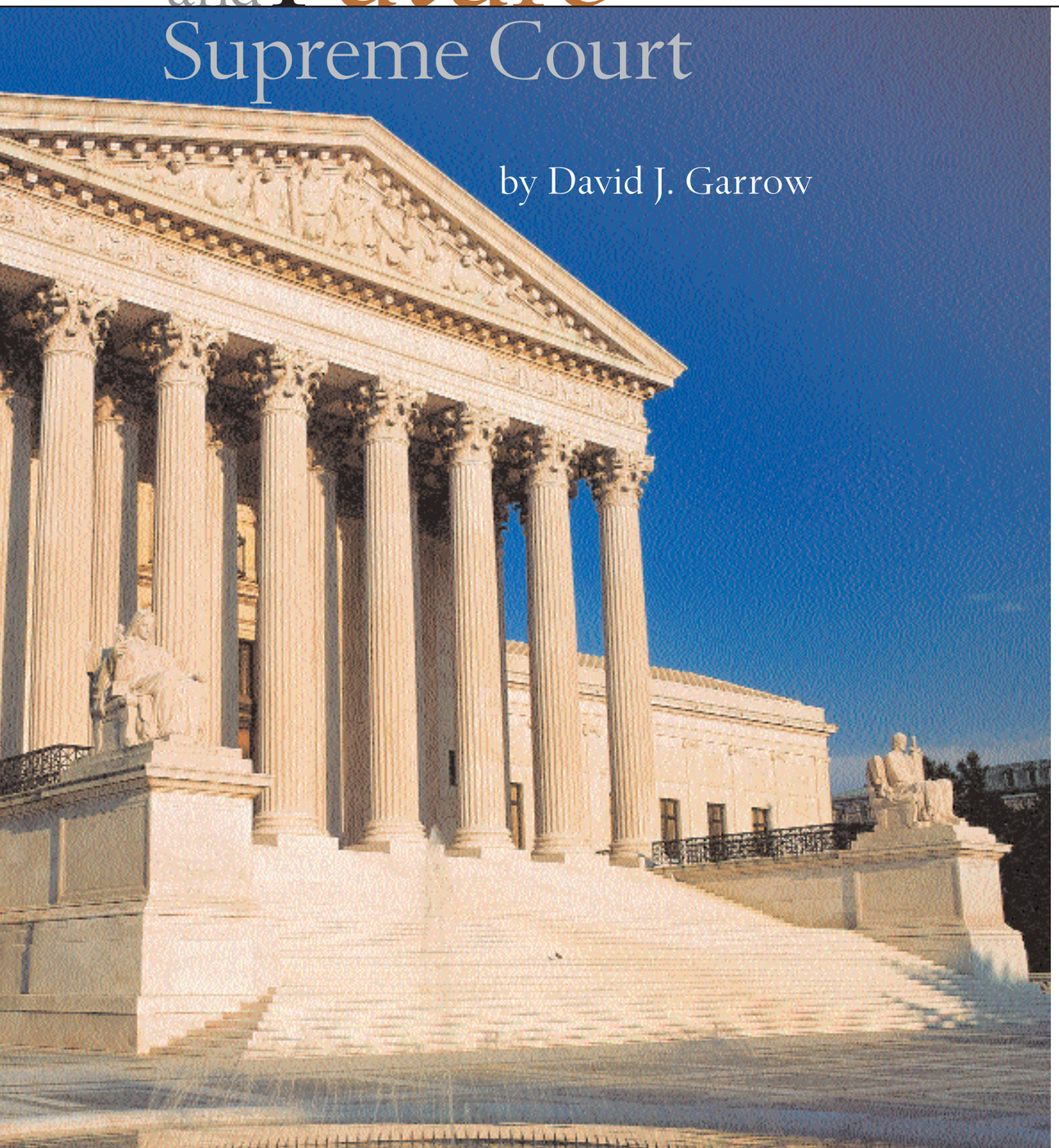
The Once and Future Supreme Court



by David J. Garrow

The last four decades have witnessed a fundamental transformation in the types of men, and now women, who exercise the broad and untrammeled judicial power of the U.S. Supreme Court.

