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## “MR. PRESIDENTIAL CANDIDATE: WHOM WOULD YOU NOMINATE?”

*Stuart Minor Benjamin & Mitu Gulati\**

*Presidential candidates compete on multiple fronts for votes. Who is more likeable? Who will negotiate more effectively with allies and adversaries? Who has the better vice-presidential running mate? Who will make better appointments to the Supreme Court and the cabinet? This last question is often discussed long before the inauguration, for the impact of a secretary of state or a Supreme Court justice can be tremendous. Despite the importance of such appointments, we do not expect candidates to compete on naming the better slates of nominees. For the candidates themselves, avoiding competition over nominees in the pre-election context has personal benefits—in particular, enabling them to keep a variety of supporters working hard on the campaign in the hope of being chosen as nominees. But from a social perspective, this norm has costs. This Article proposes that candidates be induced out of the status quo. In the current era of candidates responding to internet queries and members of the public asking questions via YouTube, it is plausible that the question—“Whom would you nominate (as secretary of state or for the Supreme Court)?”—might be asked in a public setting. If one candidate is behind in the race, he can be pushed to answer the question—and perhaps increase his chances of winning the election.*

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\* Professors of Law, Duke Law School. Thanks to Scott Baker, Steve Choi, Michael Gerhardt, Jay Hamilton, Christine Hurt, Kimberly Krawiec, David Levi, Joan Magat, Mike Munger, Eric Posner, Richard Posner, Arti Rai, Larry Ribstein, David Rohde, Larry Solum, Sharon Spray, Eugene Volokh, and Ernest Young for comments. Thanks to Jon Porter for excellent research assistance.

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*Let him say not one single word about his principles, or his creed—let him say nothing—promise nothing. Let no Committee, no convention—no town meeting ever extract from him a single word, about what he thinks now, or what he will do hereafter. Let the use of pen and ink be wholly forbidden as if he were a mad poet in Bedlam.*

—Advice that Nicholas Biddle, the manager of William Henry Harrison’s successful 1840 campaign for the presidency, reportedly gave the presidential candidate.<sup>1</sup>

### I. INTRODUCTION: NAMING NAMES

Imagine that it is fall 2012. Mitt Romney, the Republican challenger for the presidency, has been four to eight points behind President Barack Obama in every poll for the last five months, except for a small post-convention bounce for Romney that soon dissipated. If Romney does not do something to change the dynamic of the presidential race, he will lose. One of his advisers suggests that Romney announce who his top cabinet members will be and/or whom he plans to nominate to the Supreme Court. If he proposes one or more nominees who appeal to a key constituency, then he might attract enough of those voters to help him in the general election. This move involves risks. Some voters will be disappointed because their favored cabinet and Court candidates were not selected. But Romney is behind in the polls and is looking for a strategy that might turn things around. If the odds are that he is going to lose anyway, why not name names?

Presidential candidates inevitably claim that they will nominate better people than their competition will. But they are rarely pushed to name names prior to the election. When the matter of naming names comes up, candidates sidestep. For example, during the 2008 election, Obama said, “I don’t want to tip my hand” by naming possible nominees for the Supreme Court.<sup>2</sup> Instead, he explained that he wanted justices who would “follow . . . clear legal precedent,” “stop giving the executive branch carte blanche” to do whatever it wants, and, where the law was unclear, consider the interests of

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1. Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555, 555 (1972) (quoting NICHOLAS BIDDLE, *THE CORRESPONDENCE OF NICHOLAS BIDDLE* 256 (R.C. McGrane ed., Houghton Mifflin 1919)).

2. See Videotape: Obama’s “Philosophy about the Supreme Court,” available at <http://www.youtube.com/watch?v=PACfWBUY3mA> (last visited Oct. 24, 2008).

“those who are vulnerable in our political system.”<sup>3</sup> On a separate occasion, he announced that he wanted justices who would have “empathy.”<sup>4</sup> In sum, he provided little more than vague generalities as to who his justices were likely to be, even though the implicit suggestion in his “I don’t want to tip my hand” statement was that he and his advisers had already thought about potential Supreme Court nominees. There may have been personal benefits to Obama from not “tipping his hand.” Most notably, he could keep a variety of his supporters working hard on his campaign in the hope of being chosen as nominees. But the benefits to society of candidates being forced to show their cards prior to the election may be greater still.

It is trite to say that the current system of presidential nominations is flawed. The question is how to make it better. For those of us who have no direct power to effectuate change, the solution has to be one that can be achieved without the need for resources, votes, lobbyists, and the like. The idea will strike many as nutty. But asking candidates to name names may yield real answers, and the process of asking and answering may produce change.<sup>5</sup>

Our hope is to induce competition between the presidential candidates over who would choose the better nominees. There are barriers to inducing this competition. But they might be surmountable when one candidate is significantly behind in the polls and is willing to take some risks. The key is to consider how pre-

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3. *Id.*

4. Carrie Dann, *Obama on Judges, Supreme Court*, MSNBC, July 17, 2007, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx>. Perhaps the most specific Obama got was during one of the debates when, in response to a question about the kinds of people he would appoint to the Court, he said that he would seek “people who have life experience and they understand what it means to be on the outside, what it means to have the system not work for them . . . .” *Transcript: The Democratic Debate*, N.Y. TIMES, Nov. 15, 2007, available at <http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html?partner=permalink&exprod=permalink> (citing the Federal News Service).

5. A few people have made similar suggestions in recent years via blog posts and an op-ed, but there has been no extended discussion of the idea. See Chris Sprigman, Op-Ed., *Ministers Without Portfolio (Yet)*, N.Y. TIMES, Mar. 5, 2004, at A23 (suggesting that John Kerry name a shadow cabinet); James Boyce, *Barack and His Shadow: Should He Appoint a Shadow Cabinet Now?*, HUFFINGTON POST, May 29, 2008, [http://www.huffingtonpost.com/james-boyce/barack-and-his-shadow-sho\\_b\\_104035.html](http://www.huffingtonpost.com/james-boyce/barack-and-his-shadow-sho_b_104035.html); Matthew Yglesias, *Shadow Cabinet*, THEATLANTIC.COM, July 16, 2004, [http://matthewyglesias.theatlantic.com/archives/2004/07/shadow\\_cabinet.php](http://matthewyglesias.theatlantic.com/archives/2004/07/shadow_cabinet.php). Part of the reason for the lack of discussion about potential cabinet members may be the belief that such an announcement would be illegal. As we discuss below, there is indeed a federal statute that could be read to prohibit such an announcement, but such an application would clearly violate the First Amendment. See *infra* Part V.A.

election choices might differ from what we would expect from that same president once elected. For instance, we might move from the current state in which Supreme Court nominees are usually young federal appeals court judges with uncontroversial publication records, to a model of older and more interesting non-judges.

## II. THE STATUS QUO AND ITS DRAWBACKS

### A. *The Status Quo*

Presidential candidates choose and announce their choice for vice president in advance, and usually perceive the choice as one that can help them in the election. But the tradition is not to name anyone else. In contrast, Britain has a tradition of “shadow governments,” in which the party out of power has an entire cabinet of alternative (or “shadow”) ministers who are generally expected to take on those same roles if their party comes to power.<sup>6</sup> Voters thus have a sense not only of the Prime Minister they are potentially electing but also of the ministers who will serve in the cabinet.

Candidates sometimes say that they would select justices “like” certain sitting justices. George W. Bush promised to select justices like Antonin Scalia.<sup>7</sup> Similarly, John McCain said that John Roberts and Samuel Alito “would serve as the model for my own nominees.”<sup>8</sup> Meanwhile, candidates sometimes give hints about whom they would consider for cabinet positions. For example, it was widely believed that Thomas Dewey was going to choose John Foster Dulles as his secretary of state in 1948.<sup>9</sup> But presidential candidates have not publicly promised that they will choose X, Y, or Z.<sup>10</sup>

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6. *E.g.*, RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT 171–81 (1999).

7. *See* Fred Barnes, *Bush Scalia*, WEEKLY STANDARD, July 5, 1999, at 16.

8. Dana Bash, *Bush Nominates Alito to Supreme Court: Conservatives, Liberals Ready for Heated Debate*, CNN.COM, Nov. 1, 2005, <http://www.cnn.com/2005/POLITICS/10/31/scotus.bush/index.html>; Libby Quaid, *McCain Castigates Obama on Judges*, LAW.COM, May 6, 2008, <http://www.law.com/jsp/article.jsp?id=1202421162864>.

9. *See* John Foster Dulles, Secretary of State, Arlington National Cemetery, <http://www.arlingtoncemetery.net/jfdulles.htm> (“It was generally believed that Mr. Dulles would have been Secretary of State if Mr. Dewey had won, but Harry S. Truman was the surprise victor.”).

10. Candidate George W. Bush, for example, intimated that he would name Colin Powell as his Secretary of State. *See* Jamie McIntyre, *Secretary Powell? Bush Hints at Former General’s Role*, CNN.COM, Aug. 1, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/08/01/powell.state/index.html>.

*B. Problems with the Status Quo*

Only after they are elected do presidents identify their cabinet choices and (with luck) eventually a few Supreme Court nominees. The president's incentives at this stage are not to win votes—he already did that.<sup>11</sup> Now, the incentives are a combination of wanting to perpetuate his legacy well beyond his time, to pay back political favors from the election, and to protect against the Senate undermining his nominee.

A president's choices often give rise to complaints involving surprise and the qualifications of nominees.<sup>12</sup> As to the former, critics might say that the president is not nominating the sort of people whom he indicated he would nominate when he was a candidate. As to the latter, the complaints involving cabinet members might focus on the perceived inexperience of some nominees. Relatedly, there is often suspicion that these nominations are a form of patronage.<sup>13</sup> The complaints involving Supreme Court justices often involve their ideology as well as their youth, since presidents have an incentive to nominate relative youngsters to the bench in the hope that they will have long careers and thus extend presidential legacies.

