his remorse?

KENNETH STARR: I think that we should, in fact, be, you know, kind and compassionate and forgiving, you know, at an individual level, at a moral level and to be, you know, accepting of one another with all of our flaws and faults. And we all have them. I certainly do.

DIANE SAWYER: What do you think of Hillary Clinton?

KENNETH STARR: She's obviously extraordinarily talented and gifted. Very, very intelligent. And clearly enormously dedicated to the things that she believes in and works very, very hard with I think remarkable, you know, self-discipline and determination.

DIANE SAWYER: If she's no longer being investigated, shouldn't -- just in human, for humanity if nothing else, shouldn't we know it?

KENNETH STARR: I think, Diane, we've made certain statements in the submission to Congress.

DIANE SAWYER: But to leave clouds over people for another year or two?

KENNETH STARR: Oh, don't make a predictive judgment. As I've said, we are coming to our decisions in the matters that remain entrusted to us.

DIANE SAWYER: (voice-over) Which brings us back to Atticus Finch...

KEN STARR

ACTOR (Clip from "To Kill A Mockingbird"): She's committed no crime.

DIANE SAWYER: (voice-over) ...the lawyer in "To Kill A Mockingbird."

ACTOR (Clip from "To Kill A Mockingbird"): She has merely broken a rigid and time-honored code of our society.

DIANE SAWYER: (voice-over) His commitment to duty is one lesson of the story. But we reminded Starr that there's another.

(on camera) He says, to his daughter Scout, "Sometimes it's better to bend the law a little in special cases."

(voice-over) At the end of the story, Finch compromises on the law to preserve the delicate balance of justice.

KENNETH STARR: I don't like the idea of bending the law. I love the model of Atticus Finch of doing what he thought was right when everybody was saying, "Why are you doing this? This is a terrible thing."

There is truth, and the truth demands respect. And maybe in the fullness of time, after the heat of battle has subsided, that will be the abiding lesson of this episode, that the truth was important and don't compromise the truth.

DIANE SAWYER: A final irony. Back in 1978, one of the lawyers opposing the enactment of the special prosecutor law on constitutional grounds was Ken Starr. And those who know him suspect he'll be opposing it again when it comes up for renewal next year.

We'll be right back.

(Commercial Break)

DIANE SAWYER: Coming up Friday on 20/20 -- an unforgettable story about an amazing door-to-door salesman. Don't miss it. At 10:00 Eastern Time.

And then, Sunday on 20/20 -- join us for a hidden camera investigation into shady moving companies. 20/20 Sunday at 9:00, 8:00 Central.

And that's it for tonight. We thank you for joining us. I'm Diane Sawyer. And for all of us here at 20/20, have a great Thanksgiving.

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Section: A Section

PROBE BOGS DOWN IN TANGLE OF PRIVILEGE; AS STARR'S SUBPOENAS PROLIFERATE, SO DO CLAIMS OF SPECIAL PROTECTION

Ruth Marcus

Settle in for the long haul.

The increasingly vicious battle between President Clinton and independent counsel Kenneth W. Starr shows no sign of speedy resolution. This week, both sides took steps that make prospects of quickly wrapping up the investigation, one way or another, look more bleak than ever.

Nearly a month ago, Starr said he wanted to complete his inquiry into allegations involving former White House intern Monica S. Lewinsky "as quickly and thoroughly as possible." This week, he opened up yet another front with subpoenas to Clinton aides aimed at determining whether they tried to obstruct justice by investigating Starr's team.

At the same time, chances are fading of hearing soon from several critical players in the mess. Lewinsky's testimony before the grand jury, which had been scheduled for last week and was abruptly postponed, has been put off indefinitely. Likewise, the appearance of Vernon E. Jordan Jr., who promised a month ago to testify "directly, completely and truthfully," has been delayed. Jordan's lawyer said Starr's office had indicated it would be a "considerable period of time" before Jordan testifies.

Some sources have said Starr is leaning toward indicting Lewinsky, a development that -- if it plays out through a trial, possible conviction, and appeal -- could delay for months Starr's ability to obtain Lewinsky's testimony in building a case against Clinton or others.

