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Section 3: Confirmation Politics

Institute of Bill of Rights Law, William & Mary Law School

III. CONFIRMATION POLITICS

In This Section:

"Supreme Court Poker

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Stuart Taylor, Jr.

The president's favorite judge had scornfully denounced as "illegitimate" dozens of the "most significant constitutional decisions of the past three decades," as well as others going back to the 1920s. He had excoriated "the modern, activist, liberal Supreme Court" for rulings that recognized rights to abortion, contraception, and other aspects of the "right to privacy"; struck down governmental discrimination against women; outlawed official endorsement of religious symbols; required "one person, one vote"; banned poll taxes; and protected sexually explicit speech.

And as if to erase any doubt about what Judge Robert Bork might like to do if elevated to the Supreme Court, he vowed in an April 1987 speech that his own original-intent approach to constitutional interpretation would, in time, "sweep the elegant, erudite, pretentious, and toxic detritus of non-originalism out to sea." A lot of that "detritus," including *Roe v. Wade,* had been subscribed to by Justice Lewis Powell Jr., the moderate, swing-voting, Nixon-appointed Southern gentleman whose retirement three months later set the stage for President Reagan's nomination of Bork.

Those were the good old days, at least if you were a liberal seeking to alarm both liberal and not-so-liberal voters. The same paper trail that brought Bork the nomination also made it easy for his critics to argue that he would take a wrecking ball to a long list of constitutional rights. Together with other ingredients—Democratic control of the Senate, hyperbolic distortions of Bork's record as a judge, and the nominee's dour demeanor, disdain for political pandering, and less-than-elegant beard—the Bork paper trail brought a 58-42 defeat.

No serious aspirant to the Supreme Court today would give the world so clear a picture of what he or she might do if appointed. At the same time, we are unlikely to see another unknown quantity such as Justice David Souter, whose liberal votes and opinions ever since the first President Bush plucked him from obscurity in 1990 have made "no more Souters" a conservative rallying cry.

Unlike Souter, almost all of today's would-be justices are well known to the administration's legal experts and are seen as true-blue conservatives, with the exception of the somewhat-more-moderate-seeming Attorney General Alberto Gonzales. Most of the candidates also have track records on federal appellate courts (or as law professors). But predicting how most of them might vote, if promoted to the high court, on any specific issue is educated guesswork—especially when the issue is whether to overrule a liberal Supreme Court precedent that lower courts must follow.

Take the question that looms largest to many activists and voters: Would the nominee seek to overrule *Roe v. Wade*? Bork seemed a good bet to do just that. The same appears to be true of one candidate on the short list reportedly circulating at the White House: federal appellate Judge Edith Hollan Jones of Houston, who wrote last year that *Roe* was "an exercise in raw judicial power" that

had led to "perverse" results and should be reconsidered. Most of the other short-listers, however, have never publicly expressed a view on whether *Roe* was a bad or good decision, let alone whether it should be overruled despite repeated reaffirmations over more than 30 years.

But President Bush has an edge over his adversaries in the educated-guessing game. Two edges, really. The first is that he knows (or his advisers know) what the candidates have said about their views in private as well as in public. Bush's second edge is that the burden of proof has traditionally been on critics of an otherwise well-qualified nominee to show that his or her ideology is too extreme. This is especially true when, as now, the president's party controls the Senate.

This is not to suggest that Bush or his aides would disregard President Lincoln's rule that "we cannot ask a man what he will do [on the Court], and, if we should, and he should answer us, we should despise him for it." Putting aside the ethical problems with seeking anything close to a secret pledge, Bush knows that senators will grill the nominee in detail about his or her conversations with the White House. Democrats would decry any sign that abortion or other hot-button issues had been discussed as the kind of "litmus test" that Bush has said should not be used, by him or anyone else.

The president's informational advantage is, rather, that the main candidates have long been personal or professional friends with many administration lawyers and advisers, who can base their predictions on years of private conversations. And Bush himself is personally close to one leading candidate, Gonzales.

(A cautionary tale: President Truman put four cronies on the Court, only to be bitterly disappointed when two of them helped strike down his seizure of the steel mills during the Korean War. "Whenever you put a man on the Supreme Court," Truman later groused, "he ceases to be your friend.")

Assume for the sake of argument, for example, that Bush is eager to appoint a justice who would vote to overrule *Roe v. Wade,* and wants to know whether federal appellate Judge J. Michael Luttig, of Alexandria, Va., the favorite candidate of many conservatives, would fit the bill. Luttig's decisions certainly show him to be a devotee of conservative, original-intent jurisprudence. And almost all such people see *Roe* as without support in the text or history of the Constitution, as did many liberal scholars in 1973, when *Roe* came down. But Luttig has never publicly attacked *Roe.* And in striking down a ban on "partial-birth" abortion in 2000, Luttig wrote that the result was compelled by a recent Supreme Court decision in a similar case and that the protection of "a woman's fundamental right to choose whether or not to proceed with a pregnancy" was a matter of "super stare decisis," meaning firmly settled precedent.

Does this mean that Luttig would still feel bound by *Roe* if he were a justice? It's impossible for an outsider to know. But Luttig's friends in the Bush administration might have a pretty good idea. Among the former Luttig law clerks (known as "Luttigators") scattered through the administration is Theodore Ullyot, now Gonzales's chief of staff.

Senate Democrats and liberal groups, for their part, certainly suspect that Luttig would vote to overrule *Roe.* And they are quite sure that in any event, he would be steadfastly conservative across the spectrum of ideologically charged issues. But how

could Luttig's critics hope to convince moderate senators and a not-very-engaged public that they should fear this soft-spoken, scholarly, apparently principled, likable family man? "He's too conservative" probably wouldn't do the trick. "He would roll the clock back to the days of back-alley abortions" has a more alarming ring. But that claim is unprovable.

Liberal groups and Senate Democrats have devised several strategies over the years to compensate for their probable inability to prove that any nominee would perform the kind of radical surgery on constitutional law that Bork almost advertised his eagerness to do.

Shift the burden of proof. Through most of the 20th century, senators tended to assume that Supreme Court nominees were ideologically acceptable unless they had shown otherwise—as did Bork, in the view of Democrats. But this traditional presumption of fitness has become increasingly frayed.

The standard tactics include putting the worst possible spin on the nominee's often-ambiguous record.

An example: "Judge Souter's opinions and legal briefs threaten to undo the advances made by women, minorities, dissenters, and other disadvantaged groups," said Nan Aron, of the Alliance for Justice, in 1990. Souter soon proved to be one of the most liberal justices.

After Bush had become president in 2001, liberal scholars and Senate Democrats claimed more explicitly than ever before that Supreme Court nominees should be presumed unfit ideologically until proven otherwise. "We require parties who appear before a court to prove their case," Sen. Charles Schumer, D-N.Y., said during a September 2001 hearing. "It is not unreasonable to ask those who come before the Senate seeking a lifetime appointment to the federal bench to do the same."

Demand testimony about his or her views. The premise that a nominee must prove that his or her views are acceptable leads Democrats to the conclusion that the nominee must testify in detail about what those views are. They must also pass certain tests: "Unless Judge [Clarence] Thomas explicitly . . . recognizes that the Constitution protects the fundamental right to privacy, including the right to choose, the Senate should reject this nominee," NARAL's Kate Michelman asserted in 1991.

Nominees have traditionally parried such questions by noting that to "endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again" would create an appearance of partiality, as Sandra Day O'Connor testified at her 1981 confirmation hearing. Although some nominees have answered such questions—Bork, for example, had little choice but to explain his prior public attacks—"no nominee who has clung to [the O'Connor] position has ever been forcibly dislodged," according to Seeking Justices, a 2004 book by Michael Comiskey.

Schumer and his allies want to change that. "With a flick of a pen, [the justices] can change people's lives," he said on ABC's *This Week* on July 3. "To just say, 'OK, tell us where you went to law school and what your career was, and have you ever broken the law? You're on the Supreme Court'—no way." On the same program, Republican Sen. John Cornyn of Texas surprised Schumer by conceding that as long as

nominees are not asked to "prejudge" cases, "it's an appropriate question to ask what their views are on cases that have been decided and judicial opinions that have been written." Democrats will take this as a green light for questions such as these:

Do you think that *Roe v. Wade* was correctly decided? What about the decision requiring removal of framed copies of the Ten Commandments from the walls of courthouses? And the one allowing race-conscious admissions at the University of Michigan Law School? And the one striking down a Texas law making gay sex a crime? How about gay marriage? And do you agree with the views once expressed by Bork that "I don't think that, in the field of constitutional law, precedent is all that important"?

Look for the nominee to duck such questions as much as possible, while White House handlers gauge how much leg he or she needs to show in order to win.

Demonize the nominee. Some liberals believe that one or two or three Bush appointments could usher in the moral equivalent of the Dark Ages. But it's hard to sell this proposition to the unconverted, most of whom have only the vaguest notion of how changes in the Court's membership might change the country. It's especially hard when (as seems likely) the nominee is a well-spoken, decent-seeming, patriotic family man or woman who hasn't launched Borkian attacks on the precedents that the liberals fear he or she might overrule.

One way to deal with this dilemma is to resort to hyperbole, painting the nominee as almost a monster. That's what Sen. Edward Kennedy did in his famous "Robert Bork's America" speech. It was apparently pretty effective. Whether Kennedy will do it again remains to be seen.

Investigate his or her private discussions. Like opposition researchers in presidential campaigns, liberal confirmation warriors will also canvas the nominee's law school classmates, co-clerks, former colleagues and subordinates (remember Anita Hill?), neighbors, and perhaps even jilted lovers—especially any who may have grudges—in search of evidence of controversial views or actions. At least one political consulting firm with ties to abortion-rights activists has already submitted requests for the financial disclosure forms filed by more than two dozen possible nominees.

During the 1991 battle over the Thomas nomination, for example, four prominent opponents, including Rep. Maxine Waters, D-Calif., and Ralph Nader, took out an ad in *Legal Times* soliciting information from anyone who had ever heard Thomas "express an opinion about abortion rights or about *Roe v. Wade*." This solicitation came after Thomas had sworn that he did not recall ever having discussed the merits of the decision, in public or in private.

Demand confidential documents. Among the factors that sustained the Democratic filibuster that stopped Bush's 2001 nomination of conservative Washington lawyer Miguel Estrada for the U.S. Court of Appeals for the D.C. Circuit was a demand for copies of internal memoranda that he had written as a lawyer in the Justice Department's elite solicitor general's office.

A former colleague of Estrada's told Senate Democrats that the memos would show Estrada to be a rigid conservative ideologue. But the administration spurned Democrats' requests for access to the Estrada memos. And some leading Democrats, including former Clinton Solicitor General Seth

Waxman, also argued that such memoranda have traditionally been and should remain confidential.

Republican experts who are mobilizing for the coming battle predict that Democrats will try to use similar demands to stymie any nominee who has ever worked in a sensitive government job. The argument will then be over whether the administration is refusing access to the documents because they would be embarrassing—or whether the Democrats are on a fishing expedition launched mainly for purposes of delay.

At least 20 possible Supreme Court candidates have been mentioned in various news reports or floated by administration insiders. And the president could quite possibly choose someone who has not been on any of the publicly known lists.

* * *

John G. Roberts Jr. Roberts, 50, has assets, including a reputation as one of the nation's most effective, smartest, and best-liked appellate litigators; a seat on the D.C. Circuit, often described as the nation's second most important court, since the Senate confirmed him in May 2003; and a solidly conservative record combined with a paper trail that sheds relatively little light on what he would do as a justice. There is one arguable exception: In 1991, as deputy solicitor general, Roberts signed a legal brief noting the George H.W. Bush administration's previously stated position that "*Roe* was wrongly decided and should be overruled." But this was not necessarily his personal view. And in any event, *Roe* has become a more deeply entrenched precedent since 1991. Roberts graduated near the top of his Harvard Law School class; clerked for Judge Henry Friendly and then for Rehnquist; served in the Reagan Justice Department and White House counsel's office; became an appellate litigator; and was the principal deputy solicitor general under the first President Bush. He has argued dozens of cases before the Supreme Court.