### 1. Supreme Court Nominees

Before the election, presidential candidates are primarily concerned about winning. Pre-election, the matter of creating a legacy is a back-burner issue, if one at all. After the election, legacy creation moves to the front burner. Presidents have an interest in nominating justices who are as young as possible. This interest flows from a particular exception: the United States is one of the only nations that has neither a retirement age nor a term limit for the members of its highest court.<sup>14</sup>

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11. A newly elected President likely hopes to be reelected, but he would also know that re-election was sufficiently far away that his initial choice of cabinet and Supreme Court nominees would have a fairly attenuated effect on the election four years hence.

12. See Richard W. Stevenson, *When a President Is Not Spoiling for a Fight*, N.Y. TIMES, Oct. 4 2005, at A24.

13. See Posting of Dr. Denny, *Bush's Patronage Appointments to Ambassador Exceeds Father's, Clinton's*, to ScholarsandRogues.wordpress.com, (June 25, 2007), <http://www.scholarsandrogues.com/2007/06/25/bushs-patronage-appointments-to-ambassador-exceed-fathers-clinton/#more-917>.

14. For an international comparison, see Reed Watson & Matthew W. Wolfe, *Comparing Judicial Compensation: Apples, Oranges and Cherry-Picking* (Apr. 24, 2008) (unpublished

So a president seeking to maximize the impact of his appointments (and why shouldn't he?) has an interest in appointing justices who have many years to live. Unsurprisingly, in light of this incentive, most recent Supreme Court nominees have been fifty-five or younger, and Clarence Thomas was forty-three.<sup>15</sup> On the flip side, judges in their sixties, like J. Harvie Wilkinson or Richard Posner, are considered too old to be appointed to the Court—and not because of any diminishment in their judging intellect. Most experts would likely say that a person with a longer career and the varied experiences that go along with it would be a preferable choice for a justice, because such a person would exercise better judgment.<sup>16</sup> In addition, commentators have expressed concern about the entrenchment that young appointments can entail, delaying for years the impact of changes in the popular will.<sup>17</sup>

A different complaint is more specific to recent Supreme Court nomination trends: the absence of political experience among its members.<sup>18</sup> This is probably the starkest discontinuity between the current Supreme Court and its predecessors. For the first time in history, no justice of the Supreme Court has ever served in any legislature or ever held (or even run for) any elective public office.<sup>19</sup>

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abstract, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1106244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106244)). Even within the United States, few of the individual states allow for life appointments. See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary* (U. of Chi., Olin Law & Econ. Program Working Paper No. 357, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008989).

15. See Findlaw Supreme Court Center: Supreme Court: Present Justices, [http://supreme.lp.findlaw.com/supreme\\_court/justices/presjustices.html](http://supreme.lp.findlaw.com/supreme_court/justices/presjustices.html) (last visited Mar. 18, 2009) (eight of the nine Justices on the current Supreme Court were fifty-five or younger when nominated; Ruth Bader Ginsburg is the exception).

16. See generally Gregory A. Caldeira, *In the Mirror of the Justices: Sources of Greatness on the Supreme Court*, 10 POL. BEHAVIOR 247, 247 (1988).

17. See PAUL D. CARRINGTON & ROGER C. CRAMTON, REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (2005). It is remarkable that, decades after every other Gerald Ford appointee has left office, John Stevens remains in office—or that the person Stevens replaced (William O. Douglas) stepped down in the Ford administration after having been nominated in the middle of the Franklin D. Roosevelt administration. See SUPREME COURT OF THE U.S., MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, <http://www.supremecourtus.gov/about/members.pdf>.

18. See Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT'L J. CONST. L. 652, 663, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1098743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1098743).

19. See Timothy P. O'Neill, "The Stepford Justices": *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 702 (2007) (noting these facts, along with the fact that "[f]or the first time in history every justice had been a judge on the U.S. Court of Appeals at the time of appointment to the Supreme Court."); Dorsen, *supra* note 18, at 663. David Souter was Attorney General of New Hampshire for two years, but he was appointed to that position

The Court has but two members who served as high-level members of the executive branch, and neither was in the cabinet or was otherwise a significant political figure.<sup>20</sup> Scholars have noted the break with historical practice.<sup>21</sup> Through most of its history, the Court had several members who were important political figures before they joined the Court—senators (e.g., Hugo Black), governors (e.g., Earl Warren), presidents or presidential candidates (e.g., William Howard Taft), members of the president’s cabinet (e.g., Robert H. Jackson), or all of the above (e.g., Salmon Chase, who was a senator, governor, presidential candidate, and cabinet member before he became chief justice).<sup>22</sup>

Many note this development with chagrin. They argue that the country would be better served if some Supreme Court justices had significant political experience.<sup>23</sup> The cases before the Supreme Court often involve issues where knowledge of the political process would be helpful, e.g., cases where the exigencies of legislative or executive decision-making loom large. Also, some have argued that serving on the Supreme Court involves more than adjudicating—that it is in part a policy-making position and that the experiences

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(and left it to become a judge). See LII: US Supreme Court: Justice Souter, <http://www.law.cornell.edu/supct/justices/souter.bio.html> (last visited Mar. 18, 2009).

20. We are defining “high level” as those who are confirmed by the Senate, which includes all executive officers under the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2. The two are Antonin Scalia (Assistant Attorney General of the Office of Legal Counsel) and Clarence Thomas (head of the Equal Employment Opportunity Commission). Neither held a cabinet-level position, but both were Senate-confirmed. See generally Oyez: Justices, <http://www.oyez.org/justices/> (last visited Mar. 18, 2009).

21. See Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and Others Don’t?* (Columbia Pub. Law & Legal Theory, Working Paper No. 06-127), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=935129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935129).

22. Stephen Maizlish, *Salmon P. Chase: The Roots of Ambition and the Origins of Reform*, 18 J. EARLY REP. 1, 47–50 (1998); see Adam Liptak, *Obama Has Chance to Select Justice With Varied Résumé*, N.Y. TIMES, May 1, 2009, at A1 (“In 1946, for instance, eight of the nine justices had not been sitting judges when they were appointed. . . . The justices who sat in 1946 . . . included two former attorneys general, two senators, a Treasury secretary, a chairman of the Securities and Exchange Commission and a law professor.”); see generally O’Neill, *supra* note 19, at 727-31 (discussing backgrounds of the justices).

23. See, e.g., Lee Epstein, Jack Knight & Andrew Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

entailed in running for elective office (or at least serving as major appointed political officials) give justices a valuable perspective.<sup>24</sup>

Our point is not to endorse this critique but to note that it, like many academic critiques, identifies a problem on which the public currently has no impact. The president nominates and the Senate confirms.<sup>25</sup> It is possible for a group of citizens to lobby the president to choose a particular Supreme Court nominee or lobby the Senate not to confirm a nominee who lacks significant political experience. But it is hard to imagine any of the special interest groups that are capable of the necessary lobbying doing anything about this concern. Their interests probably go in the reverse direction. The trend toward nominating Supreme Court justices with little political experience has occurred alongside a rise in the lobbying of presidents and senators.<sup>26</sup>

## 2. Cabinet Nominations

There is less commonality in the criticisms of the cabinet-nomination process, but the two most common involve partisanship and qualifications. George W. Bush's first cabinet provides an example. His campaign for the presidency emphasized that he was a moderate governor who often reached across the aisle and worked closely with Democrats.<sup>27</sup> When he was elected president in the closest presidential election in American history, many expected that he would fill his cabinet with moderate cabinet members and a fair number of Democrats. Instead, there was only one Democrat—the moderate to conservative Norman Mineta (and Mineta's position, secretary of transportation, has traditionally been considered one of the least important cabinet positions). Meanwhile, Bush appointed two politicians associated with the right wing of his party (John

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24. See RICHARD A. POSNER, *HOW JUDGES THINK* (2008); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 259–64 (4th ed. 2005); O'Neill, *supra* note 19, at 722–34; see also Richard A. Posner, *Foreward: A Political Court*, 119 *HARV. L. REV.* 31 (2005).

25. U.S. CONST. art. II, § 2, cl. 2.

26. Jeffrey H. Bimbaum, *The Road to Riches Is Called K Street: Lobbying Firms Hire More, Pay More, Charge More to Influence Government*, *WASH. POST*, June 22, 2005, at A01 (reporting that between 2000 and 2005, the number of registered lobbyists doubled from 16,342 to 34,785); Opensecrets.org, *Lobbying Database*, <http://www.opensecrets.org/lobby/index.php> (last visited Mar. 18, 2009) (from 2000 to 2007 total lobbying spending increased from \$1.54 billion to \$2.81 billion).

27. Alison Mitchell, *The 2000 Campaign: The Texas Governor; Bush's Bipartisanship Would Face Tough Test*, *N.Y. TIMES*, Apr. 29, 2000, at A10.



Ashcroft and Donald Rumsfeld) to two of the most important cabinet positions (Attorney General and Secretary of Defense).<sup>28</sup>

A parallel in the context of the 2008 election is that Barack Obama was rumored to be considering two Republicans, Chuck Hagel and Richard Lugar, for senior cabinet positions, in an attempt to win over voters from John McCain.<sup>29</sup> Obama did not, however, announce that Hagel and Lugar were his top choices (although he was willing to say that they were possibilities, while at the same time widening the pool of possibilities to include even Arnold Schwarzenegger).<sup>30</sup> In response to questions from *The Sunday Times* regarding his choice of cabinet, he was coy in saying “Chuck Hagel is a great friend of mine and I respect him very much.”<sup>31</sup> Maybe we should not allow the candidates to escape with coyness and ask them for clarification. Allowing them to escape with such answers gives them greater discretion, after the election, to forget their implicit pre-election commitments to marginal voters and instead use the appointments to satisfy their core support groups.

The example of George W. Bush’s cabinet appointments is interesting in that it stands in contrast to the example of Court appointments. In the Court context, the absence of a pre-election competition over naming names seems to result in relatively young and middle-of-the-road appointments. With the Bush Cabinet appointments discussed above, we did not see the same dynamic. Rumsfeld and Ashcroft were anything but middle-of-the-road or uncontroversial. Nor were they particularly youthful. The different dynamic is due in part to the fact that cabinet members are not appointed for life, unlike Supreme Court members. Because cabinet members serve no longer than the president and are understood to be political, senators have historically been more willing to confirm partisan cabinet members.<sup>32</sup> It is hard to imagine any Supreme Court

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28. The “big four” departments are traditionally regarded as the Departments of Justice, Defense, Treasury, and State. See David Greenberg, *The Sorry Lot of a Bush Cabinet Secretary*, SLATE, Nov. 22, 2004, <http://www.slate.com/id/2110032/>.