This past October the United States Supreme Court began its 2004-05 term with the same nine justices who have served together since 1994. Going 10 years without any change in court membership has not previously occurred since the early 1820s. But now the increasing age of the justices alone—Chief Justice William H. Rehnquist has just turned 80, and senior Associate Justice John Paul Stevens is 84—virtually ensures that the next president will be able to nominate at least two new justices during the four-year term that commences on January 20, 2005.

Indeed, the next president may very well get to choose more than two. Justice David H. Souter, the court's second-youngest member, just celebrated his 65th birthday, leaving only 56-year-old Justice Clarence Thomas as the court's one nonsenior citizen. Justices Sandra Day O'Connor, now 74, and Ruth Bader Ginsburg, 71, are the other most likely retirees during this new presidential term. Justices Antonin Scalia and Anthony M. Kennedy are now both 68 years old, and Stephen G. Breyer, who has now served 10 full years as the court's "junior" justice, is 66.

News media speculation over which justices will be the first to retire, however, diverts attention from the far more notable and consequential change that the court's composition quietly has undergone over the past four decades. From President Franklin D. Roosevelt in the late 1930s through his successor, Harry S. Truman, Republican Dwight D. Eisenhower in the 1950s and Democrats John F. Kennedy and Lyndon B. Johnson in the 1960s, the predominant pattern in Supreme Court nominations was for presidents to select highly experienced national-level political figures. Since 1969, however, that practice has changed dramatically as another series of presidents—Republicans Richard M. Nixon, Gerald R. Ford, Ronald Reagan and George H.W. Bush, plus Democrat Bill Clinton—have almost without exception named little-known appellate judges to the court.

The resulting transformation of the Supreme Court has been dramatic indeed, even if the change is one that daily news accounts almost never highlight. Much critical commentary about the court, for well over a decade now, from liberals and conservatives alike, has consistently highlighted the self-aggrandizing expansion of the court's own power, both in federalism cases that have significantly curtailed Congress' legislative authority and in abortion, gender discrimination and gay rights rulings. Such conservative justices as Scalia, Thomas and Chief Justice Rehnquist have been eager to assertively exercise the court's power in federalism decisions that have insulated the states from the effects of congressional regulatory legislation, and liberal jurists such as Stevens, Souter, Ginsburg and Breyer have done likewise in abortion and gay rights cases where the conservatives are in dissent.

But the Supreme Court's two dominant "swing" justices, O'Connor and Kennedy, have been quite comfortable in joining both liberal and conservative rulings that are undeniably assertive. This consistent pattern has given the lie to the outdated but commonplace notion that only liberals are "judicial activists" whereas self-described conservatives are "strict constructionists" who minimize the exercise of judicial power. On today's U.S. Supreme Court, judicial activists hold all nine seats, and only the substance of a particular case, rather than the justices' over-arching principles, determines whether the court's assertiveness is pigeonholed as "liberal" or "conservative" by media commentators.

Perhaps it should not be surprising that a Supreme Court composed almost exclusively of career jurists is so consistent in advancing the reach of judicial power. Of today's nine justices,

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The current court differs sharply and dramatically from the Supreme Court of the 1940s, '50s and '60s.

all except Chief Justice Rehnquist were already serving on other appellate tribunals when they were nominated to the high court. (At the time of his 1971 nomination, Rehnquist headed the U.S. Justice Department's legal policy office.) Seven of the justices were promoted from the federal courts of appeal; O'Connor was serving on Arizona's appellate court when President Reagan named her as the first female justice in 1981.

Justice O'Connor is also the only current justice who has ever held (or run for) public elective office. She was twice elected to the Arizona Senate and then won election to a state trial court before being promoted to the appellate bench. Justice Thomas, who served as chairman of the U.S. Equal Employment Opportunity Commission (EEOC) from 1982 to 1990, probably ranks second in terms of "real world" political experience. Along with the chief justice, Justice Scalia, who for more than two years in the mid-1970s held the same important Justice Department post in which Rehnquist previously served, and Justice Breyer, who served two stints as a top staff member on the U.S. Senate's Judiciary Committee, round out the more politically experienced half of the current court.