On the Clinton end, the White House is preparing to assert executive privilege to block testimony from some top aides -- a matter that could be litigated up to the Supreme Court, taking months. Starr's effort to secure testimony from Terry F. Lenzner, the private investigator hired by Clinton's lawyers, could similarly bog down in litigation over the scope of attorney-client privilege.

And the Justice Department is locked in negotiations with Starr over testimony from Secret Service agents, a dispute that could also end up in court. Starr has been negotiating for access to Secret Service personnel for a solid month, and all he has to show for it is a brief grand jury appearance by a former uniformed guard, Lewis C. Fox, who said he had

seen Lewinsky visit the Oval Office once. If Starr tries to learn anything more from the president's bodyguards, he may well face a long court fight.

"We were at a position two or three weeks ago where the path looked pretty clear and direct," said St. John's University law professor John Q. Barrett. "Since that time, Lewinsky's testimony and Jordan's testimony have been continued and these privilege invocations have come about and this . . . You-smeared-me-so-I-investigate-you' distraction has kicked in."

Meanwhile, Starr and Clinton's personal lawyer, David E. Kendall, are in court over Kendall's allegation that Starr's office leaked information to the press in violation of grand jury rules. And Starr and Lewinsky's lawyer, William H. Ginsburg, are in court over Ginsburg's claim that prosecutors unfairly reneged on a promise of immunity to Lewinsky.

Some lawyers said this litigate-to-the-finish approach was inherent in the independent counsel statute, which empowers a prosecutor to focus on a particular official and provides him with unlimited time and resources. "Once you've made the decision that this {allegations concerning Lewinsky} is worth law enforcement time. . . . I don't know why you stop," said Columbia University law professor Gerard E. Lynch. "We've unleashed this mad process . . . and I don't know that there's a simple end to it."

Earlier phases of Starr's investigation offer a case study in how assertions of privilege can drag out the conclusion of litigation, as well as how prosecutions of peripheral players in hopes of snaring bigger fish can delay resolution.

For example, Starr has been battling for more than two years over whether he can get access to notes made by the lawyer for the late deputy White House counsel Vincent W. Foster Jr., as part of his probe into the firing of White House travel office employees. The lawyer, James Hamilton, argues that the attorney-client privilege survives his client's death. The case is awaiting Supreme Court action. Starr, in asking the high court not to hear the case, said, "Delay of this magnitude seriously impedes a grand jury investigation."

Likewise, the example of Susan McDougal, the Clintons' business partner in the Whitewater real estate development, shows how prosecuting smaller fry in hopes of eliciting their testimony about more important players can delay matters. Prosecutors won the conviction of McDougal for bank fraud, then gave her immunity from further prosecution and put her before the grand jury -- only to have her refuse to testify and serve what is now approaching 18 months for contempt of court. In prosecuting Lewinsky for perjury or obstruction of justice, Starr would face a significant risk that a jury might balk at convicting a young woman who could be portrayed by the defense as the victim of powerful people pressuring her. And winning a perjury or obstruction conviction would not exactly strengthen Lewinsky's credibility if she were then to testify for Starr.

"Add it all together, it's a pretty heavy-handed and legally uphill fight," Lynch said. "If she digs in for a war, it can be a long war, and even at the end of the war, look at Susan McDougal."

As the investigation drags on, some lawyers -- even veterans of Starr's office -- question whether the Lewinsky matter might be better resolved by Congress. They suggest Congress hold hearings now, even before Starr completes his inquiry, but Congress has shown little inclination to take on that task.

"From the country's perspective, it is absurd that Congress is doing nothing," said Brett Kavanaugh, a former Starr prosecutor. "The way to avoid a long, drawn-out process is for Congress to gather the relevant evidence, hold a hearing and ask Mr. Jordan, Ms. Lewinsky and the president to provide testimony. Then Congress and the people can determine directly and quickly what the facts are and whether any sanction should be imposed against the president, which are clearly the most important questions for the country."ecause of dissatisfaction with {her} performance in the correspondence section of the Office of Legislative Affairs. In neither situation did I take or recommend any personnel

action because of any suggested relationship with the president. In fact, I had and have no knowledge of any such relationship."