29. See Sarah Baxter, *Barnstorming Obama Plans to Pick Republicans for Cabinet*, SUNDAY TIMES, Mar. 2, 2008, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/us\\_elections/article3466823.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/us_elections/article3466823.ece).

30. See Posting of Sunlen Miller to blogs.abcnews.com, <http://blogs.abcnews.com/politicalradar/2007/12/obama-says-hed.html> (Dec. 20, 2007, 08:29 EST).

31. Baxter, *supra* note 29.

32. United States Senate, Nominations, <http://www.senate.gov/artandhistory/history/mon/briefing/Nominations.htm> (last visited Nov. 12, 2008).

nominee openly averring that she was a partisan Democrat or Republican, whereas such partisanship is common for cabinet appointees.<sup>33</sup>

The result is that the political dynamics surrounding Supreme Court and cabinet appointments diverge. But for both kinds of appointments, the pre- and post-election nomination considerations might be quite different. In each case, we should expect that pre-election choices would be different from Supreme Court and cabinet members chosen post-election. Had there been an explicit pre-election competition in naming names—in which Bush and Gore named their top choices in the pre-election context—polarizing figures like Rumsfeld and Ashcroft might not have gotten the nod. Their appointments, after the election, were perhaps paybacks to Bush's core constituency. Had there been a pre-election competition, the focus might have been on capturing the votes of those in the middle to whom Rumsfeld and Ashcroft would not have appealed.

### III. WHY ANSWER?

The convention against announcing selections may seem natural, given that it has existed for many years. But it might not be that difficult to change. If we simply *asked* presidential nominees to tell us whom they would nominate for the Supreme Court and their cabinet before we voted for them, they might answer. The paradigm for our thinking about this Article was the CNN/YouTube video questions asked of the candidates during the 2008 primary campaign.<sup>34</sup> That process enabled individual citizens to ask the candidates direct questions, as they do in “town hall” meetings with candidates.

Why would a candidate answer such a question? The naysayers will explain that answering—naming specific names—would so constrain the presidential candidate and be so risky that no candidate would do it. Those answers are too simple.

The observation that candidates for political office prefer to make vague pronouncements rather than specific ones is not new.

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33. *Id.*

34. CNN/YouTube Democratic Debate: Complete Video, <http://www.cnn.com/2007/POLITICS/07/24/youtube.debate.video/index.html> (last visited Nov. 4, 2008).

Scholars have posited explanations for the preference for obfuscation, grounded in the proposition that candidates have more to lose than to gain by being specific.<sup>35</sup> Our goal is not to take issue with those positive analyses of political behavior. Rather, it is to ask whether there are circumstances under which the presidential candidates might be willing (with inducement, if necessary) to be more specific. After all, candidates sometimes are willing to take risks in an attempt to change the dynamics of a race they seem to be losing.<sup>36</sup>

The circumstance we have in mind is where one candidate is significantly behind in the polls and can identify an important voting group with many members who are leaning toward his opponent (or toward staying home on election day) but are potentially movable. The voting group, let us say, is not convinced that the candidate who is behind really shares their values. The candidate can *say* that he shares their values, but talk is cheap. Vague promises are not going to help persuade voters who are on the fence or leaning away; they are already skeptical.<sup>37</sup> The candidate can promise to enact policies they favor. But the candidate can also tell them that he will nominate a person whom they know to favor their positions, and that could be valuable to those voters. It will be particularly valuable insofar as it is harder to wriggle out of those promises. A candidate who promises to appoint justices like Scalia and Thomas might be able to claim that Harriet Miers fits the bill. A candidate who promises to appoint either John Roberts, Sam Alito, or Mike Luttig cannot make the same claim about Miers.

A related response is that not enough voters will care who the appointees are, and thus presidential candidates will not see any benefit in naming names. It is true, for example, that vice-

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35. See Alberto Alesina & Alex Cukierman, *The Politics of Ambiguity*, 105 Q. J. ECON. 829 (1990); Benjamin I. Page, *The Theory of Political Ambiguity*, 70 AM. POL. SCI. REV. 742 (1976); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972). Although much of the scholarship on the politics of ambiguity is in political science, legal scholars have also discussed the question in the context of Congress passing ambiguous legislation. See Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663 (2004).

36. See, e.g., Katharine Q. Seelye, *A Scrappy Fighter, McCain Honed His Debating Style In and Out of Politics*, N.Y. TIMES, Sept. 22, 2008, at A25.

37. Cf. Harris Delles & Vally Koubi, *Smoke Screen: A Theoretical Framework*, 78 PUB. CHOICE 351 (1994) (smokescreens work better as a strategy for political candidates when they already have a high reputation and the voters in question are not particularly discerning).

presidential choices generally do not change a significant percentage of voters in the national electorate.<sup>38</sup> But vice presidents can help the ticket in one or more important states (e.g., Lyndon B. Johnson's presence on the ticket was crucial for John F. Kennedy carrying Texas, in what turned out to be a very close election).<sup>39</sup> And though Sarah Palin was not able to swing the 2008 election in John McCain's favor, she helped energize the conservative base in a way that McCain had not been able to do on his own.<sup>40</sup> Only a small percentage of voters will change their votes based on who the secretary of the treasury or chief justice will be, just as a small number will change their votes based on a candidate's position on NAFTA<sup>41</sup> or the estate tax.<sup>42</sup> But those small numbers can be game-changers in an election.

Most sports fans are knowledgeable about more than one player on a given team. For better or worse, we do not expect most voters to be as knowledgeable about the president's team as they are about their favorite sports teams, but the relevant threshold is not a majority of voters. The question is whether an electorally significant

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38. Polling data show that, among recent vice presidents, Dan Quayle is the only one whose presence on the ticket appears to have changed the votes of more than 1 percent of voters—in his case away from the ticket. See Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 926 (1992). The impact of Sarah Palin on the outcome of the 2008 election is less clear, see *infra* note 40, but CNN's exit poll found that a remarkable 7 percent of voters said that McCain's choice of Palin was the most important factor in their vote. See Local Exit Polls – Election Center 2008, <http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p6> (last visited Mar. 18, 2009) [hereinafter Local Exit Polls].

39. Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 872 (2005).

40. See, e.g., Alec MacGillis, *For the Republican Base, Palin Pick Is Energizing*, WASH. POST, Sept. 8, 2008, at A1. Some polling data and some Republican politicians suggested that Palin's presence on the ticket hurt McCain. See, e.g., Michael Cooper & Dalia Sussman, *Growing Doubts on Palin Take Toll, Poll Finds*, NY TIMES, Oct. 31, 2008, at A1; Juliet Eilperin, *Palin Plans to Remain on GOP's National Stage*, WASH. POST, Nov. 5, 2008, at A14 (“The reservations some voters have about Palin intensified over time in the Washington Post-ABC News poll. In the survey released Monday night, 44 percent of likely voters said McCain's choice of Palin as his running mate had made them less apt to vote for the GOP ticket.”); Adam Nagourney, *Second-Guessing the Vice-Presidential Pick*, NY TIMES, Oct. 27, 2008, available at <http://www.nytimes.com/2008/10/27/us/politics/27web-nagourney.html>. Meanwhile, CNN's exit poll found that of the 60 percent of voters who said that McCain's choice of Palin was a factor in their vote, 56 percent voted for McCain versus 43 percent for Obama. By comparison, of the 33 percent who said Palin was not a factor, 33 percent voted for McCain versus 65 percent for Obama. Local Exit Polls, *supra* note 38.

41. Posting of Todd Tucker to Eyes on Trade, <http://citizen.typepad.com/eyesontrade/2008/09/coolness-to-naf.html> (Sept. 17, 2008).

42. Press Release, Women Impacting Public Policy, National Survey Shows People Want US Senate to Repeal Death Tax (Aug. 28, 2003), available at <http://www.policyandtaxationgroup.com/pdf/NationalSurveyRepealDTax.pdf>.

number of movable voters would pay attention to the president's nominees, and we believe that the answer is yes.

There is evidence that, for example, Americans care about the Supreme Court to a significant degree (and more than citizens of most other nations care about their highest court).<sup>43</sup> A poll released in May 2008 found that 30 percent of Republicans picked Supreme Court appointments as their top voting issue in the upcoming presidential election—more than picked the war in Iraq.<sup>44</sup> That 30 percent of the electorate says something is their top issue does not mean that a given name will actually sway anything close to 30 percent of voters. It is unlikely that a given name will move 5 percent or even 1 percent of the national electorate. But if selecting a particular person could move even half of one percent of the voters in a swing state, that would be a huge impact for a presidential candidate.<sup>45</sup>

The presidential election is winner-take-all. If one of the candidates is behind in the polls, he should be willing to take risks to get ahead. If he thinks he can potentially sway a segment of voters who would not otherwise vote for him, he might take the risk that he will offend others. Say that Obama is having difficulty getting the

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43. See James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

44. See Scott Rasmussen, *For Republicans, Judicial Appointments Matter More Than Iraq*, RASMUSSEN REPORTS, May 21, 2008, [http://www.rasmussenreports.com/public\\_content/politics/election\\_20082/2008\\_presidential\\_election/for\\_republicans\\_judicial\\_appointments\\_matter\\_more\\_than\\_iraq](http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/for_republicans_judicial_appointments_matter_more_than_iraq).

When it comes to how they will vote in November, Republican voters say that the type of Supreme Court Justices a candidate would appoint is more important than the War in Iraq. The latest Rasmussen Reports national telephone survey found that 44 percent of Republicans pick the economy as the top voting issue, 30 percent name judicial appointments, and just 19 percent pick the War in Iraq.