Justice Souter was New Hampshire's gubernatorially appointed attorney general for two years before becoming a state court judge, and Justice Stevens served in a politically sensitive Illinois state appointive post before becoming a federal appellate judge in 1970. Justice Ginsburg litigated a series of important gender discrimination cases on behalf of the American Civil Liberties Union in the 1970s, and Justice Kennedy's Sacramento law practice included many California political contacts before he became a federal judge in 1975.

Three current justices—Scalia, Ginsburg and Breyer—spent much of their pre-judicial careers as law professors, and both Stevens and Kennedy taught law part time. Breyer spent 14 years and Ginsburg 13 as federal appellate judges before being named to the Supreme Court by President Clinton in 1994 and 1993 respectively, and Kennedy served more than 12 years on the U.S. Court of Appeals for the Ninth Circuit before being nominated to the high court in 1987. Justice Souter's pre–Supreme Court judicial experience also totaled a dozen years, and Justices O'Connor, Stevens and Scalia served between four and six years as lower court judges before joining the high bench. Only Chief Justice Rehnquist, with no judicial experience, and Justice Thomas, with hardly a year on the U.S. Court of Appeals for the District of Columbia Circuit, were relative "rookies" when they first became justices.

This court, with its strong predominance of heavily experienced and academically oriented appellate jurists, differs sharply and dramatically from the Supreme Court of the 1940s, '50s and '60s. In those decades, president after president named experienced politicians to the high bench, giving the court a decidedly different composition than what has marked the post-1968 era. When President Franklin Roosevelt, after waiting more than four years without any Supreme Court vacancies to fill, finally had the opportunity to remake the court's membership with eight new nominees between 1937 and 1943, his selections tended heavily toward justices with practical political experience rather than prior judicial service. Roosevelt's first choice, U.S. Senator Hugo L. Black, was a prominent Alabama Democrat whose only judicial experience had come on a Birmingham city police court. Roosevelt's second nominee, Stanley F. Reed, was the administration's politically appointed solicitor general, and his third, Felix Frankfurter, was a Harvard Law School professor whose political activism overshadowed his well-known academic work.

Roosevelt's second trio of selections was similar. William O. Douglas, also a law professor, had achieved political renown as the hard-charging chairman of the U.S. Securities and Exchange Commission. Frank Murphy, Roosevelt's attorney general, had previously been elected governor of Michigan and, before that, mayor of Detroit. Like Black, Murphy's judicial experience consisted only of premayoral service as a police court judge. James F. Byrnes of South Carolina was a 10-year veteran of the U.S. Senate and, before that, a seven-term member of the U.S. House of Representatives.

FDR's next-to-last nominee, Robert H. Jackson, was a longtime Roosevelt political supporter from the president's home state of New York, whom Roosevelt had named to succeed Murphy as U.S. attorney general. Only Roosevelt's final nominee, Wiley B. Rutledge, a five-year veteran of the federal appellate court for the District of Columbia and, before that, dean of the University of Iowa Law School, was a relatively little-known jurist rather than a highly visible Roosevelt administration official or partisan.

Roosevelt's practice of naming experienced political veterans to the high court was likewise followed by his successor, Truman. President Truman's first nominee, as chief justice, was Frederick M. Vinson, his secretary of the Treasury and, before that, a 12-year veteran of the House of Representatives. Truman's three subsequent high court choices were, like Vinson, political as well as personal buddies of the president: Ohio Republican Senator Harold H. Burton, a former legislative colleague; Attorney General Tom C. Clark, a Texas political veteran; and Indiana Democratic Senator Sherman Minton. At the time, and in subsequent decades, many court historians have strongly criticized Truman for naming friends with less-than-impressive legal skills.

Roosevelt's nominees may have had no more judicial experience than Truman's, but with the exception of only Murphy, Roosevelt's choices, unlike Truman's, generally have received high marks from commentators and historians.

The quintessential example of a crucial Supreme Court appointment going to a politician with no prior judicial experience was President Eisenhower's choice of California Republican Governor Earl Warren to replace Vinson as chief justice in 1953. Warren had played a crucial role in helping Eisenhower capture the 1952 Republican presidential nomination over Ohio Senator Robert Taft, and the Supreme Court nomination was an agreed-upon reward for his earlier political support.