* * *

"Bush Keeps Role in Senate Fray Out of Sight, Not Out of Mind"

Los Angeles Times
May 22, 2005
Edwin Chen and Warren Vieth

As a White House meeting was breaking up recently, a chipper President Bush sidled up to Vice President Dick Cheney and Vermont Sen. Patrick J. Leahy, who had just discovered a mutual interest in .50 caliber handguns.

"Guess what we have in common," Leahy said to Bush.

"What—you're both bald?" Bush quipped.

Leahy, a liberal Democrat, saw that Bush was in good humor, and he sensed an opening. He pleaded with Bush to help resolve the bitterly partisan Senate impasse over his judicial nominations.

"We can settle this in an hour," Leahy said, citing three other leading senators he thought could work together on an agreement. But Bush wouldn't hear of it, the lawmaker said.

"Well, I hope you keep working on it, but I told [Reid] I was going to stay out of it," the president said, referring to Senate Democratic leader Harry Reid of Nevada.

As his rebuff suggested, Bush has assumed a public posture of bystander as the Senate barrels toward a showdown that is likely to have repercussions far beyond the issue of whether every presidential appointment to the federal bench deserves an up-or-down vote.

Negotiations are underway this weekend to try to avert a collision over Senate Democrats' use of filibusters, or extended debate, to block the confirmation of Bush's judicial nominees they find objectionable.

Behind the scenes, however, the White House has become an active player. As recently as Tuesday, the vice president met privately with Republican senators to make the administration's case for holding up-or-down votes on its judicial nominees. Tim Goeglein, the White House public liaison, regularly participates in conference calls and strategy sessions with outside groups seeking to pressure wavering GOP senators.

Other White House aides have been involved, such as Candi Wolff, head of the congressional liaison office, who last week shepherded Texas Supreme Court Justice Priscilla R. Owen and California Supreme Court Justice Janice Rogers Brown around Capitol Hill for meetings and photo opportunities. Brown and Owen are the most visible of Bush's judicial nominees who were blocked by filibusters in the last Congress.

Bush's strategy reflects a delicate balance that he and his strategists must maintain in the high-stakes effort to overcome Democratic opposition to some of his judicial nominees. Democrats have said they have filibustered a small number of Bush's judicial nominees because they find them to be extremists and judicial activists. They have accused the targeted nominees of relying more on conservative ideologies than the merits of the case in formulating their legal decisions.

As much as the president wants to see his nominees confirmed, the White House must guard against heavy-handed tactics that could offend senatorial sensitivities. "They are wisely leaving the Senate to debate its own rules," said Sen. Gordon H. Smith (R-Ore.). "To lobby us would be counterproductive."

For instance, Sen. Susan Collins (R-Maine), an independent-minded moderate who often is the target of heavy lobbying from the White House, has not heard from White House aides on the filibuster issue. "Rightly or not, senators are jealous of their prerogatives," she said.

Paul M. Weyrich, a conservative activist with ties to the White House, said: "Basically what the president is saying is, 'I really need these judges confirmed. How you work that out is up to you.'"

Still, Bush and his activist Republican base can ill afford a loss on such a high-profile matter at a time when some of his second-term priorities, such as Social Security restructuring, are struggling in Congress.

"The White House and the Republicans need a victory here because it's been a tough few months for the president legislatively," said Stephen Moore, president of the Free Enterprise Fund, a conservative advocacy group.

The extent of the White House involvement in the controversy is difficult to assess since such activities take place out of the limelight. But, as Moore put it: "There's no question that the resources of the White House strategy team and legislative team are being fully engaged in this fight. It's being driven from the very top."

One example came late last week during compromise negotiations among a dozen senators from both parties. When Sen. Robert C. Byrd (D-W.Va.) proposed greater consultation between the White House and the Senate before judicial nominations are made, the White House quashed that notion, a Republican congressional staffer with knowledge of the discussions said.

For the most part, the White House has exercised its influence indirectly, working through allies and surrogates, such as Sen. John Cornyn (R-Texas), a former Texas judge and attorney general, and C. Boyden Gray, White House counsel during the administration of Bush's father, President George H.W. Bush.

Three years ago, Gray assembled a coordinating group to build public support on behalf of Bush's judicial nominees. In addition to Gray, who heads an advocacy group called Committee for Justice, the coordinating council consists of Jay Sekulow, chief counsel of the American Center for Law and Justice; Leonard Leo, executive vice president of the Federalist Society; and Edwin Meese III, attorney general under the Reagan administration.

Gray and the other members hold a conference call on Monday mornings with players in the confirmation battle to help determine strategy, at times including White House staff. Republican National Committee Chairman Ken Mehlman, who managed Bush's 2004 reelection campaign, conducts a similar call on Tuesdays to coordinate strategy.

Gray said he set up his group in 2002 at the request of then-Senate Majority Leader Trent Lott (R-Miss.), who was becoming increasingly concerned about the potential use of filibusters to block judicial nominees.

Gray said the White House had become more engaged in working with his group and

others since Bush's reelection in November, partly out of fear that a Senate filibuster could be used to block a Supreme Court nominee. Chief Justice William H. Rehnquist, 80, was diagnosed with thyroid cancer last fall and is expected to retire this year.

Although the White House wants up-or-down votes on its nominees, Gray said, "the push for this has really come more from the Senate."

It takes 60 votes to break a filibuster. The current Senate has 55 Republicans and 44 Democrats, plus one independent, who usually sides with the minority. That gives the GOP enough votes to win a simple majority but not enough to stop a filibuster.

One of the outside groups involved in the filibuster issue is Progress for America, which has close ties to Bush advisor Karl Rove and is assisting the White House on four key second-term priorities: judicial nominations, Social Security, tax-code restructuring and tort reform.

Until the filibuster controversy escalated in recent weeks, the conservative advocacy group had been devoting most of its resources to Bush's Social Security initiative, Executive Director Chris Meyers said. But in the last month, Progress for America has spent $3.6 million to promote Bush's judicial nominees.

The role of the White House in the Senate filibuster debate is a sensitive matter. In mid-April, Minority Leader Reid met with Bush and said afterward that the president had told him he would not get involved.

Days later, Cheney declared in a speech that he would support changing the Senate rule if a tie on the floor gave him the opportunity to cast a tie-breaker.

Reid accused Bush of "not being honest," saying that Cheney's remarks amounted to proof that "the White House is encouraging this raw abuse of power."

But White House counselor Dan Bartlett rejected that accusation. "The White House is not involved," he said Thursday.

Most Republicans blame the impending showdown on Senate Democrats, arguing that the president has a right to up-or-down floor votes on his nominees.

Even so, Sen. Mel Martinez (R-Fla.), Bush's former secretary of Housing and Urban Development, acknowledged that it was the president who started the fight. "He proposed the judges," Martinez said.

"The Strategy for a Successful Nomination: Disarm Opposition"

New York Times
July 20, 2005
Adam Nagourney

With his nomination of Judge John G. Roberts, President Bush moved Tuesday to plant the conservative imprint on the Supreme Court that has been a central aim of his presidency, but with a member of the Washington legal establishment designed to frustrate any Democratic effort to block Mr. Bush's replacement for Justice Sandra Day O'Connor.

As a judge for just two years on the United States Court of Appeals for the District of Columbia Circuit, Judge Roberts has a limited judicial record, which Democrats said would complicate their hopes of building a case against his nomination, even as abortion rights groups cited a brief he wrote when he was deputy solicitor general in the first Bush administration in which he noted that administration's opposition to the *Roe* decision that legalized abortion.

The Senate Judiciary Committee approved his appointment to the appellate court in 2003 by a lopsided vote of 16 to 3, and the Senate confirmed the choice in a unanimous voice vote.

The reaction by top senators like Harry Reid, the minority leader, was notably low-key and noncommittal. Even before the nomination, Senator Joseph I. Lieberman of Connecticut, a moderate Democrat and one of the 14 senators whose recent compromise averted a shutdown on the process of confirming judicial nominees, said he was likely to support Mr. Robert if he was nominated.

As often is the case with Mr. Bush, the decision appears almost obvious in retrospect: a choice that is at least good enough for conservatives, who hailed the nomination with a barrage of favorable reaction that went out even before Mr. Bush appeared in the East Room on Tuesday evening, yet someone who is genial and enigmatic enough to confound Democrats as they head into what they had long expected to be a difficult battle.

By suggesting that Mr. Bush was giving serious consideration to a woman or minority even if he did not choose one in the end, the White House may have minimized any political repercussions Mr. Bush may have suffered by choosing a man to replace the court's first woman.

"They've artfully threaded the needle," said a senior Democratic leadership aide, who declined to be identified, explaining the challenge that the party now faces.

One of the reasons for the Democrats' difficulty is that it is hardly clear, at least based on his judicial record to date, that Mr. Roberts would be in the mold of Antonin Scalia, the Supreme Court justice Mr. Bush held up during the 2004 campaign as a model of the kind of justice he would select.

Mr. Roberts, should he win confirmation, could certainly turn out to be that way, but there is little in his record to suggest he is the kind of ardent conservative that Mr. Scalia has been.

Still conservative leaders who had been well-briefed on the choice before it was announced, were delighted with the selection, and notably none raised any immediate objection to any part of his record.

"The president is a man of his word," said Tony Perkins, the president of the Family Research Council, a conservative Christian group. "He promised to nominate someone along the lines of a Scalia or a Thomas, and that is exactly what he has done."

Abortion rights groups and the Democratic National Committee were quick to put out statements attacking the abortion arguments Judge Roberts made for Mr. Bush's father. But Democratic aides said those attacks may prove to be more for the benefit of the groups' supporters and donors than anything else, and that Republicans would be able to rebut that line of attack by saying that Mr. Roberts was voicing the views of the first Bush White House.

Mr. Roberts has the resume of a member of the Washington legal establishment, and Mr. Bush highlighted it in introducing him Tuesday night: a graduate of Harvard College and Harvard Law School, a clerk for Chief Justice William H. Rehnquist. Judge Roberts served as a deputy solicitor general under Mr. Bush's father, worked under President Ronald Reagan and practiced law at the Washington firm of Hogan & Hartson when he was not working for the government. More significantly, as several Republicans argued, the youthful Mr. Roberts displayed an easygoing and nonthreatening personality that will make it difficult for opponents to demonize him the way they did, say, Robert H. Bork, before his nomination failed. In many ways, the decision was reminiscent of Mr. Bush's last big personnel decision—the selection of Dick Cheney to be his running mate—in that he chose someone who is strong on resume and credentials and not particularly flashy.

Mr. Bush used his prime-time introduction of Judge Roberts to assure conservatives by pledging that his nominee would not "legislate from the bench," a phrase deep with meaning to his party's base, while emphasizing Judge Roberts's mainstream academic and legal credentials.

Democrats were quick to suggest that the selection was little more than a repaying of a political debt that Mr. Bush owes to conservatives from his election last year. But throughout his years in public life, and certainly as a national candidate, Mr. Bush has embraced the views of his party's right wing with such vigor that it is hard to believe that his views are simply a matter of political calculation.

Mr. Bush, and his chief political lieutenant Karl Rove, have made clear that they viewed the Bush presidency as an opportunity to build a lasting conservative legacy that would produce fundamental changes in the government, and what Republicans describe as a long-lasting political realignment. The retirement of Justice O'Connor, a swing vote on the court, presented him with a clear opportunity to do that.

* * *

Mr. Bush is also someone who relishes confrontation and political combat, perhaps never more than when he finds himself under attack, as he certainly has during these rough three months in Washington. In this case, though, Mr. Bush may have found a way to accomplish one of the overarching goals of this presidency—moving the court to the right—without a reprise of the kind of polarizing battles that have sometimes marked the Bush presidency.