*Id.*

45. In this regard, it is notable that campaigns often see an electoral advantage in attacking either close advisers who are presumed to be likely nominees or existing appointees in election campaigns. Henry Kissinger managed to be the focus of negative campaigning both by Ronald Reagan (in the Republican primaries and convention) and by Jimmy Carter (in the general election) in 1976. See Walter Isaacson et al., *Rolling Out the Big Guns*, TIME, Aug. 1, 1983, available at <http://205.188.238.109/time/magazine/article/0,9171,921297,00.html> (Reagan criticizing Ford by saying that "Kissinger's stewardship of U.S. foreign policy has coincided precisely with the loss of U.S. military supremacy."); Gerald R. Ford Presidential Library & Museum, Presidential Campaign Debate of October 6, 1976, <http://www.ford.utexas.edu/library/speeches/760854.htm> (last visited Mar. 18, 2009) ("Mr. Ford, Mr. Kissinger have continued on with the policies and failures of Richard Nixon" and "as far as foreign policy goes, Mr. Kissinger has been the President of this country.").

share of the women's vote that Democratic candidates usually get and that he believes he needs to raise that percentage in order to win. One way to get that share might be to pick a female vice president.<sup>46</sup> But let us say that most female voters are skeptical and do not think that a vice president has enough power to make a difference. Or it could be that Obama does not want a female vice president. The female voters still need to be persuaded. And their skepticism means that they will need a credible signal rather than vague promises.<sup>47</sup> To solve this problem, Obama could announce that his top three picks for the Court are all women who share the values of Hillary Clinton supporters—or he could announce that Hillary herself will be his next pick for the Court. If the makeup of the Court and the issues it addresses, such as abortion, are voting issues for a number of women, then such an announcement might bring a nontrivial number of these voters into the Obama camp.

The point is that if candidates see that naming names is a way to win votes, they can be pushed to answer the question. And a candidate who is behind in the polls will be more likely to offer names. The risk is not that different from many of the risks candidates already take. For example, a candidate who runs personally hostile advertisements might win over some voters but alienate others. By moving the discussion of specific nominees to the pre-election context, we convert it into one of the weapons that the candidates are allowed (or forced, insofar as they are grilled by a questioner) to use in their competition.

When presidential candidates give names in advance, they constrain themselves. The fewer names they give per position,<sup>48</sup> the greater the constraint. That said, the president will ultimately choose

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46. Some Hillary Clinton supporters said they would vote for McCain rather than Obama in response to the sexism that they perceived in the Democrats' process. See Ina Jaffe, *Citing Sexism, Clinton Supporters Vow Switch*, NPR, May 23, 2008, <http://www.npr.org/templates/story/story.php?storyId=90755773>. A similar story can be told for McCain, who needed to persuade some conservative voters that he really was conservative. One of the concerns had to do with whether he really would appoint conservative enough justices to the court. Robert D. Novak, *Is McCain a Conservative?* WASH. POST, Jan. 31, 2008, at A21 (reporting on accounts that McCain might have thought Alito too conservative and how these reports have concerned many conservatives).

47. See Eric Posner & Adrienne Vermuele, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007) (discussing credible signals from the executive).

48. We imagine they will proffer a single name per cabinet position, to give themselves the maximum benefit from naming particular people.

just one person per position, so this is simply moving the constraint forward in time. But beyond the differences discussed above about *who* will be chosen, naming names in advance does rule out one pre-election possibility: promising, or at least suggesting, the same job to more than one person. Pre-election, a presidential candidate can hint to multiple people that they will be his choice for secretary of the treasury.<sup>49</sup> Post-election, there can be only one choice. The presidential candidate will thus forego the option of (falsely) promising the same job to several people. But if the choice is between foregoing such a constraint and not being president versus accepting this constraint but being president, we would expect candidates to choose the latter option.

How do we game this out? If the slates that each presidential candidate picked cancelled each other out (in terms of the votes netted by each slate), naming names would be a version of the prisoner's dilemma.<sup>50</sup> Both presidential candidates would be better off if neither named names in advance. That would keep their choosing power at its maximum. But the benefit of one defecting could be great to that one candidate (winning over swing voters). If both candidates disclosed, then they would (by hypothesis) be back to the status quo ante, so neither candidate would have benefited himself, and both would have reduced their power.

But the assumption of equal effect on voters seems unlikely: in all probability, the sets of names offered by the candidates will not have the same effect, and thus one candidate will gain support while the other will lose it. This could flow in part from the public perceiving the second discloser as simply copying the first discloser and trying to play catch-up. Even assuming no first-mover advantage, it seems likely that one set of names would add more votes to candidate *A* than the other set of names would add to candidate *B*, because one set of names proves more persuasive to more key voters.

Thus, this would not be a prisoner's dilemma but instead another potential field of competition. What each candidate would gain is a better shot at the White House in a zero-sum game with his

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49. Some will not even need the hint in order to imagine themselves as possible nominees.

50. Stanford Encyclopedia of Philosophy, *Prisoner's Dilemma*, <http://plato.stanford.edu/entries/prisoner-dilemma/> (last updated Oct. 21, 2007).

opponent. Offering the names of top appointees would become a new field of battle. Candidates would be competing to pick slates that would persuade voters in relevant voting groups.

Presidential candidates already compete with respect to their choice of running mates. They choose vice presidents who will help bring particular segments of voters to their side, or at least soften the perception that a candidate is too extreme (e.g., Reagan choosing Bush), too moderate (e.g., Dole choosing Kemp), too old (e.g., Kemp again and McCain choosing Palin), too callow (e.g., Kennedy choosing Johnson), etc.<sup>51</sup> Presidential candidates have a number of voting groups they want to bring into their coalition, and they know that no vice-presidential choice will resonate with all these groups. Announcing Supreme Court and cabinet choices in advance provides more opportunities for such balancing.

Beyond these narrow electoral considerations, there is a larger public-policy benefit to announcing nominees in advance: it allows the president-elect's key cabinet nominees to begin the transition process immediately after the November election. As matters stand, a president-elect names his key officers during the transition after the election, and the FBI then conducts its background checks (as it does on all nominees).<sup>52</sup> The result is a slow start for each new administration, as the president waits for his key people to be approved by the FBI and the Senate before they can dive into their work. Two members of the 9/11 Commission argue that this current approach is "ineffective and dangerous" with respect to national security matters, where a smooth transition is crucial.<sup>53</sup> They contend that the FBI should conduct background checks on top nominees before the election.<sup>54</sup> That way, immediately after the presidential election the nominees can meet with those they will succeed and get up to speed on the many issues they will confront.<sup>55</sup> This strikes us as right: a slow start-up for a new administration can

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51. See Albert, *supra* note 39, at 874–77 (arguing that a presidential nominee chooses a vice president who will neutralize perceived weaknesses or shortcomings).

52. The White House, Nominations & Appointments, <http://www.whitehouse.gov/appointments/> (last visited Nov. 3, 2008).

53. See Jamie Gorelick & Slade Gorton, Op-Ed., *Between Presidents, a Dangerous Gap*, N.Y. TIMES, July 16, 2008, at A19.

54. *Id.*

55. *Id.*



be costly and dangerous; naming nominees before the election will help the new administration get a running start.

But, a skeptic might ask, if naming names had the potential of turning things around for candidates who are significantly behind in the polls (not to mention smoothing the presidential transition), why hasn't a presidential candidate already tried this strategy? The point is a fair one. Candidates are advised by expert strategists who presumably have thought through every strategy and weighed costs and benefits. If the strategy has not been used, it is probably because it is not a good one.

We have two answers to this objection. First, there have been relatively near misses and an analogue. In the 2008 election cycle, Bill Richardson stated, "I would announce my cabinet before the election. If I'm the nominee, I would tell you who my team would be."<sup>56</sup> Richardson did not become the nominee, but he believed that it would be in his interest to reveal his team. And as we noted above, it has been an open secret in some campaigns that a presidential candidate would nominate a specific person for a specific job.<sup>57</sup> Beyond that, there is at least one instance from the past when a candidate did something akin to our proposal. In 1976, when Ronald Reagan was fighting Gerald Ford for the Republican nomination and needed to persuade the Republican moderates, he took the risky step of violating convention by naming his vice-presidential running mate prior to securing the nomination.<sup>58</sup> He hoped that naming his vice-presidential candidate (Richard Schweiker) would turn a number of the delegates in his direction.<sup>59</sup> Reagan eventually lost, but the Schweiker strategy reportedly moved him closer than he would have been otherwise.<sup>60</sup>

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56. Philip Elliott, *Richardson Promises Cabinet Preview*, WASH. POST, July 28, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/28/AR2007072800781.html>.

57. See *supra* note 9 and accompanying text (on Thomas Dewey indicating that he would nominate John Dulles); McIntyre *supra* note 10 and accompanying text (George W. Bush indicating that he would nominate Colin Powell).

58. Matt Negrin, *Risky Strategy That Doomed Reagan in '76 Could Boost Democrats*, B. GLOBE, Feb. 24, 2008, at A12.

59. See *id.*

60. A 2008 Boston Globe article reminded readers of the Schweiker strategy, speculating that Hillary Clinton might want to name a vice-presidential candidate early so as to try to sway some of the superdelegates who were on the fence. *Id.* More recently, a candidate for governor in Maryland in 2006 picked his running mate nine months before the Democratic primary and won both the primary and the general election. *Id.* Note though that the Schweiker strategy does

The above examples are few and far between. Our second answer is that the benefits for the candidates themselves from such a strategy, even when they are far behind, probably do not outweigh the costs. The costs include not being able to promise patronage appointments after the election. Additionally, the fact that these appointments were preapproved by the electorate (and may be instrumental in seeing the president in question elected) would give the appointees a level of independence that many presidential candidates would not want to cede. On their own, the candidates probably have other risks that they are more willing to take when they are behind in the polls. But the benefits are sufficiently close to the costs for candidates that we believe the norm can be changed. This is why our proposal has a chance of working only if there is some method of pushing the candidates to compete over names—perhaps by forcing them to tackle the question in a competitive public debate setting where they are under pressure to score points over their opponents.