Had Warren's career as chief justice turned out differently than it did, the explicit quid pro quo of his selection might be regarded as a scandalous act of using a Supreme Court seat as simple political barter. Warren never became one of the court's more legally knowledgeable or analytically astute justices, but his leadership qualities within the group of nine, plus the simple and direct common sense that often was visible in his opinions, more than sufficed to make him, along with John Marshall a century earlier, one of the two greatest chief justices in American history.

Warren's remarkable success, notwithstanding his complete lack of any prior judicial experience, was due in part to the justices who followed him to the high court. President Eisenhower's next two appointees, John M. Harlan and William J. Brennan Jr., eventually emerged as the two most highly rated members of the "Warren Court." Harlan had served only briefly on the U.S. Court of Appeals based in New York before his nomination, and Brennan was promoted from the New Jersey Supreme Court, but

ROOSEVELT APPOINTEES Between 1937 and 1943, Franklin D. Roosevelt appointed eight men to the U.S. Supreme Court. They were (clockwise from top far left) Hugo L. Black, Stanley F. Reed, Felix Frankfurter, James F. Byrnes, William O. Douglas, Frank Murphy, Wiley B. Rutledge and Robert H. Jackson

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TRUMAN APPOINTEES
Harry S. Truman filled Supreme Court openings with (clockwise from top left) Harold H. Burton, Frederick M. Vinson, Tom C. Clark and Sherman Minton.

both men, unlike Warren, were selected based upon their legal and judicial track records, and not their political experience or connections.

Harlan and Brennan turned out to be arguably the two finest Supreme Court jurists of their era. Harlan, though often pigeonholed as a conservative, was a thoughtful and sometimes unpredictable justice, someone who quickly emerged as the court's top judicial craftsman. Brennan, sometimes stereotyped as a glad-handing strategist, became Warren's closest friend and counselor and soon was authoring some of the court's most pathbreaking opinions.

President Eisenhower's two final appointees, federal appeals court judges Charles E. Whittaker and Potter Stewart, fell short of Harlan and Brennan's stature. Whittaker, a Kansas friend of Eisenhower's family, had served as a lower court federal judge for three years before his elevation, and Stewart had spent four years on the U.S. Court of Appeals prior to his promotion. Stewart became an influential voice within the court during the 1960s and 1970s, but Whittaker retired after only five personally stressful and unproductive years of service.

Eisenhower's four final Supreme Court appointees were all little-known appellate judges at the time of their selection, not governors, senators or cabinet secretaries. Those selections marked a significant change from the earlier Black-through-Warren roster of nominees, but during the ensuing Kennedy-Johnson years, presidential practice returned to the Roosevelt-Truman norm.

President Kennedy's first appointee, Deputy Attorney General Byron R. White, had been an active participant in the president's 1960 election campaign and before that had won national fame as a college and professional football player. Kennedy's second nominee, Arthur J. Goldberg, was serving as secretary of labor and later, after leaving the court to become U.S. ambassador to the United Nations, ran unsuccessfully for governor of New York. As the successor to Justice Frankfurter, Goldberg also represented a political commitment to keeping at least one Jewish justice on the court.

When President Johnson persuaded Goldberg to take the U.N. post, Johnson replaced him with presidential buddy and counselor Abe Fortas, a Washington wheeler-dealer with no prior judicial experience. Johnson's second and final Supreme Court nomination made his solicitor general, Thurgood Marshall, who previously had sat on the U.S. Court of Appeals in New York following an illustrious two decades as the top lawyer for the National Association for the Advancement of Colored People, the first black justice ever. Both men were accomplished litigators, but their selections fell squarely in the Roosevelt-Truman-Kennedy political tradition. Late in Johnson's presidency, an attempt to promote Fortas to chief justice, and then name another presidential buddy, former Texas Congressman Homer Thornberry, to Fortas' seat, failed in the face of widespread Senate opposition.

Johnson's successor, President Nixon, was able to name four new justices to the court between 1969 and 1972. Warren E. Burger, who took Earl Warren's place as chief justice, was a little-known judge on the U.S. Court of Appeals in Washington, D.C., who previously had worked in the Eisenhower Justice Department. Nixon's second successful appointee, Harry A. Blackmun, was a childhood friend of Burger's who had served for more than a decade as a federal appellate judge. Prior to Blackmun's nomination, however, Nixon's two previous choices, Southern federal judges Clement Haynsworth and Harrold Carswell, had each been rejected by the U.S. Senate, the first such Supreme Court confirmation defeats in 40 years.