"An Interview by, not with, the President"

New York Times
July 21, 2005
Elisabeth Bumiller and David D. Kirkpatrick

When President Bush sat down in the White House residence last Thursday to interview a potential Supreme Court nominee, Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit, he asked him about the hardest decision he had ever made—and also how much he exercised.

"Well, I told him I ran three and a half miles a day," Judge Wilkinson recalled in a telephone interview on Wednesday. "And I said my doctor recommends a lot of cross-training, but I said I didn't want to do the elliptical and the bike and the treadmill." The president, Judge Wilkinson said, "took umbrage at that," and told his potential nominee that he should do the cross-training his doctor suggested.

"He thought I was well on my way to busting my knees," said Judge Wilkinson, 60. "He warned me of impending doom."

Judge Wilkinson's conversation with the president about exercise and other personal matters in an interview for a job on the highest court in the land was typical of how Mr. Bush went about picking his eventual nominee, Judge John G. Roberts, White House officials and Republicans said. Mr. Bush, they said, looked extensively into the backgrounds of the five finalists he interviewed, but in the end relied as much on chemistry and intuition as on policy and legal intellect.

"He likes to have the info, he likes to have the background, but he also is a field player," said Dan Bartlett, the counselor to the president, in a briefing to reporters on Tuesday night. "He likes to size people up himself, make his own judgment."

White House officials and Republicans said Mr. Bush, who prides himself on his instincts about people, had clicked with Judge Roberts and what a friend calls his Midwestern "regular guy" demeanor in an hourlong interview in the White House on Friday, the day after the president met in the same setting with Judge Wilkinson. But Mr. Bush was particularly impressed, Mr. Bartlett said, with the judge's "impeccable credentials" from Harvard College and Harvard Law School and his record of arguing 39 cases before the Supreme Court.

Equally important, Republicans close to the White House said, Mr. Bush knew that Judge Roberts was acceptable to conservatives but came with such a sterling résumé and ties to Washington's establishment that Democrats would find it hard to go on the attack. "For the last 15 years, he's been in the talent pool for where you start to look for a Supreme Court nominee," said C. Boyden Gray, the White House counsel to Mr. Bush's father and the chairman of the Committee for Justice, an organization he formed three years ago to lobby for the president's judicial nominees.

Mr. Bush also conducted an additional interview on Friday and two on Saturday. Republicans close to the administration said they thought the interviews were with three other federal appellate judges: Edith Brown Clement, Edith H. Jones and J. Michael Luttig. White House officials would not

disclose the names of the also-rans, but Mr. Bartlett told reporters that Mr. Bush's interviews had included women.

As is Mr. Bush's style, the interviews he conducted with Judge Roberts and Judge Wilkinson focused heavily on the upbringing of the two men. "He wanted to know about his personal life and about where he came from," Mr. Bartlett said of Mr. Bush's interview with Judge Roberts, noting that the judge had been president of his high school class and also captain of the football team.

Judge Wilkinson said he was not asked about his views on issues like abortion or even a particular legal case in his interview with Mr. Bush as well as in interviews with others on the White House staff; he would not say if he had talked to Vice President Dick Cheney. "I wasn't crowded in any way," Judge Wilkinson said. "There was no litmus test applied." Scott McClellan, the White House press secretary, said in a briefing on Wednesday that neither Mr. Bush nor White House staff members asked any of the finalists about their positions on issues.

Neither Judge Wilkinson nor any one at the White House would shed light on Wednesday on why Mr. Bush had not selected a woman for the job, particularly after his wife, Laura Bush, had said that was her wish. The first lady's comments were interpreted by Republicans as a reflection of Mr. Bush's thinking, which fed a daylong frenzy of rumors on Tuesday that Judge Clement in New Orleans was the president's pick. A woman who answered the phone in Judge Clements' chambers on Wednesday would only say that the judge was not available, then hung up.

But retiring Justice Sandra Day O'Connor quickly weighed in on the president's nomination for her replacement, calling Judge Roberts "good in every way, except he's not a woman." Justice O'Connor made the comments in an interview on Tuesday after a fly-fishing trip with the outdoor editor of *The Spokane Spokesman-Review*, where she was also quoted as saying that she was almost sure Mr. Bush would not appoint a woman to replace William H. Rehnquist because she did not think he would want a woman as chief justice.

"So that almost assures that there won't be a woman appointed to the court at this time," Justice O'Connor said.

Former Senator John Breaux, a centrist Democrat from Louisiana, the home state of Judge Clement, said the rumors got so out of hand on Tuesday that people in New Orleans informed him that Judge Clement was on a plane bound for Washington, with her next stop presumably the White House.

In an interview on Wednesday, Mr. Breaux speculated that Judge Clement might never have been a real candidate. "Maybe they were all along working on Roberts and they misled everybody," Mr. Breaux said. Mr. McClellan, the White House press secretary, countered later on Wednesday that the administration had never sent out signals that Judge Clement was the pick.

What is clear is that Mr. Bush made up his mind only hours before he called Judge Roberts on Tuesday at 12:35 p.m. to offer him the job. He told only a handful of people before he picked up the phone, an administration official said, and asked them to tell no one else. Only after the call was made did Mr. Bush inform the other senior members of the White House staff.

By 7:30 p.m. on Tuesday, as Mr. Bush was informing important members of the Senate before his 9 p.m. televised announcement,

Karl Rove, the president's political adviser, was calling key conservatives to tell them that Judge Roberts was the pick. One of Mr. Rove's first calls was a conference call with Mr. Gray; Leonard Leo, the executive vice president of the Federalist Society and the head of Catholic outreach for the Republican Party; Jay Sekulow, the chief counsel of the American Center for Law and Justice, an evangelical group; and former Attorney General Edwin Meese III of the Heritage Foundation.

Mr. Sekulow and Mr. Leo were part of an outreach team of lawyers assembled by the White House to push Mr. Roberts with conservative groups. Both said on Wednesday that they had known Judge Roberts for years and attested to his conservatism with others in the movement.

Judge Wilkinson said on Wednesday that Mr. Bush had given him an extensive tour of the family quarters of the White House, including the Lincoln bedroom and a handwritten copy of the Gettysburg Address. "He just could not have been more gracious," he said.

Judge Wilkinson said he could offer no insight into how the president made the decision that he did, but he did say that "I was given a good shot, and you just can't find a better person or a better judge than John Roberts."

"A Year of Work to Sell Roberts to Conservatives"

New York Times
July 22, 2005
David D. Kirkpatrick

For at least a year before the nomination of Judge John G. Roberts to the Supreme Court, the White House was working behind the scenes to shore up support for him among its social conservative allies, quietly reassuring them that he was a good bet for their side in cases about abortion, same-sex marriage and public support for religion.

When the White House began testing the name of Judge Roberts on a short list of potential nominees, many social conservatives were skeptical. In hearings for confirmation to the United States Court of Appeals for the District of Columbia Circuit, he had called the original abortion rights precedent "the settled law of the land" and said "there is nothing in my personal views that would prevent me from fully and faithfully applying that precedent."

And they were frustrated, as many Democrats were this week, by his not having left a long record of speeches and opinions that laid out his views.

But with a series of personal testimonials about Judge Roberts, his legal work, his Roman Catholic faith, and his wife's public opposition to abortion, two well-connected Christian conservative lawyers—Leonard Leo, chairman of Catholic outreach for the Republican Party, and Jay Sekulow, chief counsel of an evangelical Protestant legal center founded by Pat Robertson—gradually won over most social conservatives to nearly unanimous support, even convincing them that the lack of a paper trail was an asset that made Judge Roberts harder to attack.

Both had been tapped by the White House to build the coalition for judicial confirmation battles.

Mr. Leo said that "there were certainly questions a year or two ago about whether John Roberts fit the president's standards as he set forth in his two campaigns"—a jurist in the mold of Antonin Scalia or Clarence Thomas—"but as we moved closer and closer to the period when a vacancy would occur people became much more educated and more comfortable with his background."

When conservatives expressed doubts, Mr. Leo said, "I would say, 'I know the man.'" Mr. Sekulow agreed, saying, "I have known John Roberts for 17 years. When I talk about John Roberts with the groups, it is not theoretical, it is based on firsthand, direct experience. He and I have argued cases together before the Supreme Court—you can't get more direct than that."

They made their case by recounting the briefs Judge Roberts had filed as lawyer for Republican administrations, including one arguing against the validity of the abortion rights precedent *Roe v. Wade* and another in support of allowing religious ceremonies at public school events.

Although Judge Roberts said at his confirmation hearings that his work as a legal advocate did not necessarily reflect his own views, Mr. Sekulow said he knew that Judge Roberts's heart was in it. "He doesn't argue just to argue," Mr. Sekulow said.

Mr. Leo said he, too, had known Judge Roberts for nearly 15 years in legal and Catholic circles and at the opera.

Mr. Leo said he told wary social conservatives that even though Judge Roberts had not ruled on abortion or other issues his other opinions showed "a respect for the text and original meaning and a presumption of deference to the political branches of government."

For example, Mr. Leo told allies, Judge Roberts had supported the administration's argument that executive privilege protected Vice President Dick Cheney's meetings about energy policy, and he had dissented against interpreting the Constitution's interstate commerce clause broadly enough to allow the federal endangered species act to protect a certain California toad.

Mr. Leo said such narrow and deferential rulings are "going to comport better" with the restrained role that social conservatives want judges to play on questions about abortion, gay rights or religious displays, which they believed should be left to elected officials rather than the Supreme Court, Mr. Leo said.

Judge Roberts's family life and religious convictions helped sell him to Christian conservatives as well. Both he and his wife, Jane Sullivan Roberts, were observant Catholics, Mr. Leo told other allies. They had joined a church in Bethesda to follow their priest, Msgr. Peter J. Vaghi, who was well known in the Washington area as an advocate of Catholic orthodoxy and opponent of abortion.

"For people like me who are reading the tea leaves, it is another marker that we can breathe easy," said Austin Ruse, president of the Culture of Life Foundation, a conservative Catholic group.

Ms. Roberts, who is also a lawyer, was equally well-connected in conservative circles. She has also been active for several years in Feminists for Life, an anti-abortion group that works largely on college campuses. From 1995 to 1999, she was the group's executive vice president, and she has donated legal services since then, an official of the group said.

Serrin Foster, president of Feminists for Life, declined to characterize Ms. Roberts' views but said the group's goals were "bigger" than ending abortion rights.

"If *Roe* were over, that's not enough for us," she said adding that the group's ultimate goal was to "make abortion unthinkable" by providing every pregnant woman and mother with adequate support and resources.

Supporters of Judge Roberts bolstered their case with the opinions of two leading legal thinkers in the movement to oppose abortion rights: Prof. Robert George of Princeton University and Prof. Hadley Arkes of Amherst.

Professor Arkes said he, too, had vouched for Judge Roberts with other social conservatives, partly on the strength of a personal acquaintance with him and on a longer acquaintance with his wife.

At a dinner with friends after Judge Roberts's appeals court confirmation, Professor Arkes said, he had suggested that nominees questioned about *Roe v. Wade* should turn the tables to put the senators on the defensive, asking them whether they understood the implications of the ruling. "He didn't rule it out, but he didn't think the hearings could be turned into that kind of seminar," Professor Arkes said.

He had presumed they both believed the decision should be overturned, Professor Arkes said, because they were with friends

who shared that view. But he said Judge Roberts never said so explicitly. "He is a very, very careful guy."

On Wednesday, Professor George joined a conference call for reporters with James C. Dobson, founder of Focus on the Family, to discuss their support for Judge Roberts. They said they knew more about his legal thinking than conservatives had known about Justice David H. Souter, a Republican appointee and a disappointment to them.

"I think that we do know a lot about Judge Roberts, from his life, from his record, from the things he has stood for," Dr. Dobson said.