#### IV. DIFFERENCES BETWEEN PRE- AND POST-ELECTION NOMINEES

If candidates did give names, how might pre-election nominees differ from post-election nominees? Are they likely to be more ideologically extreme? More likely to come from a swing state? More likely to represent a voting bloc? We begin with the area of greatest uncertainty (perceived position on the political spectrum) and then move to areas about which we think we can have some degree of confidence.

##### *A. Ideology*

The effect of pre- versus post-election announcement on ideology is least certain. Will a presidential candidate choose nominees who tend to be political moderates (perhaps even members of the opposite party)? Might a candidate instead lean toward candidates associated with the most ideological wing of their party?

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appear to have angered some conservatives. See *NBC Evening News: Campaign 1976, Republican Convention: Buckley* (NBC television broadcast Aug. 11, 1976), available at <http://openweb.tvnews.vanderbilt.edu/1976-8/1976-08-11-NBC-2.html> (noting that Reagan delegate and conservative North Carolina Senator Jesse Helms did not like Schweiker as the vice-presidential choice).

Relatedly, might a candidate choose a nominee associated with a powerful interest group, even if that group is unpopular with a substantial segment of voters? Because there are arguments on both sides, depending on how a presidential campaign plays out, these issues are difficult to predict.

The conventional wisdom of presidential campaigns is that candidates play to the base in the primaries and then move toward the middle in the general election.<sup>61</sup> The candidates want to capture swing voters in the middle, so they emphasize how moderate they are. If this dynamic prevails for a given presidential candidate, then we might expect him to name moderate Supreme Court and cabinet nominees. He might even want to name one or more moderate members of the opposite party. Naming a vice president from the opposing party entails significant risks (since that person would succeed the president if he died in office) and has been done only once in United States history, with what is widely regarded as a bad result (the presidency of Andrew Johnson).<sup>62</sup> But there might be nontrivial benefits to Obama and/or Romney announcing that he will nominate one or more members of the opposite party as key cabinet members or as Supreme Court justices.

That said, sometimes presidential campaigns prioritize energizing their bases. George W. Bush's 2004 strategy, which focused on bringing out core supporters, is a prime example.<sup>63</sup> If energizing supporters is a high priority, then we might expect more ideological nominees.

Then there is the related possibility of appeasing an organized voter group. Depending on the central issues for such a group, appealing to its members could push a candidate toward the middle of the voting populace or toward extremes. If, say, the Concord Coalition were able to motivate a large number of voters under a banner of fiscal responsibility, appeasing its members might appeal to a wide range of moderate voters. That said, the aims of most organized voter groups tend to be more ideologically skewed. These

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61. See, e.g., Joel Achenbach, *Red Meat Season*, WASH. POST, June 10, 2007, at B01.

62. See, e.g., Henry Olsen, *Lieberman Would Be a Bad Veep Choice for McCain*, WALL ST. J., Aug. 27, 2008, at A15.

63. See, e.g., Craig Gilbert, *2008 Presidential Candidates Obama, McCain find lessons in 2004 Campaign*, MILWAUKEE J. SENT., June 29, 2008, <http://www.jsonline.com/news/president/29561629.html>.

groups are generally organized to push a particular agenda that they believe the political mainstream does not adequately represent. The ideology is part and parcel of their existence and appeal. In keeping with their origins, their ideology tends to be outside the political mainstream. Among the more significant of these groups, in terms of a history of mobilizing issue-based voters, are the National Rifle Association, trade unions, and conservative religious groups like Focus on the Family Action. Insofar as the candidates favored by these groups tend to play to each party's base (as we think is the case), naming such a candidate as a cabinet or Supreme Court choice would push the presidential candidate out of the mainstream, at least on the issue(s) that the mobilization group cared about. The presidential candidate's calculation, presumably, would be that many more members of the group would change their votes if their favored candidate were nominated for a post than would non-members of the group abandon the presidential candidate in disappointment. For example, it may be that John McCain would have gained more votes among conservative Christians by naming one or more of their choices as a Supreme Court nominee than he would have lost among the rest of the voting populace, if it turned out that many more conservative Christians vote based on the Supreme Court than other voters do.<sup>64</sup>

The problem with predictions about the ideological valence of a presidential candidate's choices is that there are many different ways a campaign can play out. In some campaigns, a candidate may believe he needs to shore up support among elements of his core supporters or voter-mobilization groups outside the political center. In others, he may believe that he needs to appeal to moderates. Does that mean that we cannot say anything about a presidential candidate's likely choices? On the contrary, we can say with some confidence that naming names before an election will tend to favor

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64. Announcing nominees pre-election could give leverage to politically cohesive minorities—including issue-based groups, as well as racial and ethnic minorities who might want to use their votes to have narrow concerns addressed. Given that minority groups are typically not large enough to sway an election through their votes, most minority groups have to throw their support behind presidential candidates who are promising vague support to a variety of groups. These candidates, once elected, may not deliver. If, however, the candidates were to compete on naming potential nominees for posts that these minority groups cared specifically about, this would be a method by which minority groups could concentrate the effect of their votes. Pre-election, these groups would be able to compare the names from the two presidential candidates to see which one would better match their views on the issues of importance to them.

appointees from swing states and appointees with significant followings, and will strongly disfavor appointees whose main claim to fame is that they are confidants of the presidential candidate.

### *B. Swing States*

Because of the Electoral College, presidential elections are a simultaneous set of state elections. And some states loom large—the swing states that can collectively determine the outcome of an election.<sup>65</sup> In the 2004 presidential election, the key swing states were Florida, Ohio, and Pennsylvania.<sup>66</sup> Political analysts correctly predicted that the candidate who won two of those three states would also win the election.<sup>67</sup> The identity of the key swing states could be different in future elections, but the number of such key states will still likely be small.<sup>68</sup>

Candidates know this. The obvious strategy for a candidate is to appeal to the voters in an important state by naming appointees who will particularly appeal to voters from that state. A Democrat might promise to make Ohio's popular governor, Ted Strickland, his secretary of the treasury. A Republican might make the same promise for equally popular Governor Charlie Crist of Florida. Or maybe a presidential candidate would pick a person from a swing state with more obvious credentials for the job (say, a sitting state supreme court justice as a Supreme Court nominee) as a way of showing a commitment to quality while also choosing a favorite son or daughter.

There is a cost to this strategy. Voters in other states may feel slighted because their governor (or whomever they favor) was not selected. But the point about swing states is that only a relatively small number of states are likely to be significant, in terms of the Electoral College. Some voters in Utah might be upset if Romney or Obama announced a Missourian as the attorney general nominee.

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65. See, e.g., Jim Malone, *Analysts Say Swing States Hold Key to US Election*, VOANEWS.COM, Oct. 24, 2008, <http://www.voanews.com/english/2008-10-24-voa41.cfm>.

66. See, e.g., Ronald Brownstein, *Bush, Kerry Split in 3 Key Swing States*, L.A. TIMES, Oct. 28, 2004, at A1.

67. *Id.*

68. See, e.g., *Political Geography*, WASH. POST, Nov. 2, 2008, <http://www.washingtonpost.com/wp-srv/politics/interactives/campaign08/political-geography/> (identifying Montana, Missouri, Indiana, Ohio, North Carolina, and Florida as swing states for the 2008 presidential election).

But any defections in Utah will almost assuredly have no effect on Utah's likelihood of voting Republican. Given the benefits of gaining even half of one percent of the voters in a swing state by promising a job to a favored politician, such a strategy may make sense.<sup>69</sup>

### C. *Those with a Following Versus Confidants*

Similarly predictable are two other phenomena that are related to each other: presidential candidates tend to choose people who have some significant political support on their own, and they tend not to choose people whose sole claim to fame is their relationship with the candidate.

The point of a campaign is to gain votes, and the safest way to do that is to select appointees who are popular with voters. That should lead presidential candidates to choose appointees who are political figures in their own right with a substantial number of supporters and a much smaller number of detractors. The goal is to find appointees who will have the maximum appeal, and that is likely to mean people with strong and positive reputations.

It is possible that in some situations these considerations will lead a candidate to name appointees who are regarded for their ability and judgment but are not widely known among the electorate. Their following would be created by the positive responses of the commentariat to their selection. President Ford's decision to

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69. If this happened it would be a return to an earlier model: for most of the history of the United States, Supreme Court and cabinet choices were understood to reflect regional and state-based balancing. There was a perceived southern seat on the Court, for instance (along with the more recent "Jewish seat" and the still more recent "woman's seat"). LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 128 (1986) (discussing the New York seat and the New England seat); John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 *CAP. U. L. REV.* 499 (2002) ("Geographic diversity was crucial throughout the nineteenth century. Certain positions on the Supreme Court were viewed as the 'New England seat' or the 'Southern seat,' to be occupied only by jurists hailing from that part of the nation. Religious diversity has also been important on occasion, particularly since the implicit establishment of a 'Jewish seat' on the Court with President Wilson's appointment of Justice Brandeis. More recently, racial and gender diversity has played a significant role in appointments throughout the federal and state judiciary."); Kenneth G. Dau-Schmidt, *An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*, 25 *U.C. DAVIS L. REV.* 659 (1992) (noting "[t]he establishment of a 'black's' and a 'woman's' seat on the Supreme Court"). And it was widely understood that, just as a vice president was chosen for regional balance, so too were cabinet members. Further, it was often understood that particular powerful states—Ohio, New York, and Pennsylvania prominent among them—needed to have representation in the cabinet.

nominate Edward Levi, who was Dean of the Chicago Law School and President of the University of Chicago before being chosen as the Attorney General, is one example.<sup>70</sup> Ford's decision was praised by politicians and commentators who saw Levi as a break from the perceived cronyism and corruption of the Nixon administration.<sup>71</sup> Even though Levi was not a major political figure on his own, he became a political asset because of the reaction to him. A presidential candidate might similarly want to dispel any appearance of cronyism by choosing an appointee who had a sterling reputation—especially for the Supreme Court, where the public expects probity and wisdom.