Neither of Nixon's two final appointees, Rehnquist and Lewis F. Powell Jr., had any prior judicial experience, yet both men were experienced lawyers notwithstanding their relative public obscurity. Powell was a former president of the American Bar Association, and Rehnquist was a top Justice Department attorney.

Chief Justice Rehnquist has now served on the U.S. Supreme Court for more than 32 years, one of the longest periods of service in American history, but those 32 years represent more than just a personal milestone. Rehnquist also was the last Supreme Court nominee who was not an appellate judge to be put forward for the high bench. All eight of Rehnquist's present colleagues, from Stevens through Breyer, were appellate jurists at the time of their nomination, as were both of the unsuccessful nominees, Robert H. Bork and Douglas Ginsburg, whom President Reagan sent to the U.S. Senate prior to the subsequent successful confirmation of Kennedy.

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EISENHOWER APPOINTEES
Dwight D. Eisenhower's appointees were (from top) William J. Brennan Jr., Earl Warren, Potter Stewart (left), Charles E. Whittaker (right) and John M. Harlan.

All the nominees of the entire post–1968 era, from Nixon through Clinton, thus differ measurably from those of the 1937 to 1968 period, excepting only Eisenhower's four final choices. From Presidents Ford, who selected Stevens; through Reagan, who named O'Connor, Scalia and Kennedy; then George H.W. Bush, who nominated Souter and Thomas; and finally Clinton, who chose Ginsburg and Breyer; all eight new justices were experienced appellate court judges before they joined the U.S. Supreme Court. (No vacancies occurred during either Jimmy Carter's 1977-81 term or George W. Bush's 2001-05 term.)

How different a Supreme Court would we have today if, for example, either Ronald Reagan or George H.W. Bush had selected Utah Republican Senator Orrin Hatch as a justice, or if Bill Clinton had named former New York Governor Mario Cuomo? If both Hatch and another experienced Republican politico, plus Cuomo and a second national Democrat, had joined the court between 1986 and 1994, in place of, say, Justices Kennedy, Souter, Ginsburg and Breyer, today's court would look—and almost certainly act—radically different than it does.

Those hypothetical nominations would have represented a return to the old Hugo Black–Earl Warren pattern but, ironically, it may be that the jurists on today's Supreme Court are actually far more comfortable with exercising far-reaching judicial power than would be electorally experienced national politicians who for more than a half-century now have been passed over for every vacancy since Warren's selection in 1953.

There can be little argument that the last dozen years of the Rehnquist court have witnessed a consistent pattern of muscular judicial

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KENNEDY APPOINTEES
From top: Arthur J. Goldberg and Byron R. White were named to the high court by John F. Kennedy.

JOHNSON APPOINTEES
Lyndon B. Johnson named (from top) Abe Fortas and Thurgood Marshall.

assertiveness. There likewise is no doubt that both highly conservative and relatively liberal justices have repeatedly embraced judicial activism. To argue that a court with more politically experienced justices would be far more inclined than the current bench to practice true judicial restraint at both ends of the ideological spectrum is, of course, inherently speculative, but that analysis is one that bears serious consideration as a new generation of Supreme Court vacancies looms on the horizon.

The highly political nominees that Roosevelt and Truman placed on the court often exhibited considerably more deference toward executive branch actions and congressional legislation than do our present-day justices. That may at first glance seem surprising, but opposition to the reactionary judicial activism that characterized the pre-1937 Supreme Court was a defining element in New Deal politics. In addition, the extremely close personal and political ties that most of the Roosevelt and Truman nominees had to either the White House and/or the Congress also created a situation in which most, if not all, justices had a firsthand understanding of, and perhaps even sympathy for, the policies and practices of the court's two coordinate federal branches.