He continued: "We believe the issues we care about will be handled carefully by this judge."

"Right, Left Gird for Battle Over Nominees"

St. Louis Post-Dispatch
June 26, 2005
Deidre Shesgreen

It was August 1987, a month after the White House had named Robert Bork as its choice to fill a Supreme Court vacancy. Conservative activist Paul Weyrich started to get nervous.

Liberal groups were hammering Bork, and some Democratic senators who had committed to vote for the controversial nominee were starting to go wobbly. So Weyrich paid a visit to Howard Baker, President Ronald Reagan's White House chief of staff.

"We're getting killed," Weyrich recalled telling Baker. "We need a counteroffensive and I'm perfectly willing to make that happen." The ensuing GOP strategy was a matter of some dispute, but the result was not: Bork was defeated.

This time around—as Washington holds its collective breath in anticipation of a vacancy on the high court—Weyrich and other conservatives aren't waiting for a green light from the White House.

Indeed, interest groups on the right and left are like the British and French before Waterloo, with detailed battle plans at the ready.

Conservative groups are already running ads, pre-emptively attacking what they expect will be Democratic opposition to a Bush nominee. Liberal groups are compiling thick opposition research files on potential nominees. And both sides are raising gobs of money.

All eyes will be on the high court Monday, when the current term is scheduled to end, to see whether Chief Justice William Rehnquist, suffering from thyroid cancer—or any other justice—announces their retirement.

In Washington, the looming showdown between legions of political activists already looks and feels more like a full-scale election than a Senate confirmation. That's no accident; both sides have been gearing up for a confrontation since President George W. Bush's re-election victory in November, if not earlier.

This time, the voters will be the members of the U.S. Senate. And the pressure from outside interest groups on those 100 lawmakers promises to be relentless.

"It's just going to be unbelievable," said former Sen. John C. Danforth, R-Mo., who acted as a chief defender of Clarence Thomas's Supreme Court nomination in 1991.

"The conservatives, especially the religious conservatives, are going to want a nominee who has been pretty much pre-cooked, somebody who they think they can count on, so they're going to be very hard to please," Danforth said. And the liberals, he said, "probably don't want almost anybody who President Bush would nominate."

Reid Cox, general counsel to the conservative Center for Individual Freedom, said: "We now have 100 people in the Senate chamber—and thousands more outside—that are (going to) want to give their input on every last comma that these

nominees have inserted into their (previous court) decisions" or other legal writings.

Activists on both sides say they anticipate an all-out fight over a Supreme Court vacancy even if it's created by the conservative Rehnquist, whose conservative replacement would not dramatically alter the court's ideological make-up.

"It's not about the tilt of the court," said Nancy Keenan, president of NARAL Pro-Choice America, an abortion-rights advocacy group. "It's about replacing an aging conservative with a very young conservative (who could have) a minimum of 40 more years on the court."

"It's going to be a knock-down, drag-out fight no matter who the nominee is," said Jeff Mazzella, president of the Center for Individual Freedom. "It's something we've been preparing for several months, if not several years now . . . and we are ready to mobilize in anticipation of a Bork-like fight."

In advance of a possible Monday announcement, Progress for America, another right-leaning advocacy group, unveiled a $700,000 TV ad campaign this week titled "Get Ready." The ads—the first salvo in what the group says will be an $18 million campaign—warn that "some Democrats will attack anyone the president nominates."

Progress for America and other conservative groups have prepared detailed defenses of the possible nominees' records, lined up friendly "surrogates" to blanket cable and network news shows, and set up field operations in more than 20 states that are home to potential swing-vote senators. (Missouri and Illinois are not among the targeted states.)

"Our role is to make sure that no spurious charge goes unanswered," said Sean Rushton, executive director of the Committee for Justice, formed to promote "constitutionalist" candidates for the courts.

Liberal groups have hired consultants, started digging into the public records of the half-dozen or so candidates thought to be on the White House's short list, and huddled with key Democrats, including Sen. Dick Durbin, D-Ill., to share information and plot strategy.

"We've been working every day since I came here five years ago in preparation for a Supreme Court vacancy," said Ralph Neas, president of People for the American Way.

Neas said his group has started doing "message research" with focus groups and polls and has assembled a team of veteran Democratic strategists, including Joe Lockhart, former Clinton White House spokesman, and Carter Eskew, a top strategist for Al Gore's 2000 presidential campaign.

With the war paint already on, the potential for accommodation is slim to none, many say, even though a recently negotiated truce over the use of filibusters to block Bush's appellate court nominees called for White House-Senate consultation on future court picks.

For one thing, though the president will name the candidate and the senators will cast the votes, they will do so with one eye toward placating the outside interest groups so crucial to their respective party bases. And those groups have already drawn lines in the sand.

Nowhere is that line clearer than on the issue of abortion.

Judie Brown, president of the American Life League, said of all the potential Bush nominees floated so far, she hasn't seen one that she'd go to bat for. "The time for wimps is over," Brown said. "I haven't seen that one individual who is willing to say 'Abortion is murder and I'm going to make that very clear if I'm nominated.'"

On the other side of that debate, NARAL's Keenan was equally disenchanted with the list of possible candidates.

"All of them are anti-choice," she said. Like Brown, Keenan said she would demand a clear statement on abortion from any nominee.

"They need to be asked where they stand on *Roe v. Wade,*" Keenan said. "We're not going to stand for any ducking or dodging."

It's a long way from the time when nominees could decline to answer such contentious questions on the grounds that the issue might come before them on the court. Today's highly charged climate can be traced back to Bork's nomination 18 years ago, followed four years later by the bitter fight over Thomas.

In an interview, Bork said that because of the highly partisan atmosphere now surrounding judicial battles, any potential nominee will have to "act more like a candidate for political office" than a prospective jurist. He or she will have to prepare speeches, get in front of the TV cameras, and court the myriad constituency groups.

"The entire process has changed so that it becomes explicitly political," Bork said. "The left and the right both insist upon answers in an effort to control the court."

Said Danforth: "I feel sorry for the poor devil who is nominated."

"Lobbyists Can't Wait to Push Justice Favorites"

Pittsburgh Post-Gazette
June 27, 2005
Maeve Reston

There are few, if any, people on Capitol Hill who know whether Chief Justice William H. Rehnquist will step down this week. At the moment, it's the most coveted secret in Washington politics.

But that hasn't prevented outside groups from launching their public relations campaign over a potential Supreme Court nomination—one that is expected to be of unprecedented scale.

This past week, the conservative group Progress for America began airing $700,000 in television ads intended to "warn Americans" that "liberal attack groups are hungry to smear almost any potential candidate" who doesn't meet their test.

On the left, the People for the American Way Foundation has sent out thick reports to members of the press arguing that if Bush chooses a nominee as conservative as Justices Clarence Thomas and Antonin Scalia, some 100 Supreme Court precedents "protecting seven decades of social justice gains" could be overturned.

The pre-campaign campaigning is just a glimpse of what's to come. In Washington's viciously partisan environment, outside groups have been preparing for this potential moment since President Bush was elected.

They have formed coalitions of several hundred groups poised to spend millions of dollars in an effort to sustain or defeat Bush's nominee.

The recent struggle over 10 of Bush's picks for federal appeals court openings who had been held up by Democrats provided a dress rehearsal for the now-looming drama.

The conservative Progress for America spent close to $4 million advocating for several of Bush's most contested nominees, and the People for the American Way Foundation spent $5 million on their campaign to prevent Senate Republicans from abolishing filibusters of judicial nominees. Both groups coordinated their efforts with dozens of smaller groups that helped hone the message through efforts on the ground.

Those campaigns—from the television advertisements, to the rallies to the thousands of telephone calls to wavering senators—solidified the structure that is now in place to handle a Supreme Court nomination.

"We found out that there are a lot of people in this country that are watching. . . . We have huge networks now," said Nancy Zirkin, Deputy Executive Director at the Leadership Conference for Civil Rights.

In anticipation of a nomination to the high court, groups on both sides have prepared exhaustive dossiers on the 12 to 15 people that Bush is rumored to be considering for the post.

Researchers have picked apart the speeches, court decisions and legal journal articles of those potential candidates. Both sides have prepared talking points.

Groups on the right have singled out compelling aspects in each candidate's

personal story or record, which they will highlight as the frenzy of television appearances and advertising begins.

They have also tried to anticipate each candidate's vulnerabilities and how to respond to attacks.

"We are prepared—literally within an hour of an announcement we can be ready," said Jay Sekulow, a key player in one of the major Supreme Court coalitions on the right and the chief counsel for the American Center for Law and Justice—a public-interest law firm founded in part by the Rev. Pat Robertson.

"There's never been this much of an organized effort on our side. Ever," he said.

Sekulow was one of a handful of conservative leaders and former government officials tapped by the Bush administration to create the first coalition to coordinate support for Bush's judicial nominees. In the past few years, Sekulow has worked closely with former President George H.W. Bush's White House counsel, C. Boyden Gray, former Attorney General Edwin Meese and scholars at the Federalist Society think tank on those efforts.

Recently, Manuel A. Miranda, a former aide to Senate Majority Leader Bill Frist, split off to form another coalition, which was briefly the National Coalition to End Judicial Filibusters, and has now been renamed the Third Branch Conference.

Miranda said he wanted to create a group that was less centralized around Washington-based leaders and lawyers.

Miranda said the Third Branch now holds weekly calls to strategize with groups as varied as anti-abortion groups in Maine to chambers of commerce in Michigan, and that the list is growing.

A third coalition, the Judicial Confirmation Network, is being spearheaded by a former law clerk for Thomas.

Progress for America is likely to be the major fund-raising power; the group recently announced that it would spend $18 million on a campaign to support Bush's potential nominee to the high court.

On the left, not long after Bush was elected, People for the American Way banded together with other prominent progressive and liberal groups—including the Alliance for Justice, the Leadership Conference on Civil Rights, and the abortion rights group NARAL—to form the Coalition for a Fair and Independent Judiciary.

The group has been meeting to discuss potential Supreme Court vacancies at least once a week since 2001 when Bush sent his first slate of federal judicial nominees to the Senate.

During the confirmation battles of the nominees to the lower courts, People for the American Way's president, Ralph Neas, said, his organization converted their fifth floor conference room into a war room to help coordinate the efforts of the groups within the coalition.

The 2,500 square foot room is now equipped with 40 computer workstations and 75 phone banks—where staff would spring into action to defeat a Supreme Court nominee they deem unacceptable. Neas said he expects some 75 of his 120 staff members to be engaged and he said the coalition also wanted to set up what will be the equivalent of presidential campaign team to supplement the coalition's efforts.

They have lined up former Clinton aides Carter Eskew and Joe Lockhart as consultants; along with pollsters and aides to conduct focus groups. A number of the aides, like Neas, were players in the bitter fight over President Ronald Reagan's 1987 nominee, Robert Bork.

But Neas says the consequences of this next moment are even more significant than that drawn-out struggle.

"More and more people—perhaps than any other time in our history—understand what's at stake," Neas said, noting the court's frequent 5-4 decisions.

"Hopefully there's going to be this extraordinary national debate involving millions of people because what happens is not some, arcane legal result but a nomination that could affect the lives of all of us now and our children and our grandchildren."

Wendy Wright, senior policy director at Concerned Women for America, echoed those sentiments—but from a conservative viewpoint, stating that there is perhaps no issue that will attract more people than an appointment to the Supreme Court.

"Christians had been pretty much sitting on the back bench, just living out their lives, raising their families, not involved at all until we felt assaulted one after another with cases of judges forcing cultural changes upon us," Wright said.

"The interest level is so high regarding judges that people are literally waiting by their computers and their phones for marching orders," she said. "They're just waiting for the gun to go off."