Patsy Thomasson, a former official in the White House personnel office, said much the same after her 2 1/2 hours of testimony. Her attorney, Jeffrey S. Jacobovitz, said his client was "the facilitator, the intermediary" in Lewinsky's ouster, acting at the request of Keating, who told her the young clerk "should be moved out of the White House." Thomasson had heard from other White House officials that Lewinsky "was performing her job properly when she was working at her desk, but was away from her desk too often" and "was essentially loitering in the West Wing too often," Jacobovitz said.

Nancy Hernreich, a longtime Clinton aide dating to his days as Arkansas governor and now a key player as director of Oval Office operations, testified for about two hours, but declined to answer questions afterward. She left the grand jury room at least once during her testimony to consult with her attorney, Gerard F. Treanor Jr., who under grand jury rules was not allowed into the room.

Hernreich keeps close tabs over who gets in to see Clinton and supervises Betty Currie, the president's personal secretary who arranged job interviews and White House visits for Lewinsky after she moved to the Pentagon.

Even as testimony proceeds before the grand jury, officials said yesterday that Starr has been thwarted twice in recent weeks in his attempt to launch investigations into whether his office illegally disclosed grand jury information. Clinton's attorney, David E. Kendall, has demanded a formal probe of what he charged were illegal leaks from Starr's office and the independent counsel has tried to preempt that with an internal inquiry.

Starr first requested that he be given FBI agents to handle the probe. After that was rejected he asked Michael E. Shaheen Jr., retired head of the Justice Department's Office of Professional Responsibility, to head up an inquiry, the officials said. Shaheen agreed as long as several conditions were met, including total independence from Starr. Shaheen went to see Attorney General Janet Reno and Deputy Attorney General Eric H. Holder Jr. last week, but on Thursday was told by Holder that he should not proceed, they said.

Holder insisted that Chief U.S. District Judge Norma Holloway Johnson, who is supervising the Starr grand jury, should decide how the matter was handled. Holder acted in part out of concern that Justice would appear to be favoring Starr if it acceded to the prosecutor's request, the officials said.

The situation involving executive privilege remained unresolved yesterday as information was tightly held because of court secrecy orders. "The White House counsel's office is trying to find a reasonable solution on this issue in ongoing discussions with the Office of Independent Counsel," White House spokesman Joe Lockhart said.

A long fight over privilege could hamper Starr's investigation by diverting significant resources and dragging it out for what several legal experts estimated could be three to eight months. But if he does not mount a court challenge, Starr could forgo access to important witnesses beyond Lindsey, including Secret Service personnel and White House lawyers. Staff writers Susan Schmidt, Amy Goldstein and Roberto Suro contributed to this report. CAPTION: Patsy Thomasson, a former senior White House aide, speaks to reporters outside the federal courthouse. CAPTION: Nancy Hernreich, left, director of Oval Office operations at the White House, leaves the federal courthouse after her testimony to the Starr grand jury. umerous U.S. officials familiar with the program now question whether the units are making much of a difference reducing the production or trafficking of drugs.

One U.S. source involved in interdiction said that, in the past year, he had not seen a single report of the special forces making an important arrest or seizure. To illustrate his point, he cited a September 1997 report to Congress by McCaffrey's office that limited the accomplishments of the groups to spotting clandestine airstrips, locating marijuana fields and seizures of marijuana.

"You will notice there is not one seizure of cocaine or heroin or the capture of a kingpin," the source said. "That is more than a little disturbing. The obvious question is what the hell are they doing?"

A Mexican official said that because many of the special forces support other units, the results on paper did not accurately reflect their contribution.

While much less visible, sources familiar with the counter-drug program in Mexico said, an equally important element is the elite 90-person intelligence unit within the army that is being trained by the CIA.

U.S. and Mexican officials say the CIA-trained unit could have a more important long-range impact than the special forces or other ground troops because it is crucial to developing the intelligence that is essential to identify the drug leaders and their chief lieutenants and develop a strategy for dismantling trafficking organizations.

But two sources familiar with the intelligence operation said the intelligence passed on to the Mexican unit is carefully screened because of the residual mistrust that still exists between the two countries.

"While intelligence sharing is significant, there is no free flow," said one U.S. source. "We send information that has been scrubbed, that safeguards our interests. I imagine they have the same scrubbing process on their side." CAPTION: A Mexican soldier stands by a burning pile of marijuana plants after helping clear a hillside plantation of the illegal growth in the state of Jalisco.

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