Naming experienced national political figures to the Supreme Court may, counterintuitively, produce a bench that is more reluctant and measured in exercising judicial power than is a bench composed primarily of career jurists who largely lack any significant personal political experience. For more than a decade now, the Rehnquist court has cut back on the legislative powers of the U.S. Congress in a series of sometimes abstruse rulings based upon the Constitution's Commerce Clause or the highly obscure 11th Amendment. These decisions do not generate large headlines in daily newspapers, but cumulatively they have represented a remarkable reallocation of power between a previously unconstrained Congress and a Supreme Court that now has repeatedly asserted its own authority as the ultimate arbiter of federal legislative decision-making. A court with one or more justices who were themselves congressional veterans might well take a dramatically different, and far more deferential, attitude toward congressional power than have the judicially self-confident jurists of the Rehnquist era.

During the Supreme Court's 2003-04 term, the presidential election may have caused the justices to

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draw back from any of the widely visible acts of judicial assertiveness that had marked prior terms. In 2000, of course, the court was squarely in the middle of the disputed presidential election that its 5-to-4 ruling in *Bush v. Gore* decisively resolved. In 2003, in *Lawrence v. Texas*, Justice Kennedy's majority opinion not only voided all remaining state sodomy statutes punishing consensual and private adult sexual relations but also delivered a ringing moral declaration of the fundamental equality of gay and lesbian Americans.

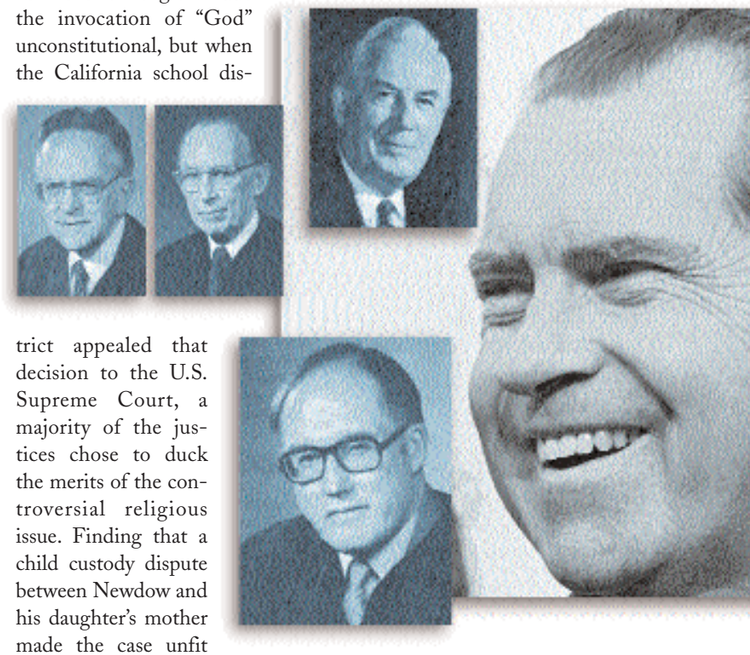
When it so chooses, as in *Lawrence*, as in *Brown v. Board of Education* in 1954, which initiated the slow desegregation of racially segregated Southern public schools, or as in *Planned Parenthood v. Casey* in 1992, when it forcefully reaffirmed *Roe v. Wade*, the 1973 ruling that had given constitutional protection to a woman's right to choose abortion, the Supreme Court can "pull out all the stops" in telling the American people that a historic change must indeed be made.

Such moments of moral invocation occur only rarely, and none took place during the court's 2003-04 term, notwithstanding three hotly contested cases challenging the George W. Bush administration's executive detention of two U.S. citizens, and some 600 foreigners, whom it alleged were active supporters of the al Queda terror network. The cases offered the court an opportunity to either roundly condemn or expressly endorse President Bush's pursuit of the war on terror. The court responded almost delicately, however, requiring that judicial recourse be made available to all the detainees but declining to spell out whether such opportunities for appeal would actually allow any of the captives to contest their status and obtain their freedom.

Those rulings effectively postponed any decisive action concerning the detainees until after the 2004 presidential election. A similar desire to avoid controversies that might have thrust the court into the midst of the 2004 contest also seemed apparent in the two other most highly visible legal cases of the 2003-04 term.