"Bringing the Hearings to Order"

New York Times
July 24, 2005
Arlen Specter

It's been 11 years since the Senate held confirmation hearings for a Supreme Court nominee. With the memory of the proceedings involving Robert H. Bork, Clarence Thomas and Anita Hill still fresh in their minds, the American people are eager for a sense of how the hearings for Judge John G. Roberts will play out. As chairman of the Senate Judiciary Committee, I will try to provide an answer.

The nomination of Judge Roberts has extraordinary significance because he will replace Justice Sandra Day O'Connor, who has been the decisive vote in many 5-to-4 decisions on the cutting edge of issues confronting our society. Interest groups at both ends of the political spectrum have long been poised to fight this confirmation battle, which could determine a victor in the so-called cultural war.

In this battle, the central issue remains *Roe v. Wade,* which established a woman's right to choose. Both sides are looking for assurances that Judge Roberts will side with them. Some senators have stated their intention to directly ask the nominee if he would overrule *Roe v. Wade.* While senators may ask any question they choose, the nominee may answer or not as he sees fit.

The confirmation precedents forcefully support the propriety of a nominee declining to spell out how he or she would rule on a specific case. Abraham Lincoln is reputed to have said pretty much the same thing: "We cannot ask a man what he will do, and if we should, and he should answer us, we would despise him. Therefore, we must take a man whose opinions are known."

This, of course, does not foreclose probing inquiries on the nominee's general views on jurisprudence. For example, it would be appropriate to ask how to weigh the importance of precedent in deciding whether to overrule a Supreme Court decision. Some legal scholars attach special significance to what they call superprecedents, which are decisions like *Roe v. Wade* that have been reaffirmed in later cases.

Beyond the range of social issues, the hearings for Judge Roberts will doubtless focus on other key matters like First Amendment rights, presidential authority, Congressional power under the Constitution's Commerce Clause, judicial restraint, civil rights, environmental law, eminent domain and the rights of defendants in criminal cases.

With his outstanding character and admirable record of achievement, including 39 appearances before the Supreme Court, Judge Roberts has disarmed critics on all sides. But he must do more. The Judiciary Committee, the Senate and the country need to know much more about his judicial philosophy. That is why we will conduct a full and thorough hearing that will allow sufficient time for senators to prepare and to satisfy themselves that the nominee will uphold our constitutional values of equality, liberty and justice.

In my discussion with Judge Roberts last week, I asked him if he would feel

comfortable with any of the customary labels—liberal, moderate, conservative. Rejecting those categorizations, he said he would strive for modesty. His goal was to be a modest jurist on a modest court that understands its place in the balance of powers inherent in our Constitution.

He also emphasized the importance of stability. His focus on modesty and stability provide comfort that he would not be an activist but would respect Congressional action and judicial precedent. Whatever assurances may be inferred from those statements, our history is filled with Supreme Court justices who have provided big surprises once confirmed.

It's been said before, but it cannot be said enough, that the hearing will be conducted on a strictly bipartisan basis. Senator Patrick Leahy of Vermont, the ranking Democrat on the committee, and I have been discussing the prospects of such a hearing for months. Our cooperative work together on other committee matters gives me confidence that we will be able to agree on procedures, timing and witnesses.

My duty as chairman is to lead an efficient, dignified hearing and report the nominee to the full Senate. Even in Judge Bork's case, in which the committee members (including me) voted 9 to 5 against him, the nomination went to the full Senate. I believe that the Constitution requires action by the Senate, rather than having the nominee bottled up in committee—regardless of the committee's vote.

While everything I know about Judge Roberts is positive, I intend to keep an open mind until the witnesses are heard and the committee's deliberations are concluded. It is crucial that the public have confidence in the fairness and deliberative judgment of the Senate, and I am confident that we can meet our responsibilities.

"High Court Peace Offering"

Washington Post
July 21, 2005
John Yoo

Democrats should recognize an olive branch when they see it.

By choosing John G. Roberts to replace Sandra Day O'Connor on the Supreme Court, President Bush came as close as possible to finding a non-ideological, consensus nominee who can also lay claim to being a Republican.

Potential nominees such as Attorney General Alberto Gonzales, or federal judges Edith Brown Clement, Edith Jones, Michael Luttig, Michael McConnell or J. Harvie Wilkinson, rightly or wrongly would have prompted intense opposition in the Senate for their written views on abortion, affirmative action, religion, race or the regulatory powers of the federal government.

But Roberts has no far-reaching ideology, no creative articles, no revolutionary plans for constitutional law. He looks like an emblem of the Washington establishment: currently a judge on the U.S. Court of Appeals for the D.C. Circuit, commonly referred to as "the second-highest court in the land"; deputy solicitor general under President George H.W. Bush; associate White House counsel under President Ronald Reagan; clerk on the Supreme Court to then-Justice William Rehnquist; managing editor of the Harvard Law Review; summa cum laude Harvard graduate. If he had gone to St. Albans for grade school, he would have been perfect.

He is most likely to follow the center of the court in its current direction, and he may try to engage in course corrections, but as a standing member of the Washington establishment he won't try to turn the ship around or steer it to a completely different port.

Senate Democrats do not get to choose the nominee; the Constitution vests that power, as Alexander Hamilton explained in the Federalist Papers, in the president. But many Republican partisans did not get their favorites, either. Roberts is no Robert Bork (and I for one wish there were more judges with Bork's intellect and abilities on the Supreme Court and in the lower federal courts).

In fact, the Roberts nomination represents the best opportunity since the outrageous Bork hearings to repair the polarized confirmation process and to bring consensus to our fractured constitutional law.

Of course, the usual advocacy groups want to disqualify Roberts because he signed a brief in 1991 noting that the first Bush administration continued to believe that *Roe v. Wade* was incorrectly decided. But disagreement with *Roe* represented the views of Ronald Reagan and George H.W. Bush, who headed administrations that were put in office by large electoral margins. If senators refused to confirm everyone who ever worked in the Justice Department under presidents who exercised their right to interpret the Constitution differently from the courts, many federal judges, both Republican and Democratic appointees, would be disqualified from office. So would many members of the bar who would make

excellent judges.

It should be clear by now that Senate Democrats' efforts to use the filibuster to block Bush's nominees have failed. The nominations deal made by 14 senators has allowed most of Bush's blocked nominees to get a floor vote, and has not succeeded in persuading Republicans to nominate judges more acceptable to Democrats. Republicans will almost certainly use the option of changing the Senate rules to prohibit filibusters for judicial nominees if Democrats choose to block Roberts. Rather than mounting an ultimately futile attack on Roberts as a right-wing ideologue, Senate Democrats have a chance to return to the standard of confirming nominees with the highest professional qualifications and sound judgment. Or they can try to block Roberts, and give Senate Republicans the ground to block the next Ruth Bader Ginsburg or Stephen G. Breyer.

Confirming Roberts could also be the first step in bringing consensus to the Supreme Court itself. In his few opinions, Roberts has displayed a noteworthy deference to the elected branches of government on matters of policy. In what is becoming known as the "french fry" case, Roberts (a father of two young children) did not allow his clear personal feelings to get in the way of upholding a valid regulation prohibiting eating on Washington's Metro, even though it resulted in the arrest of a 12-year-old girl for eating a single french fry. Last week, Roberts was a member of a unanimous panel of the D.C. Circuit that accepted Bush's decision to use special military courts to try Osama bin Laden's driver and bodyguard, and that refused to second-guess Bush's decision that the Geneva Conventions do not apply to the war against al Qaeda. No doubt critics of these decisions would have preferred different rulings, but Roberts understood that those choices are up to the president and Congress, not the unelected courts.

For the past few years, Democratic Party thinkers and liberal academics have demanded a greater degree of restraint from the Supreme Court because they disagree with the court's decisions on race and states' rights. Some, such as Stanford Law School dean Larry Kramer and Georgetown University law professor Mark Tushnet, have even proposed eliminating the judicial power to invalidate acts of Congress, a power the courts have enjoyed since Chief Justice John Marshall's decision in *Marbury v. Madison* in 1803.

For their part, legal conservatives have long wanted to take the federal courts out of their aggressive role in setting national social policy, and they should be more comfortable with judicial restraint now that they control both the presidency and Congress. Perhaps Republicans and Democrats can agree not only on Roberts the person, but also on what he represents—a judge who will bring a measure of judicial restraint to the Supreme Court that allows our elected representatives, and not the courts, to make policy on our most important social issues.

"A Six-Pronged Strategy for Defeating Roberts"

MSNBC.com
July 21, 2005
Tom Curry

Although defeating Judge John Roberts, President Bush's nominee to the Supreme Court, is an uphill climb for Senate Democrats and the liberal groups allied with them, the outlines have emerged of a strategy to challenge, if not defeat Roberts.

Democrats and liberal groups will press Roberts on several fronts, using varied arguments, some short-lived and simple, others more substantive and subtle.

Here are the themes Democrats and liberal advocates were using as Roberts made his second day of courtesy calls to senators Thursday:

Argument One—GENDER: Roberts is male, unlike retiring Justice Sandra Day O'Connor.

Sen. Ken Salazar, D-Colo. released a letter he'd sent to President Bush Wednesday lamenting "that you have missed an opportunity to help create an America that includes women at all levels of our nation's government."

And when a female reporter asked Sen. Barbara Boxer, D-Calif. whether she thought it was regrettable that Bush had nominated what this reporter described as "just another white guy" instead of a woman, Boxer agreed that it was regrettable, although she added that commitment to women's rights was more important to her than just the sex of a nominee.

Argument Two—IDEOLOGY: The

ideological make-up of the court is fixed—and Bush is wrong to change it.

"Judge Roberts is no Sandra Day O'Connor," said Sen. John Kerry, D-Mass., in an e-mail to his supporters Wednesday. "Last night we learned that President Bush wants to replace a woman who voted to uphold *Roe v. Wade* with a man who argued against *Roe v. Wade,* and that sends a clear signal that this White House remains bent on opening old wounds and dividing America."

On each of these cases, decided by a 5-to-4 margin, the outcome might well have been different had Roberts sat in O'Connor's place:

- *Stenberg v Carhart* (2000): O'Connor joined the decision striking down Nebraska's ban on certain abortions which involve dismemberment of the fetus.
- *Grutter v. Bollinger* (2003): O'Connor wrote the decision upholding the use of racial preferences in the University of Michigan law school admissions department.
- *McCreary County v. American Civil Liberties Union* (2005) The court, with O'Connor in the majority, held that display of the Ten Commandments in a county courthouse was a government promotion of religion.

Argument Three—EVASIVENESS: Roberts was evasive in his 2003 confirmation hearings to become a federal

appeals court judge. He might try the same thing again. Sen. Charles Schumer, D-N.Y. used this argument Wednesday.

"I can't think of another nominee other than (Bush appeals court nominee) Miguel Estrada who was less forthcoming in the questions when he was nominated to the D.C. court of appeals" in 2003, Schumer said. (Despite this, the Senate confirmed Roberts unanimously.)

Schumer—who stressed that he had not yet made up his mind on Roberts—criticized him for refusing to answer these questions which he posed to him in 2003: "What two current Supreme Court justices do you believe have the most divergent judicial philosophies? How would you characterize the judicial philosophies of each? Of the two you name, which justice do you anticipate you will more closely approximate and why?"

Roberts replied that it wasn't his job to issue critical reviews of justices of the Supreme Court.

Reminded that Justice Ruth Bader Ginsburg refused to answer several questions during her confirmation hearings in 1993, Schumer brushed that off: "It was a different time" and she was "a consensus nominee."

Schumer had what he called a "cordial" meeting with Roberts for 55 minutes Thursday afternoon and will have another meeting with him next week.

Schumer said they discussed the kinds of questions that senators will pose to Roberts during the confirmation hearings.

The New Yorker handed Roberts a list of 110 detailed questions about past Supreme Court decisions and constitutional law that Schumer intends to ask during the public hearings. Schumer said the list was "not inclusive."