This relates to the proposition about which we have the most confidence: a candidate usually will not choose appointees who have neither an existing following nor a sterling reputation, but instead are largely known as friends or confidants of the candidate. Such a person brings little value to the electoral equation and brings costs insofar as she seems to have gained her job through cronyism.

Candidate George W. Bush might have said that he would select a prominent judge with whom he was friendly for the Supreme Court (e.g., a member of the Texas Supreme Court), but there is little chance that, pre-election, he would have named Harriet Miers as a possible Supreme Court selection. Her stature was perceived to be purely a function of her relationship with him. In the pre-election context of a competition for votes, she would have added little. And the taint of cronyism would have cost him votes.<sup>72</sup> The same is true of Robert Kennedy's appointment. Just as it is hard to imagine candidate Bush naming Harriet Miers, it is hard to imagine candidate John Kennedy naming his brother as his selection for attorney general.

#### *D. Diversity and Minority Interests*

If a candidate decides to announce nominees, he might sometimes strategically choose more than one name. Return to the example of Obama seeking to persuade skeptical women voters and

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70. See Chris Lehmann, *Bedtime for Gonzo: 'Where's Ed Levi Now That We Need Him?'*, N.Y. OBSERVER, Aug. 28, 2007, available at <http://www.observer.com/2007/bedtime-gonzo>.

71. See CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE* 141-42 (1992).

72. E.g., David Greenberg, *Supreme Court Cronyism: Bush Restarts a Long and Troubled Tradition*, SLATE, Oct. 5, 2005, <http://www.slate.com/id/2127493/>.

assuming that their concern rests largely with whether he will nominate a pro-choice woman to the Court. It might help assuage the women voters' concerns more if Obama asserted that not only was his most favored nominee for the Court a pro-choice woman, but so were three of his next four favorites. This would provide additional assurance to skeptical voters that even if the top choice did not work out, there was still a high likelihood that a woman would be nominated. The broader point is that naming names could well have an impact on various forms of diversity, in particular for Court nominees. If a candidate names three or more potential Supreme Court nominees, almost assuredly not all three will be white males (although all three could conceivably be women). A candidate who names only one nominee, however, might well choose a white male.

## V. OBJECTIONS

### A. *Legality*

18 U.S.C. § 599 provides, in relevant part:

Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned not more than one year, or both.<sup>73</sup>

Does this statute prevent a candidate from announcing during the campaign whom he would nominate for cabinet or Supreme Court positions?<sup>74</sup> No. Depending on methodology, this statute can be interpreted in different ways. There is a textual ambiguity in the statute: the trigger for the statute is “procuring support in his candidacy.”<sup>75</sup> Is this trigger procuring support *from the public* for his candidacy or instead procuring support from the potential nominee

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73. 18 U.S.C. § 599 (2000).

74. Some blogs have answered this question in the affirmative, albeit without any legal analysis beyond citing the existence of the statute. See Posting of Kevin Drum to WashingtonMonthly.com, [http://www.washingtonmonthly.com/archives/individual/2007\\_01/010654.php](http://www.washingtonmonthly.com/archives/individual/2007_01/010654.php) (Jan. 31, 2007, 11:38 EST) (raising the possibility that pre-election announcements of names might violate federal anti-patronage laws); see also Posting of Michael to Discourse.net, [http://www.discourse.net/archives/2004/03/why\\_kerry\\_will\\_not\\_appoint\\_a\\_shadow\\_cabinet.html](http://www.discourse.net/archives/2004/03/why_kerry_will_not_appoint_a_shadow_cabinet.html) (Mar. 6, 2004, 10:29 EST).

75. 18 U.S.C. § 599.



(or perhaps the potential nominee's associates) for his candidacy? As a matter of sentence construction, the answer is not clear. The best argument in favor of § 599's application to the announcement of proposed cabinet and Supreme Court members is 18 U.S.C. § 600, which specifically covers quid pro quo bribery.<sup>76</sup> Note, though, that § 600 applies to promises regarding "employment, position, compensation, contract, appointment, or other benefit, *provided for or made possible in whole or in part by any Act of Congress.*" Hence it may be that both § 599 and § 600 were focused on quid pro quo corruption, but § 600 is more focused on those involving acts of Congress. Beyond these textual considerations, the legislative history of 18 U.S.C. § 599 reveals that Congress targeted corruption in the form of candidates secretly auctioning government appointments in return for money and political patronage from corrupt interests.<sup>77</sup> The fear was that a candidate would go "to the corrupt interests and tell them that he will be their agent and tool."<sup>78</sup> Nothing in the legislative history suggests that Congress had the remotest concerns about the sort of statements we are proposing,

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76. 18 U.S.C. § 600 provides:

Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined under this title or imprisoned not more than one year, or both.

77. 66 CONG. REC. 2603 (1925).

78. *Id.* (statement of Sen. Heflin). The statute was originally passed as the Federal Corrupt Practice Act of 1925. In addition to the statement by Senator Heflin, its sponsor, Senator David Walsh, explained the purpose of the bill: since money had become increasingly influential in campaigns, candidates must "put themselves under the domination and influence and control and direction of those who have wealth" if they want to win. *Id.* (statement of Sen. Walsh). The 1925 statute applied only to Senate and House candidates. Federal Corrupt Practice Act of 1925, 43 Stat. 1073; CAMPAIGN FINANCE REFORM; A SOURCEBOOK 29 (Anthony Corrado ed., 1997). The statute was codified and moved to Title 18 in 1948, but "the original intent of Congress is preserved." 94 CONG. REC. 8721 (1948) (quoting Sen. Wiley). After passing the Federal Election Campaign Act of 1971, Congress included presidential and vice-presidential candidates under the relevant sections of Title 18. But it did so with its eye on the corrupting power of money, the original intent of the statute. See *Federal Election Campaign Act of 1971: Hearing on S. 1, S. 382, and S. 956 Before the S. Comm. on Communications of the S. Comm. on Commerce*, 92d Cong. 368 (1971) (statement of Joseph Califano) ("Isn't the relationship between campaign contributions and ambassadorial posts a luxury beyond our national means in the crisis-prone world of the 1970's? Are not domestic issues sufficiently complex to require high level executive branch appointments on the basis of ability without regard to financial contributions?").

which would be neither based on money nor secret. It is hard to see how such announcements could be regarded as the sort of corruption at which Congress was aiming.

We do not dwell on these arguments regarding statutory interpretation because any attempt at applying this statute to a candidate's promises would violate the First Amendment. In *Brown v. Hartlage*,<sup>79</sup> the United States Supreme Court confronted a state statute very similar to § 599.<sup>80</sup> A candidate for county commissioner had promised to lower commissioners' salaries if elected, and the Kentucky Court of Appeals found that this violated the following state statute:

[W]hen a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.<sup>81</sup>

The Supreme Court reversed, unanimously. The Court treated this regulation of candidates' speech as subject to strict scrutiny (one in a long line of cases so finding),<sup>82</sup> and it invalidated this statute because it failed the first prong of a strict scrutiny inquiry: the identification

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79. 456 U.S. 45 (1982).

80. The statute at issue in *Hartlage* provided that:

No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract.

KY. REV. STAT. ANN. § 121.055 (West 1982).

81. *Hartlage*, 456 U.S. at 51 n.6 (quoting *Sparks v. Boggs*, 339 S.W.2d 603 (Ky. Ct. App. 1960) (internal citation omitted)).

82. See *Buckley v. Valeo*, 452 U.S. 946 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003); *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006); see also *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

*Id.*

of a compelling state interest. The Court noted that there was a plausible claim that a promise to accept a lower salary would reduce voters' taxes, but it found that the state's interest in preventing vote-buying was not implicated because "Brown did not offer some private payment or donation in exchange for voter support; Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens."<sup>83</sup> As the Court emphatically stated:

Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.<sup>84</sup>

In *Hartlage*, there was at least a plausible interest that the state could articulate (avoiding vote-buying), even though it was unpersuasive.<sup>85</sup> It is difficult to see any legitimate—much less compelling—interest that the government would have in preventing

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83. *Hartlage*, 456 U.S. at 58.

84. *Id.* at 55–56; *see also id.* at 60

In barring certain public statements with respect to this issue, the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.

*Id.*

85. *Id.* at 54.

corruption via prohibiting the naming of cabinet or Supreme Court nominees. Put differently, it is hard to fathom what the state's interest would be. In *Hartlage*, there was a benefit to voters in the form of reduced taxes,<sup>86</sup> but here there is no benefit to voters other than the likely nomination of appointees whom they would like to see in positions of power—and there is no conceivable state interest in preventing that from happening.

The government might have an interest in prohibiting *concealed* promises from candidates to potential nominees. Secret promises give no information to voters, so their only benefit is a private one to the candidate and/or to the nominee. That underscores the implausibility of any government interest in preventing the public naming of nominees in advance. There is no corrupting element.

A different way to come at this question is to consider why the First Amendment is treated as placing a high value on electioneering speech. One reason is because an active and full debate among candidates helps voters make more informed choices.<sup>87</sup> The voters are the customers choosing among products in the marketplace of ideas. Reading the statute to prohibit the public disclosure of prospective nominees results in the implicit (and sometimes explicit) bargains between presidential candidates and prospective nominees being pushed underground. And that in turn prevents voters from being able to evaluate the competing bargains that the different candidates have struck—the opposite of what First Amendment values push toward. In effect, this occurred with Earl Warren's appointment to the Supreme Court in 1953. Dwight Eisenhower reportedly promised Earl Warren that he would be appointed to the Court as soon as a seat opened up.<sup>88</sup> The public, though, had no way of factoring this promise into their decision as to whether to vote for Eisenhower.

It is simply impossible to imagine any compelling interest for the application of § 599 to our proposal, much less a compelling interest to which application of § 599 would be narrowly tailored. And it bears noting that in the years since *Hartlage*, the Court has, if anything, raised the First Amendment bar for regulations on

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86. *Id.* at 48.

87. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1048 (2d ed. 2005).

88. *See* Dorsen, *supra* note 18, at 657.

campaign speech. For example, the Court has held that a prohibition on candidates for judicial office “‘announc[ing] his or her views on disputed legal or political issues’” violates the First Amendment, despite the obvious state interest in avoiding the appearance of impartiality.<sup>89</sup> The bottom line, then, is that application of § 599 to our proposal would run afoul of the First Amendment, and the matter seems so clear that the weight of expert opinion would so conclude.