In *Cheney v. U.S. District Court*, Bush administration critics sought access to confidential documents generated by a politically controversial energy policy task force headed by U.S. Vice President Dick Cheney. Much as in the terror detainee cases, the court handed down a less-than-decisive ruling that effectively delayed any clear resolution of the dispute for many months.

The court's best-known and most closely watched case was *Elk Grove Unified School District v. Newdow*, in which an atheist parent objected to his daughter being confronted each morning in her public school classroom with the words "under God" that are part of the Pledge of Allegiance to the U.S. flag. A lower court had agreed with Michael Newdow that the U.S. Constitution's prohibition of any government "establishment" of religion made the invocation of "God" unconstitutional, but when the California school district appealed that decision to the U.S. Supreme Court, a majority of the justices chose to duck the merits of the controversial religious issue. Finding that a child custody dispute between Newdow and his daughter's mother made the case unfit for decision, the high court simply vacated the lower court ruling. Had the justices instead affirmed the lower court's decision, they almost certainly would have made themselves a major presidential election issue.



NIXON APPOINTEES
Richard M. Nixon sent (clockwise from far left) Harry A. Blackmun, Lewis F. Powell Jr., Warren E. Burger and William H. Rehnquist to the Supreme Court.

The 2003-04 term's unusual outbreak of judicial meekness may well represent a strategic calculation by the justices to keep themselves as far distant from a presidential election year's partisan debates as possible, particularly in light of how the court itself ended up deciding the 2000 contest. With the detention cases, Vice President Cheney's dispute and the Pledge of Allegiance controversy all sidelined until sometime in 2005 or later, campaign arguments about the court, and about the kinds of nominees

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CURRENT SUPREME COURT

The current nine justices of the Supreme Court have served together for the last 10 years. They are: (standing from left) Ruth Bader Ginsburg (Bill Clinton appointee), David Souter and Clarence Thomas (G.H.W. Bush appointees), Stephen G. Breyer (Clinton); (seated from left) Antonin Scalia (Ronald Reagan), John Paul Stevens (Gerald Ford), Chief Justice William H. Rehnquist (Richard Nixon), Sandra Day O'Connor and Anthony M. Kennedy (Reagan).

George W. Bush or John F. Kerry would add to the bench when the inevitable vacancies occur over these next four years, remained far down the list of presidential election issues.

That relative absence of the court, its justices and its potential future justices from the 2004 election may point toward a continuation of the low-visibility appellate jurist selections that have occurred without interruption for more than a third of a century now. In a more politicized climate, a new president might well opt to revert to the Roosevelt-Truman-Kennedy-Johnson model and look toward a top political ally, or a close personal acquaintance, to fill a crucial high court vacancy. But where the court instead has kept itself as far distant as possible from partisan firefights, the new president may feel wholly comfortable in continuing the new tradition of promoting little-known but well-experienced appellate judges to the nation's highest court. If so, it's a safe bet that those new justices, irrespective of whether they are named by a Democratic president or a Republican, will be just as at home with the resolutely aggressive exercise of judicial power as are the current justices. Should that indeed come to pass, the Supreme Court's unchallenged stature as the ultimate and final arbiter of U.S. governmental power will be ratified once more.

The last four decades have witnessed a fundamental transformation in the types of men, and now women, who exercise the broad and untrammeled judicial power of the U.S. Supreme Court. Not so long ago it was common practice for judicially inexperienced national politicians to be placed at the pinnacle of judicial power.

However, for more than a generation now, a new pattern, embraced by presidents as different as Richard Nixon, Ronald Reagan and Bill Clinton, has instead filled the U.S. Supreme Court with jurists whose career experiences have occurred predominantly in the quiet chambers of appeals courts rather than in the halls of Congress or the White House cabinet room. This change has drawn little public comment or debate, even as its consequences have indisputably accumulated.

A United States in which the Supreme Court only rarely defers to the president or Congress may be a country in which individual rights and freedom from unfair government conduct are indeed well protected, but it may also represent a redistribution of political power that has occurred by quiet accretion rather than robust debate or explicit decision. Most Americans, if they understand and ponder the changes the U.S. Supreme Court has undergone in their lifetimes, may choose to endorse rather than object to those changes, but the transformation is one that should be appreciated rather than ignored. ❑