Roberts told Schumer that "he had 'modesty in terms of a judge's role, in terms of precedent and in terms of the legislature.'" Schumer said he expected the nominee "to fill in a little more detail" of this statement.

Asked if he thought he could nudge Roberts toward his views with this series face-to-face meetings, Schumer said, "He's too smart a man with too much experience and too much confidence, frankly, that he's going to be nudged because a senator says 'you ought to think this way.'"

Argument Four—CONFIDENTIAL DOCUMENTS: Schumer and his allies say they must have the confidential memoranda that Roberts wrote while he served in the solicitor general's office in the first Bush administration.

The Bush administration didn't turn over such memos during the Democratic filibuster that defeated Estrada and there's no reason to think it will do so now in the Roberts struggle.

Roberts "came to the conclusion he would defer to the client in that regard," Schumer reported, after his meeting with Roberts Thursday. The client in this case was the executive branch.

Argument Five—THE COMMERCE CLAUSE: According to Schumer, Sen. Edward Kennedy, D-Mass, and the liberal Alliance for Justice, Roberts's interpretation of the Commerce Clause is so restrictive that it would cripple federal powers.
"To me, the number one issue is the Commerce Clause," Schumer said.

The underpinning of the expansive federal

government is this phrase in the Constitution: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

The Commerce Clause is the basis for the Endangered Species Act and other laws that affect businesses and individuals every day from Anchorage to Atlanta.

It may turn out that the most important thing Roberts has written in his 25 years of lawyering and judging is a dissent—amounting to barely more than one page—in a case called *Rancho Viejo LLC v. Norton,* issued on July 22, 2003.

In it, Roberts questioned whether the Endangered Species Act of 1973 gives federal regulators the power to stop a housing development that might affect the survival of a species, the arroyo toad, which lives within the boundaries of one state, California.

How can it be, Roberts wondered, that "regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States'"?

The issue here is the same one the Supreme Court addressed in the recent decision which undermined California's medical marijuana law.

As his guiding stars, Roberts cited two decisions written by his former mentor, Chief Justice William Rehnquist: *United States v. Lopez* in 1995 and *United States v. Morrison* in 2000, which limited the reach of the Commerce Clause.

Schumer said the *Lopez* and *Morrison* cases were wrongly decided, but he added that someone who didn't agree with him on that point would not necessarily be disqualified from serving on the bench.

Argument Six—GAY RIGHTS: Roberts, his adversaries predict, won't have an expansive view of the Equal Protection and Due Process clauses of Fourteenth Amendment to the Constitution; therefore, he will be less inclined to support new definitions of gay rights.

Joe Solmonese, president of the Human Rights Campaign, a leading gay rights group, made this argument Wednesday.

"Bush said he would be nominating someone who wouldn't 'legislate from the bench," Solmonese wrote in the gay magazine the *Advocate.* "Although this might sound reasonable at first, in fact . . . it's code for judges who refuse to rule that the Constitution ensures equal protection for all."

Prior to the court's ruling in *Lawrence v. Texas* two years ago, the court had never held that the Equal Protection Clause encompassed gay rights.

Despite all this or because of it, conservatives such as James Dobson of Focus on the Family praised Roberts Wednesday. "Judge Roberts has a brilliant legal mind and his qualifications are impeccable," said Dobson in a conference call with reporters. "Most importantly, we believe Judge Roberts will interpret the Constitution and not try to legislate from the bench, which has been the pattern in recent years."

"Opponents of Nominee Taking Populist Tack"

Los Angeles Times
July 23, 2005
Ronald Brownstein

Critics of John G. Roberts Jr. are turning to populist economic arguments to thwart his nomination to the Supreme Court, echoing one of the themes Al Gore used against George W. Bush in the 2000 presidential campaign.

In their first reactions to Roberts, many of the Democrats and liberal groups resisting his selection by President Bush are trying to portray him as a threat to the economic interests of average families. The strategy—even the language—is similar to Gore's effort to frame the 2000 presidential campaign as a choice between "the people" and "the powerful."

Sen. Edward M. Kennedy (D-Mass.) thundered in his first floor statement on the nomination this week: "Americans deserve to know if nominees will be on the side of justice and individual liberties, or if they will side with powerful special interests."

This use of populist economic arguments appears partly driven by necessity: Roberts' record as an attorney and federal judge is much more extensive on economic than social issues, and thus potentially offers more ammunition for critics.

But the strategy also reflects the decision reached by liberal groups, after years of planning for a Supreme Court vacancy, to spotlight bread-and-butter economic issues as much as more emotional social concerns, such as gay marriage or abortion.

Ralph G. Neas, president of People for the American Way, a liberal group expected to help lead the fight against Roberts, said polling conducted by his organization found that most Americans would oppose a justice seen as too close to big business.

"If John Roberts is perceived as someone who is not going to protect the rights of ordinary Americans, and will favor corporate interests, there will be a 70% majority against his nomination," Neas said.

Senior White House strategists and the independent campaigns backing Roberts predict such arguments will not seriously threaten his confirmation, in part because they maintain his record is too complex to support the portrayal. They also believe Bush's two presidential victories, especially his win over Gore, have shown the limits of a class-based populist message.

"A reprise of the Al Gore campaign projected onto the Supreme Court nominee five years later is just not an effective strategy," said one GOP strategist who spoke on condition of anonymity when discussing White House plans for the confirmation fight.

Roberts' supporters see another hurdle for the case critics are building: His views on business and regulatory issues closely track those of Sandra Day O'Connor, who many Democrats have lauded since she announced her retirement.

"It is ironic that Democrats are praising O'Connor while now trying to paint Roberts as too 'pro-business,' when that is the one area of the law where there probably is

complete overlap between them," said C. Boyden Gray, chairman of the Committee for Justice, a coalition supporting Bush's judicial appointments. "If O'Connor is acceptable to Democrats, Roberts certainly should be, at least with respect to the commercial issues."

Still, such criticism began within hours of Bush's announcement Tuesday of Roberts' nomination.

Eli Pariser, executive director of the political action committee associated with the liberal advocacy group MoveOn.org, issued a news release that in its first sentence described Roberts as a "right-wing corporate lawyer."

Formerly in private practice, Roberts now serves as a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

Kennedy, a likely leader of Senate opponents of Roberts, did not mention abortion until the end of his floor statement Wednesday.

Instead, he noted that the next Supreme Court Justice could significantly affect American's lives on issues such as worker rights, civil rights, retirement security, environmental protection, corporate accountability and access to healthcare.

Echoing a populist phrase from the 1930s, Kennedy said the central issue in the upcoming debate would be "whose side John Roberts would be on"—whether he would represent average Americans or "powerful special interests."

Equally telling was the reaction of Sen. Charles E. Schumer (D-N.Y.), another likely Roberts' opponent, at a news conference Wednesday.

The first questioner asked Schumer whether he was anxious for Roberts to clarify his position on the right to abortion. Schumer replied that abortion was "hardly the only question."

He said that for him, "the No. 1 issue" was whether Roberts' views on the Constitution's commerce clause would lead him to retrench federal regulations aimed at protecting workers and consumers or safeguarding the environment.

The commerce clause provides the federal government with the authority to regulate interstate commerce.

Another senior GOP strategist familiar with White House thinking about the nomination said he believed these economic-focused remarks from critics were not "an accident," but instead part of a shift in the Democratic message since Bush's reelection in November.

With polls finding that Bush romped over the Democratic nominee, Sen. John F. Kerry of Massachusetts, among voters who attended church most often, many Democrats urged the party to play down social issues and highlight populist economics in an effort to recapture more culturally conservative blue-collar voters.

"This is . . . a recognition [by Robert's opponents] that, 'We can't make this about abortion because that undermines us with people of faith,' " said the GOP strategist who spoke on condition of anonymity. Instead, they have "got to make it about, 'Are you on the side of little guys versus big corporate interests?' "

Liberals deny they are reluctant to highlight the abortion issue, and note that recent

surveys show that most Americans want the next justice to uphold *Roe vs. Wade,* the 1973 decision legalizing access to the procedure.

Rather, Pariser and Neas said they were trying to assemble a broader argument against Roberts because they wanted to show that tilting the court right would directly affect millions of Americans beyond those deeply concerned about abortion and other social issues.

One senior Senate Democratic aide maintained that although Bush survived Gore's populist criticism in 2000, such arguments might prove more potent now because polls showed the president's record had deepened suspicions that he favored business interests and the wealthy over average families.

Regardless of the outcome, Democrats believe they can use the Roberts nomination fight to further stamp that image on the GOP—and claim the opposite for themselves, said the aide, who spoke on condition of anonymity when discussing the strategy.

"We are going to use that megaphone [of the Roberts' confirmation debate] to push out what we stand for, what we are fighting for," the aide said. This strategy frames the obvious question: Can critics make their portrait of Roberts stick?

Liberal groups are focusing on two aspects of Roberts' career. One is his advocacy, as a private attorney, for a number of major corporate clients. These include Toyota, which he defended against a claim under the Americans with Disabilities Act, and the National Mining Assn., which he represented in a suit brought against certain strip-mining techniques.

Critics are also likely to center their argument on one of Roberts' opinions as a judge.

The case, *Rancho Viejo LLC vs. Norton,* involved a California developer's challenge to the Endangered Species Act.

Roberts expressed doubts about the act that signaled he held views similar to the conservative majority on the Supreme Court, which for the last decade had interpreted the commerce clause in ways that limited the federal government's regulatory ability.

Citing that ruling, the liberal Alliance for Justice charged that his views on the commerce clause "might threaten to undermine a wide swath of federal protections, including many environmental, civil rights, workplace and criminal laws."

Roberts' defenders acknowledge his close relations with the business community, but contend his record doesn't support the effort to depict him as simply an ally of big corporations.

Anthony Sabino, a law professor at St. John's University's Peter J. Tobin College of Business in New York, said Roberts had demonstrated a respect for precedent that made it unlikely he would seek to broadly retrench federal authority, as critics had claimed.

"He realizes the so-called 'rolling back' of precedent is bad for America," said Sabino.

"Democratic Filibuster of Roberts Unlikely"

Associated Press
July 21, 2005
Jesse J. Holland

Key Senate Democrats say John Roberts won't get a "free pass" to a seat on the Supreme Court, while acknowledging that there is little chance they will filibuster the nomination.

As Roberts paid courtesy calls on senators Wednesday, a conservative group purchased TV ad time in support of his nomination. Abortion rights groups, meanwhile, staged protests against the nominee at the Supreme Court and the Capitol.

Majority Republican senators have been unfailingly admiring of the candidate since President Bush announced the nomination Tuesday night. And even though Democrats are uncertain about Roberts' judicial philosophy, not a single Democratic senator so far has called for the conservative jurist's outright rejection. Also, there has been no public talk of trying to block a yes or no vote.

Democrats, however, said they weren't about to rubber stamp Bush's selection of Roberts to replace retiring Justice Sandra Day O'Connor.

"No one is entitled to a free pass to a lifetime appointment to the Supreme Court," said Vermont Sen. Patrick Leahy, senior Democrat on the committee that will question the 50-year-old judge later this summer.

Abortion and access to internal government memos loomed as likely flash points as Democrats pointed toward the nationally televised proceedings, likely to take place after Labor Day.

Yet chances of a Democratic filibuster were fading.

"Do I believe this is a filibuster-able nominee? The answer would be no, not at this time," said Sen. Dianne Feinstein, D-Calif., an abortion-rights supporter.

Roberts scheduled conversations with Senate Judiciary Committee members on Thursday, part of a methodical campaign to reintroduce the Supreme Court nominee to a Senate that voted for him unanimously in 2003.

Even as Roberts made the rounds, 14 Senate centrists who halted a partisan confrontation over Bush's judicial selections two months ago weren't waiting for a visit from the nominee. This "Gang of 14" was meeting Thursday to discuss the nomination and learn whether any among them think it might trigger the "extraordinary circumstances" caveat that Democrats could say justifies a filibuster.