The clarity of this unconstitutionality is important. We could imagine a candidate’s staff concluding that a seeming prohibition on some planned activity would not apply, but also that reasonable minds could differ as to legality, so that the candidate should not engage in that activity. Section 599 is not one of those cases, because there is no plausible argument that its application to a presidential candidate is consistent with First Amendment jurisprudence. Just as the vast majority of economists said that a summer “gas tax holiday” would be a bad idea,<sup>90</sup> so too the vast majority of legal scholars would conclude that application of § 599 to the naming of cabinet or Supreme Court members would be unconstitutional. It bears noting that the revelation of the economists’ views on the gas tax holiday coincided with a shift in polls on the issue; early support by a majority of those polled gave way to majority opposition once the economists’ views became known.<sup>91</sup>

Perhaps that clarity explains why § 599 has never been the subject of a single case and why it has come up so rarely: those who might raise the issue know that they are subject to the objections that not only are they being legalistic and litigious but also their legal arguments fail on their own terms because the statute is so obviously unconstitutional. In the public’s eye, one of the few things worse than a narrow, legalistic claim is a narrow, legalistic claim that, according to experts, is flatly wrong because it is unconstitutional.

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89. *Republican Party v. White*, 536 U.S. 765, 768 (2002) (quoting MINN. CODE OF JUD. CONDUCT, Canon 5(A)(3)(d)(i) (2000)).

90. *See, e.g.*, Bryan Caplan, *The 18-Cent Solution*, N.Y. TIMES, May 8, 2008, at A37.

91. *See, e.g.*, Posting of Brad Aaron, Q Poll Finds Americans Opposed to Gas Tax “Holiday”, to Streetsblog (May 15, 2008), <http://www.streetsblog.org/2008/05/15/q-poll-finds-americans-opposed-to-gas-tax-holiday>; Matthew Yglesias, *Shocking Results*, THEATLANTIC.COM, May 5, 2008, [http://matthewyglesias.theatlantic.com/archives/2008/05/shocking\\_results.php](http://matthewyglesias.theatlantic.com/archives/2008/05/shocking_results.php).

*B. Too Much Like an Election*

In effect, we are pushing toward more direct democracy. The large literature on the evils of judicial elections suggests that moving toward something akin to the election of justices on the Court is crazy.<sup>92</sup> But if unpacked, the objection to the election of judges is not that elections are bad. Instead, the objection is primarily to uninformed voters.<sup>93</sup> The argument is that the electorate has little incentive to obtain the information necessary to make good choices, so the result is more farce than anything resembling an election. The typical critique of elections involves invoking some story of an election in which some unqualified candidate won simply because he had a catchy name or that his name resembled that of someone famous.<sup>94</sup>

But even conceding that voters are not adequately informed when it comes to local and state elections, they will likely have more information regarding a Supreme Court justice or a top cabinet position. If anything, because the candidates are competing for voters, the supporters of the different potential nominees will compete to provide more information about their favorite nominees, in the hope that the candidates will choose them. Lack of information about the nominees is unlikely to be the problem.<sup>95</sup>

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92. E.g., Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J. L. & SOC. POL'Y 29 (2008).

93. E.g., Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423 (2007).

94. *Id.*

95. A different concern is that voters will be interested only in one issue, such as abortion and (for a Supreme Court justice) thus whether *Roe v. Wade*, 410 U.S. 113 (1973), will be overturned. Given the voting public's focus on a limited set of oversimplified issues, one might fear that the naming of a potential nominee to the Court would simply result in voters asking whether this nominee would vote in favor of upholding *Roe* or not. We do not see why it would be a terrible thing if voters had better information as to whether a presidential candidate would appoint justices who would overturn or affirm *Roe*. As a general principle, we should prefer voting that is better informed. The fear, though, is that better informed voting about a single issue will do more harm than good. But persuadable voters will care about a range of issues that they believe the Supreme Court may decide—*Roe*, Ten Commandments displays, the Second Amendment, etc.—not just one single issue. The hot-button issues that interest voters do not, of course, encompass the range of cases that the Supreme Court decides. But that is already the case: with respect to Supreme Court nominees, not only the public but also interest groups and Senators focus on a few hot-button issues. And the advantage of our proposal is that voters get much more information about presidential candidates and their administration's policies before they cast their votes.

A related objection is that cabinet members or Court appointees whose names were announced pre-election might see themselves as having received a mandate from the voters, independent of the president. They may, in other words, have their own agendas. An example here is another recent historical analogue—George W. Bush’s broad hints that he would name Colin Powell as his secretary of state.<sup>96</sup> This pre-election anointing might have led Powell to see himself as having an independent connection to the voters and thus led him to resist the Bush administration’s agenda. One commentator put this forward as a reason why pre-election announcements are unwise, suggesting that such announcements will lead to greater independence on the part of cabinet members.<sup>97</sup> Of course, whether this is desirable or not is hotly contested. This implicates one of the central questions regarding the structure of the federal government: how much control should a president have over those who serve in his administration? There are no easy answers to this question, as an increase in presidential control will strike some as beneficial and others as harmful. But, in any event, the president would still have the same legal authority—including the ability to fire those in his cabinet.

The Supreme Court bears particular emphasis on this question of independence. Most people would embrace independence in a Supreme Court justice with good reason: if justices simply mirror the views of the president who appoints them, then they are acting as a small, unrepresentative group of life-tenured super-legislators—and it is far from clear why we should embrace that state of affairs.<sup>98</sup>

The larger point is that the competition for votes is what matters. If presidential candidates think that voters prefer to elect a president with advisers and Court appointees who are beholden to him, then let us force them to take that position. And maybe we will have a

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96. See, e.g., McIntyre, *supra* note 10.

97. See Posting of Jacob T. Levy to Volokh Conspiracy, [http://volokh.com/archives/archive\\_2004\\_07\\_14.shtml#1089997773](http://volokh.com/archives/archive_2004_07_14.shtml#1089997773) (Jul. 16, 2004, 13:09 EST).

98. Books can be—and have been—written on this subject, and we will not dwell on it here. But the overwhelming weight of the commentary is that it would be undesirable to have a Court whose members simply voted as the president who appointed them would. Empirical research suggests that the alignment of Supreme Court justices and the views of the presidents appointing them have been increasing over time. See Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 *DRAKE L. REV.* 609 (2008).

competition where the presidential candidates adopt different strategies. One would disclose his prospective cabinet and Court nominees, and the other would not. The voters would be better informed as to what type of president they were voting for.<sup>99</sup>

*C. Too Much Pressure and Scrutiny on the Nominees*

A third objection involves the scrutiny of the nominees. Arguably, there is a greater incentive for political opponents to find damaging information about a nominee before the election, for the simple reason that such information could help to change the outcome of the election. Torpedoing an elected president's nominee has some benefits for the opposition (tarnishing the president, perhaps getting a replacement nominee more to the opposition's liking), but the president still gets to choose the failed nominee's replacement. Damaging a nominee pre-election, however, might have a greater payoff, because it might sufficiently hurt the candidate (likely distracting the candidate from his message, and perhaps making him seem like a poor judge of character) to cause him to lose the election. After all, we are positing that the naming of a nominee could swing the election in a candidate's favor. If that is so, then maybe the tarnishing of the nominee could swing the election back toward the candidate's opponent. And in light of the incentives to find dirt on the pre-election nominees, wouldn't the scrutiny be too severe? Maybe it would be so severe that it would dissuade the best nominees. And surely, it would be uncomfortable for a sitting judge—on a state or lower federal court—to be the topic of debate during a presidential election.

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99. What about the danger that having to name names in advance might unduly constrain the president's ability to adjust to changed circumstances? After all, in the period between the presidential election and when a seat on the Supreme Court opens up, circumstances can change. Those changed circumstances can, in turn, alter presidential preferences regarding appointments to the Court. The point is a fair one. Having named names in advance, the president would not be able to alter names as easily as he would have been able to do otherwise. But that is not necessarily a bad thing. If changed circumstances required a deviation from the previously named names, the president would have to explain, with specific reasons, why the new name was better in the context of those changed circumstances. For example, say that it is three years since the presidential election before a seat opens up on the Court. In that period, a new star has emerged in the ranks of the state court judiciary—one who is considered fair minded and insightful and whose opinions are the most cited of any state court judge in the country. For the president to name this person over the previously named individual, he would have to provide a credible and detailed explanation for why the new nominee was better than the prior one. Vague statements about how "this is the most qualified individual" would not suffice. The end result would be greater transparency.



The potential benefits of attacking an opponent's nominees are greater pre-election than post-election. But so are the potential costs. If, say, Romney announced nominees who were subjected to attacks that the public perceived as unfair, the public would likely attribute the unfairness to Obama. Obama probably would not persuade many people if he tried to say that the attacks were independent of him; people would likely believe that his people were involved in it, just as voters believed that George H.W. Bush was involved in the Willie Horton advertisement in 1988.<sup>100</sup> Indeed, if Obama tried to distance himself from attacks on Romney's nominees, voters might see that as him trying to weasel out of responsibility. In other words, in the crucible of an election, when the battle between two opposing ideologies is personified in a race between two individuals, the benefits and costs of everything relating to the campaign are received and borne by those two individuals.

It still may be that campaigns decide that a particular attack will win over more persuadable voters than it will deter. Increasing your vote count and/or decreasing your opponent's are the only cost and benefit that matter to a campaign. One can imagine many different attacks, and some percentage of them will win more votes than they will lose. But it is difficult even for political professionals to figure out in advance which attacks will work and which will not, and sometimes they explode in the face of those peddling the information. In 2004, presidential candidate John Kerry pointedly noted that Dick Cheney's daughter is a lesbian,<sup>101</sup> hoping to score political points. But the reaction to his statement was so negative that it likely was counterproductive for Kerry.<sup>102</sup>

Indeed, the scrutiny for those named before the election could be lower—and perhaps better, from the candidate's and the populace's perspective—than it would be after the election. There are a couple of reasons why this might be the case. First, during an election, given that there are numerous other issues to be debated, the scrutiny may be lower. Further, the larger the number of names announced,

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100. See, e.g., Jake Tapper, *The Willie Horton Alumni Association*, SALON, Aug. 25, 2000, <http://archive.salon.com/politics/feature/2000/08/25/horton/index.html>.