Many of the participating Republicans have indicated their support for Roberts. "I think that Judge Roberts deserves an up-or-down vote, and I hope that the other members of that group agree with me," Sen. John McCain, R-Ariz., said.

And while most of the Democrats are uncommitted on confirmation, it also doesn't seem like they would support a filibuster

either. Sen. Joe Lieberman, D-Conn., said the group had sent a message to the president to nominate a mainstream conservative. "And it appears at first look that Judge Roberts is that," he said.

Roberts, who didn't say much publicly during his five-hour visit to the Capitol, made sure to praise the politicians who will decide the first Supreme Court nomination in 11 years.

"I appreciate and respect the constitutional role of the Senate in the confirmation process," Roberts said after meeting with Senate Majority Leader Bill Frist, Majority Whip Mitch McConnell, R-Ky., and Judiciary chairman Arlen Specter, R-Pa.

While Democratic senators said things like Roberts was "in the ballpark" of being a nonconfrontational selection, they refused to guarantee a smooth confirmation process.

"The nominee should be as clear and open as he possibly can in answering our questions," Leahy said.

Republicans showed no doubt about the outcome. "We intend to have a respectful process here and confirm you before the first Monday in October" when the court reconvenes, McConnell told Roberts.

The administration is taking no chances as it seeks to fill O'Connor's seat, placing former Sen. Fred Thompson, R-Tenn., at Roberts' elbow to smooth the way to confirmation.

Progress for America, a conservative organization with ties to the administration, unveiled the opening salvo in an ad campaign designed to ensure confirmation. It stressed Roberts' resume of academic and professional accomplishments and public service—first in his class at Harvard Law School, confirmed by the Senate to his current position and lawyer in two presidential administrations.

Like Leahy, several Democratic senators said they intended to question Roberts closely about whether he would separate his personal views from his judicial rulings.

Senate Democratic leader Harry Reid of Nevada hinted at another potential area of conflict when he publicly prodded Roberts to provide written materials requested by senators.

Democrats have blocked confirmation votes on two of Bush's high-profile nominees in recent years in disputes over access to documents. In one case, federal appeals court nominee Miguel Estrada withdrew his nomination in 2003. The other nomination, involving John Bolton, nominated to be U.S. ambassador to the United Nations, is unresolved.

"Senate's 'Nuclear Option'"

Los Angeles Times
December 5, 2004
Michael Gerhardt and Erwin Chemerinsky

The GOP plan to eliminate the filibuster for judicial nominations would do lasting damage to the Senate. Not only do the Republicans hope to do it without following the long-established rules for changing Senate procedure but, if they're successful, they would eliminate a key check, guaranteeing their party's absolute control over Supreme Court appointments.

Filibusters are possible because of a parliamentary rule that allows a minority of senators to keep debate open on any subject; the votes of at least 60 senators are needed to end debate. This reflects the Senate's historic commitments to protecting minority viewpoints and encouraging consensus. Without the filibuster, 51 senators reflecting a minority of the population could pass anything and not bother to consult with the remaining senators, who represent a majority of the population. The filibuster is a key check in our system of checks and balances.

The filibuster is as old as the Senate itself, as Sen. Bill Frist (R-Tenn.) recently noted. The first one was in 1790, when senators from Virginia and South Carolina sought to prevent the location of the first Congress in Philadelphia.

For Republicans today to denounce filibusters of judicial nominations as obstructionist is disingenuous. Republicans used filibusters when they were the minority party—just as the Democrats do now. In 1968, Sen. Strom Thurmond (R-S.C.) led a successful filibuster blocking the confirmation of Abe Fortas as chief justice and Homer Thornberry as associate justice. During Bill Clinton's presidency, most Republican senators each voted at least once to filibuster one of his judicial nominations.

In President George W. Bush's first term, the Senate has confirmed 203 of his judicial nominations, and Democrats have filibustered only 10. Although Republicans are unhappy with this, it is the highest success rate ever for a president's judicial nominations. Republicans apparently want to give Bush the unique legacy of 100% success in confirming his judicial nominations.

But here's one problem: GOP leaders lack the two-thirds vote needed to change the rules and end filibusters of judicial nominations. Their only chance is called the "nuclear option." It entails procedural moves culminating in a ruling by the Senate's presiding officer—Vice President Dick Cheney—declaring filibusters of judicial nominations unconstitutional. Democrats may appeal the ruling to the full Senate, but only 51 votes are needed to uphold it. With 55 members next year, Republicans believe that they will have sufficient numbers to uphold such a ruling. Once the nuclear option is used, the Senate as it has been for more than 200 years will cease to be. The filibuster has had the salutary effect of encouraging compromise, but without it the majority would have no incentive to consult the minority.

What's more, a precedent would be set under which the Senate could change the rules to suit its needs. The Senate would become

permanently trapped in a vicious cycle of payback. Even if Democrats were to deny the unanimous consent required since 1846 to schedule floor business, Republicans could do away with those rules too.

The major problem with the nuclear option is that it is a cynical exercise of raw power and not based on constitutional principle or precedent. The deployment of the nuclear option would transform the Senate into a rubber stamp.

Recently, some GOP senators begrudgingly agreed to allow Sen. Arlen Specter (R-Pa.) to become chairman of the Judiciary Committee pursuant to its rules as long as he promised "to support all the president's judicial nominees." But the Senate's duty is not to support all judicial nominations. The Constitution empowers the Senate to give its "advice and consent" on nominations. The president has earned the privilege of nominating federal judges. But the Republicans' triumph on Nov. 2 does not entitle them to ignore Senate rules or to eliminate a "tradition," which Frist describes as uniquely responsible for making the Senate "the world's greatest deliberative body."

"Break the Filibuster"

The Weekly Standard
May 9, 2005
William Kristol

Suddenly Democrats are wrapping themselves in the Constitution. Emphasizing his commitment to maintaining the filibuster as a way to stop President Bush's judicial nominees, Senate Democratic whip Richard Durbin said last week, "We believe it's a constitutional issue. . . . It's a matter of having faith in the Constitution." The trouble is, the filibuster is nowhere mentioned, or even implied, in the text of the Constitution.

Suddenly, too, European liberals are discovering the virtues of the Founding Fathers. On the same day that Durbin was confessing his faith in the Constitution, the editors of the *Financial Times* were urging Bill Frist to "cease and desist" his efforts to break the filibuster, imploring him to "reread the wisdom of the Federalist Papers." The trouble is, the filibuster is nowhere mentioned, or even implied, in the Federalist Papers.

What's really going on here, of course, is this: President Bush, having been elected and reelected, and with a Republican Senate majority, wants to appoint federal judges of a generally conservative and constitutionalist disposition. The Democrats very much want to block any change in the character of the federal judiciary—a branch of government they have increasingly come to cherish, as they have lost control of the others. It's a political struggle, not unlike others in American history, with both sides appealing to high principle and historical precedent.

But it happens to be the case that Republicans have the better argument with respect to the filibustering of judicial nominees. The systematic denial of up or down votes on judicial nominees is a new phenomenon. Republicans are right to say that it is the Democrats who have radically departed from customary practice.

More important, perhaps, the customary practice of not filibustering presidential nominees—whether for the judiciary or the executive branch—is not a mere matter of custom. It is rooted in the structure of the Constitution. While the filibuster of judges is not, in a judicially enforceable sense, unconstitutional, it is contrary to the logic of the constitutional separation of powers.

As David A. Crockett of Trinity University in San Antonio has explained, the legislative filibuster makes perfect sense. Article 1 of the Constitution gives each house of Congress the power to determine its own rules. Senate Rule XXII establishes the necessity of 60 votes to close off debate. With this rule, the Senate has chosen to allow 40-plus percent of its members to block legislative action, out of respect for the view that delaying, even preventing, hasty action, or action that has only the support of a narrow majority, can be a good thing. As Crockett puts it, "Congress is the active agent in lawmaking, and if it wants to make that process more difficult, it can." One might add that legislative filibusters can often be overcome by offering the minority compromises—revising the underlying legislation with amendments and the like.

There is no rationale for a filibuster,

however, when the Senate is acting under Article 2 in advising and consenting to presidential nominations. As Crockett points out, here the president is "the originator and prime mover. If he wants to make the process more burdensome, perhaps through lengthy interviews or extraordinary background checks, he can." The Senate's role is to accept or reject the president's nominees, just as the president has a responsibility to accept or reject a bill approved by both houses of Congress. There he does not have the option of delay. Nor should Congress have the option of delay in what is fundamentally an executive function of filling the nonelected positions in the federal government. In other words—to quote Crockett once more—"it is inappropriate for the Senate to employ a delaying tactic normally used in internal business—the construction of legislation—in a nonlegislative procedure that originates in a coequal branch of government."

This is why the filibuster has historically not been used on nominations. This is the constitutional logic underlying 200-plus years of American political practice. This is why as recently as 14 years ago the possibility of filibustering Clarence Thomas, for example, was not entertained even by a hostile Democratic Senate that was able to muster 48 votes against him. The American people seem to grasp this logic. In one recent poll, 82 percent said the president's nominees deserve an up or down vote on the Senate floor.

They are right. History and the Constitution are on their side, and on majority leader Bill Frist's side. When the Senate returns from its recess, the majority leader should move to enact a rule change that will break the Democratic filibuster on judicial nominees, confident in doing so that he is acting—the claims of Senator Durbin and the *Financial Times* to the contrary notwithstanding—in accord with historical precedent and constitutional principle.

"A Last-Minute Deal on Judicial Nominees"

Washington Post
May 24, 2005
Charles Babington and Shailagh Murray

Fourteen Republican and Democratic senators broke with their party leaders last night to avert a showdown vote over judicial nominees, agreeing to votes on some of President Bush's nominees while preserving the right to filibuster others in "extraordinary circumstances."

The dramatic announcement caught Senate leaders by surprise and came on the eve of a scheduled vote to ban filibusters of judicial nominees, the "nuclear option" that has dominated Senate discussions for weeks. The deal clears the way for prompt confirmation of three appellate court nominees—Priscilla R. Owen, Janice Rogers Brown and William H. Pryor Jr.

Democratic leader Harry M. Reid (Nev.) called the pact "a significant victory for our country." But Majority Leader Bill Frist (R-Tenn.) said "it has some good news, and it has some disappointing news."

Frist, who was under pressure from conservative groups and colleagues to ban judicial filibusters, said that each of Bush's judicial nominees deserves an up-or-down vote on the Senate floor and that the agreement "falls short of that principle." But he and Reid had no choice but to accept the agreement's outline.

The bipartisan negotiators, who signed a two-page "memorandum of understanding," have the votes both to prevent judicial filibusters without banning them and to defeat efforts to invoke the nuclear option, regardless of the views of their Democratic and GOP colleagues, the White House and outside groups on the left and right. The action represents an unusual attempt to wrest power from the leadership.

The negotiators largely credited Sens. John McCain (R-Ariz.) and Ben Nelson (D-Neb.), and said they received significant support from veteran senators John W. Warner (R-Va.) and Robert C. Byrd (D-W.Va.). Their agreement calls for Democrats to drop filibusters of three appellate court nominees they have long opposed: Owen, of Texas; Brown, of California; and Pryor, of Alabama. It does not protect two other contested nominees—William G. Myers III of Idaho and Henry Saad of Michigan—who will be filibustered or withdrawn, negotiators said.

On the more difficult issue of future judicial fights, the memo's signers vowed to filibuster nominees only "under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist." The paragraph retaining the right to filibuster—considered the pact's most difficult question—states: "In light of the spirit and continuing commitments made in this agreement, we commit to oppose the rules changes in the 109th Congress," which extends through 2006.

Several Democrats quickly declared victory, saying the language left Republicans no room to ban judicial filibusters. "The nuclear option is off the table," Democratic Whip Richard J. Durbin (Ill.) said on the Senate floor, moments after the negotiators

announced their deal at a crowded news conference.

In a sharp comment aimed at the White House, Reid said: "Abuse of power will not be tolerated, and attempts to trample the Constitution and grab absolute control are over. We are a separate and equal branch of government. That is our Founding Fathers' vision, and one we hold dear."

But Republicans said they are free to back a ban if they believe Democrats act in bad faith and filibuster a nominee whose credentials do not amount to an "extraordinary" circumstance. "We don't think we're going to get there," said Sen. Mike DeWine (R-Ohio), adding that he will not hesitate to vote to ban judicial filibusters if he concludes the Democrats are abusing the right.

At one point last week, negotiators considered language saying Republicans would not trigger the nuclear option, "provided that there is good faith compliance with the commitments set forth in" the "extraordinary circumstances" provision on the future use of the filibuster.

Leaders of both parties said the pact's greatest implications will surface when Bush fills a Supreme Court vacancy, which many expect this summer. Democrats, who hold 44 of the Senate's 100 seats, were eager to retain filibuster powers in hopes of dissuading Bush from nominating a staunch conservative.

Depending on how conservative groups digest the news over the next few days, one of the biggest losers in the deal could be Frist, who is weighing a presidential run in 2008. He has always insisted on up-or-down votes on judicial nominees. Amassing the support needed to win the vote on the nuclear option was considered a major test of his leadership skills and his adeptness at promoting social conservative causes.

Twelve of the 14 negotiators beamed as they took the stage at the news conference, clearly relieved and even proud that they had pulled off such a feat. "This agreement is meant in the finest traditions of the Senate it was entered into: trust, respect and mutual desire to see the institution of the Senate function in ways that protect the rights of the minority," McCain said.

The senators said they hope the agreement will serve as a wake-up call to the White House to consult more closely with the Senate on judiciary candidates, before fights erupt on the Senate floor.

"We're going to start talking about who would be a good judge and who wouldn't," said negotiator Lindsey O. Graham (R-S.C.). "And the White House is going to get more involved and they are going to listen to us more."

Other signers were Democrats Joseph I. Lieberman (Conn.), Mark Pryor (Ark.), Mary Landrieu (La.), Ken Salazar (Colo.) and Daniel K. Inouye (Hawaii), and Republicans Susan Collins (Maine), Olympia J. Snowe (Maine) and Lincoln D. Chafee (R.I.).

Many senators singled out Warner as particularly influential. Though he never showed his hand publicly, Democrats were confidant that he would vote with them against the nuclear option—a major coup, because of Warner's stature and traditionally conservative voting record.

"I've said very little throughout this entire process," Warner told reporters. "And I'll say very little now, except that it's been a

remarkable study of Senate history and the history of our country throughout this entire process."

Americans are divided along partisan lines over whether to eliminate the filibuster on judicial nominees, according to a new Washington Post-ABC News survey. Forty-three percent favor eliminating the filibuster rule on judges and 40 percent want to keep it. Two-thirds of all Republicans support the rule change and the same proportion of Democrats opposes it. The survey also found that only 47 percent of those surveyed said they are paying at least somewhat close attention to the debate, and 53 percent said they are paying little or no attention.

Efforts to avert a vote on the nuclear option started months ago and gained steam in recent weeks, as the timing of the vote firmed up. Frist and Reid tried to hash out a compromise, under terms similar to those in the final agreement, but backed off last week because the majority of both caucuses did not want to relent.

The group of 12—now 14—seemed a dubious lot at the outset, given the range of members, from Senate lions such as Warner and Byrd to newcomers such as Pryor and Salazar. Over the past two weeks, the group met formally almost daily and huddled in smaller groups and spoke to one another constantly by phone.

Lieberman said the negotiators began to realize a deal was coming together when they were handed a draft marked 4:27 p.m., and agreed to meet again after a Senate vote at about 5:30 p.m. "We all discussed it and agreed we were ready to go," he said.

Lieberman said one of the last changes, besides a typo, was the declaration that "in light of the spirit and continuing commitments made in this agreement," the senators would oppose any rules change in this two-year Congress that would force a vote on a judicial nomination by a new procedure. "We all wanted it to be positive," he said. "The other versions had stressed a negative, or were too conditional. . . . Interest groups on both sides won't be happy. But this is the kind of day we came to the Senate for."

Finally, yesterday, the clock caught up with them. "The impetus was when the vote was," Collins said. "It was now or never."

Reid, who called a news conference as soon as the negotiators ended theirs, was buoyant.

"This is really good news," he said. "Tonight the Senate has worked its will on behalf of reason and responsibility."

For some liberal groups, including the Alliance for Justice, the deal went too far. Although the group said it "has no interest in seeing the Senate break down, we are very disappointed with the decision to move these extremist nominees one step closer to confirmation," said President Nan Aron.

Filibusters can be halted only with 60 or more votes. Frist and others say Democrats abused the right by repeatedly blocking confirmation votes for appellate court nominees who would be approved on simple-majority roll calls. Democrats noted that the Senate has approved 208 of Bush's federal court nominees and held up 10, and that Republicans have filibustered judicial nominees in the past. They contend that the delaying tactic is a legitimate tool to prevent the majority party from overreaching.

As negotiators described the talks, they made it clear leaders of both parties were bystanders. When Republicans presented

the deal to Frist, Snowe told reporters, he asked "how it would be implemented and exercised." Snowe said she thinks the negotiators were doing Frist a favor but was not sure he would agree.

"When you're leaders, ultimately you're reconciled to certain positions," she said. "That's the way it is, and sometimes you can't transcend that boundary. That's where we were able to assist in that process, doing something that either one or both leaders could not do."

"Senators Who Averted Showdown Face New Test in Court Fight"

New York Times
July 14, 2005
Sheryl Gay Stolberg

When seven Democrats and seven Republicans joined in the Senate to avert a showdown on President Bush's judicial nominees, they urged the president to remember the word "advice" in the Constitution's advice and consent clause. Now that Mr. Bush is consulting with leading senators on a Supreme Court vacancy, the so-called Gang of 14 is patting itself on the back.

"The word 'advice' was buried in history," declared Senator John W. Warner, Republican of Virginia, a chief architect of the deal, referring to the Constitutional mandate that the Senate advise and consent on presidential nominees. "Now we've resurrected it. I'm extremely satisfied."

That may have been the easy part. With the resignation of Justice Sandra Day O'Connor—and renewed speculation that Chief Justice William H. Rehnquist, who has thyroid cancer and was in the hospital Wednesday with a fever, could retire—the members of the Gang of 14 are trying to chart a course that would keep them unified in the event of a divisive Supreme Court confirmation fight.

On Thursday, they are planning to meet for breakfast to do just that. If the gang sticks together, it could become a powerful force—so powerful that some of its members, including Mr. Warner, have insisted that the group steer clear of issues beyond the judiciary, for fear of becoming a kind of shadow leadership.

But the gang, which Ross K. Baker, a political scientist at Rutgers University, likens to "emergency standby equipment in the Senate," faces pitfalls that could cause it to splinter. Its members are under intense scrutiny both in the Capitol and at home, where some, particularly Republicans like Senators Lindsey Graham of South Carolina and Mike DeWine of Ohio, are suffering political repercussions for crossing conservatives to join.

There is little consensus among the 14 on the meaning of "extraordinary circumstances," the language they used in their agreement to describe conditions that would warrant a filibuster, the parliamentary tactic that Democrats had used to block some of Mr. Bush's judicial nominees.

"I'll know it when I see it," Senator Joseph I. Lieberman, Democrat of Connecticut, said of the phrase's definition. His sentiment was echoed by Mr. DeWine.

"We'll define it when we see it," Mr. DeWine said, "but it's not defined, so we are going to have to work our way through this. We knew that, and we knew that the day of reckoning was going to come and it would come with a Supreme Court nominee."

Members of the gang say they do not expect to use Thursday's session to debate the meaning of "extraordinary circumstances"—"It would be presumptuous of me to try and define it," Mr. Warner said—nor do they have any particular agenda for the session,

other than to keep the lines of communication open.

The seven Democratic members held a similar get-together on Tuesday. Senator Mark Pryor of Arkansas, who was the host for the meeting, said the Democrats chatted about who they thought the nominee might be (no one had any idea, he said) and whether they thought their bipartisan compromise would hold.

"I just wanted to get everybody together, make sure everybody's doing O.K., see what everybody was thinking, to see if everybody on the Democratic side thought the agreement would still hold," he said. "And we all do."

Not all the members of the group are so certain. "Time will tell," said Mr. Graham, adding that he does not believe that the gang holds any special power. "If the Senate wants to come together, the Senate will come together. Fourteen people are not going to make that happen."

The intense feud over the filibuster was at the heart of the gang's pact. With the Republican leader, Senator Bill Frist of Tennessee, threatening to exercise the so-called nuclear option to bar judicial filibusters, the seven Democrats agreed not to block certain appeals court nominees in exchange for a promise from the seven Republicans not to vote for the nuclear option. Now, though, some Democrats in the Senate are threatening to filibuster any Supreme Court candidate they find extreme.

Such a filibuster would force the seven Democrats to choose between party loyalty and loyalty to the gang. The entire group was so worried about that possibility that its members have agreed to reconvene, intervention style, if any of them feels the urge to filibuster a court nominee, said Senator Susan Collins, Republican of Maine.

If that makes the gang sound a bit like a support group for wayward Senate moderates, the analogy may not be all that far off. "It is a support group, in some ways," Ms. Collins said.

Ms. Collins might need one. Already she and her fellow Maine Republican, Senator Olympia J. Snowe, have been the focus of advertisements at home from the political action arm of the liberal advocacy group MoveOn.org, urging them to vote against any extremist nominee.

Ben Brandzel, the group's advocacy director, said the ads—which have also appeared in Nebraska, South Carolina and Virginia, all home to Gang of 14 members—are intended as gentle reminders to the senators not to "go back on their word or violate the compromise."

The gang is also facing pressure from the right, particularly on Senators Graham and DeWine. Both had intended to vote in favor of the nuclear option, both infuriated conservatives when they joined the gang, and both are facing possible primary challenges in their next elections as a result.

In Mr. DeWine's case, the fallout may have extended to his family. When his son, Pat, lost a primary campaign for the House of Representatives last month, some Christian conservatives said they believed that he had been hurt by his father's participation in the compromise.

Mr. Graham, for his part, says he is not worried. "I think the agreement was good for the country, good for both parties, good for the Senate, good for the president, good

for the judiciary," he said, "and over time it will be seen as a good thing."

There have always been single-issue coalitions of one sort or another in the Senate, said Mr. Baker, the political scientist, "but they were groups that endured over the decades." The Southern segregationists, all Democrats, fought civil rights legislation in the 1950's and 1960's. The isolationists resisted American involvement in World Wars I and II.

And while the Senate has always featured a core group of moderates—a group that is shrinking in today's deeply polarized political environment—rarely do they come together in ad hoc fashion, Mr. Baker said, to "formalize their neutrality to try and make a deal."

For that reason, members of the Gang of 14 are "very sensitive," in the words of Ms. Collins, not to overstate their power. "We do not want to be the new Judiciary Committee," Mr. Pryor said. "We do not want to be a superbody within the Senate.

Nor can the group afford to be seen as a political platform for any one senator. One of its most prominent members, Senator John McCain, Republican of Arizona, is widely considered a presidential contender for 2008 and has drawn intense publicity for his role in the gang. The usually loquacious Mr. McCain was circumspect when asked about Thursday's meeting, dismissing questions about the agenda with a shrug.

If the gang members agree on one thing, it is that they would like to put themselves out of business.

"The last thing anybody in this group wants is to even have to decide whether to go to a filibuster, or have to decide whether they're going to vote for the nuclear option," said Senator Ben Nelson, Democrat of Nebraska, who will be the host of Thursday's breakfast. "We're in the game of avoidance."