101. Tom Vanden Brook, *Kerry Lesbian Remark Angers Cheneys*, USA TODAY, Oct. 14, 2004, [http://www.usatoday.com/news/politicselections/nation/president/2004-10-14-lynn-cheneys\\_x.htm](http://www.usatoday.com/news/politicselections/nation/president/2004-10-14-lynn-cheneys_x.htm).

102. Sharon Kehnemui Liss, *Kerry Clarifies 'Lesbian' Remark*, FOX NEWS, Oct. 16, 2004, <http://www.foxnews.com/story/0,2933,135392,00.html>.

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the lower the attention paid to any one of those names is likely to be. Second, think about the type of scrutiny that might be applied before an election versus after. After the election, the president has control of the choice. Scrutiny therefore tends to be largely of the muckraking variety—looking to see whether the nominee rented dirty videos or joined some inappropriate student group while in college. That makes sense, since the only game being played is unearthing enough dirt to tank the nominee. If the game is moved to the pre-election period, however, the scrutiny might be in terms of which presidential candidate has the better proposed nominees. In other words, it might be scrutiny of the useful and positive variety. Some of the proposed nominees might still come out looking worse for the wear. But those potential nominees, if given the choice, may prefer scrutiny before the election over scrutiny after.<sup>103</sup>

A particular incentive for potential nominees is that there may be a kind of estoppel effect. A potential nominee whose name was put forward before the election and whose candidate won could make two related arguments. First, my candidate won the election after releasing my name, so the voters effectively ratified my selection. Second, you had a chance to make your objections before the election, and you failed to do so persuasively, so now it is unfair for you to bring forward new arguments or even to oppose me.

One might still imagine that potential nominees will not want to be named in advance, because they will know that the scrutiny may be for naught. After all, the most obvious difference between pre- and post-election nomination is that the scrutiny after the election is only for the nominee whose candidate is elected, whereas the scrutiny before the election is for two sets of nominees (one for each major party presidential candidate, assuming that both decide to name their nominees). So one set of names will be subject to public scrutiny and then still not be selected for the positions, because their candidate lost the election. In addition, if a presidential candidate names three possible choices for each given cabinet position, then

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103. Relatedly, since expected scrutiny and expected penalty go hand in hand in making strategic choices during an election, it may be that the penalty for naming a person who turns out to have a sordid past might not be as large in the pre-election context. Perhaps, in the pre-election context, because the public will know that the candidate had less time to evaluate the potential nominees, the penalty will be lower. We concede, however, that it may be that the first time or two a presidential candidate names names, the public will expect lots of vetting (because of the boldness of trying something new).

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not only would the losing candidate's choices be subject to scrutiny without obtaining the cabinet position, but so would two-thirds of the winning candidate's named choices. This last point is a reason why a presidential candidate might choose to name a single person for each cabinet position. The biggest payoff for undecided and skeptical voters arises if they *know* that their favored candidate will be secretary of X, rather than knowing that their favored candidate is one of three possibilities.

But let us return to the nominees of the presidential candidate who loses. What difference will this make? It will disappoint those who are named by presidential candidates who lose the election. But will it make enough of a difference to persuade anyone to remove her name from consideration by a presidential candidate? We doubt that it would, for a few reasons. First, there is distinction in being chosen by a candidate. Everyone would prefer to be secretary of the treasury rather than simply to be proffered as the secretary if one's presidential candidate wins. The question is which of the following would be a person's second choice: (1) to be named as a presidential candidate's choice for secretary of X but have one's candidate lose; (2) never to have been named, believing (along with at least several others) that one would have been chosen by the presidential nominee had he been elected but never finding out because that candidate lost. Most would choose the first option, because with the first option the potential candidate has been identified as such and thus received a fair amount of fame and press attention. There is an analogy to the position of running mate. Vice-presidential candidate Bob Dole would have preferred that he and President Ford had been elected in 1976. But merely being on the ticket helped his political fortunes, pushing him to a greater level of prominence than he would have achieved if he had not been chosen as Ford's vice-presidential running mate.<sup>104</sup> The same is true for Sarah Palin, Joe Lieberman, Jack Kemp, Geraldine Ferraro, and most every other losing vice-presidential candidate.<sup>105</sup>

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104. See Martin Tolchin & Jeff Gerth, *The Contradictions of Bob Dole*, N.Y. TIMES, Nov. 8, 1987, § 6, 63 (describing Dole's televised debate with Walter F. Mondale as the most memorable moment of 1976 vice presidential race).

105. Some suggest that simply being on Bob Dole's short list in 1996 (Dole eventually chose Jack Kemp) propelled McCain's career. See Mark Leibovich, *The Great American Float*, N.Y. TIMES, June 22, 2008, at 1 (Week in Review), 5..

That said, neither the presidential candidate nor his announced choices will be happy if the candidate puts forward a name with skeletons in the closet. Many aspects of one's personal life (e.g., having sex with prostitutes or soliciting sex in men's bathrooms) are considered fair game, and presidential candidates are going to avoid people about whom there might be embarrassing revelations. This will lead to a preference for pre-election nominees who can credibly claim to be squeaky clean.

One way to credibly establish such a claim is for the potential nominee or the campaign to hire an independent investigative firm to check her background. But the more obvious solution is for the FBI to perform background checks. The FBI already performs such checks for all nominees,<sup>106</sup> so this would just move up the time for a few of those checks.<sup>107</sup> As noted above, pre-election FBI background checks would have the added advantage of having the new president's team up and running as soon as possible after the election.<sup>108</sup>

Beyond that, a potential nominee could credibly claim to be squeaky clean based on a different sort of background check—the scrutiny that comes from running for office or holding other important political positions. Someone who has recently run for office can point out that political opponents and the press extensively researched her background and found nothing. So, insofar as private or FBI vetting is unattractive, pre-election selection will tend to favor existing politicians. And, again, pre-election selection will favor existing politicians for another reason: presidential candidates will want to name people with a significant following (in the hope that they are sufficiently popular to bring some persuadable voters to vote for the presidential candidate), and people with such a following will

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106. See Gorelick & Gorton, *supra* note 47.

107. Presidential candidates would not need to worry about a hostile administration getting information from the FBI. Such a leak would be a remarkable breach of protocol. If information about an FBI background check were released to the public in advance of an announcement, the presidential candidate would (fairly) express his outrage at the administration's violation of the FBI's processes. And the charge would likely be effective: people do not like the idea of the FBI playing politics. The hostile administration could try to remove its fingerprints from the leak. But, as with the release of unfair attacks, people will attribute the attacks to the party that benefits, and will associate that party (naturally enough) with the party's presidential candidate.

108. See *supra* notes 52–54 and accompanying text.

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tend to be existing politicians who, not coincidentally, have already been subject to much scrutiny.

One issue lingers: with respect to Supreme Court nominees, sitting judges may feel some discomfort. Maybe these judges would find it difficult to make decisions fairly while under such scrutiny. We are skeptical, however. At the outset, we note that it might not be so horrible if presidents choose Supreme Court justices from outside the pool of sitting judges. Sitting lower court judges do bring with them the experience of having been judges, but the Supreme Court is a different entity than the lower courts. As noted above, some commentators believe that we would be better served by justices who are drawn from beyond the judiciary.<sup>109</sup> There would be costs to not being able to draw from the pool of lower court judges, but possible benefits too.

The more important point is that if lower court judges did feel discomfort—as they probably should in politically sensitive cases in the period of time after their names have been announced by a presidential candidate—they could recuse themselves from those politically hot cases. Given that there is already a perceived problem with some lower court judges auditioning for the Supreme Court through their opinions, it might be good to eliminate that auditioning by naming names and inducing recusals.

Under the current norm, some appellate court judges may shape their opinions with an eye toward a presidential candidate's advisers who may be scrutinizing those opinions for the right kinds of attitudes. Naming names in advance should ameliorate that problem. It will reduce the number of judges auditioning and will also allow (if not force) the chosen ones to recuse themselves from some cases, or to take a leave of absence, to avoid the appearance of political favoritism. That transparency seems preferable to the opacity of a bunch of judges trying to outdo each other in currying favor with a new president.

*D. Too Much Distraction from the Key Issues  
About the Candidates Themselves*

Would forcing candidates to think hard about whom specifically they might want on the Supreme Court (or as their secretary of

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109. See *supra* text accompanying notes 23–24.

defense or treasury) before the election force them to turn their attention away from important campaign or policy questions? The answer depends on what a discussion of nominees would displace. One only has to look at the sorts of issues that the media choose to focus on—and therefore that the candidates have to focus on—in campaigns. Some give us useful information about a president's likely performance and policies (e.g., who has the better health-care plan),<sup>110</sup> but such discussions are often overwhelmed by endless rehashing of supposed gaffes or other ephemera.<sup>111</sup> A presidential candidate's naming of possible cabinet or Supreme Court appointees would produce at least some discussion about whether the named people would be good choices and what this reveals about the likely policies of the president's administration, which with any luck would be more illuminating about the president's likely policies and performance in office than whatever it would crowd out. Given the financial crisis that arose in 2008, wouldn't it have been worthwhile for the candidates to compete on who would appoint a better secretary of treasury? Or, given the situation in Iraq, maybe the country would have benefited from a competition in the 2008 election over who the secretaries of defense and state would be.

Our proposal does push the electoral considerations slightly toward a focus on a presidential candidate's team. But, given the importance of cabinet members and Supreme Court justices, such a move seems appropriate. And, significantly, the media and voters already pay a lot of attention to people who are perceived as reflecting on the presidential candidate's judgment—in this past election cycle preachers have loomed large,<sup>112</sup> and to a lesser extent

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110. See, e.g., Margaret Talev & William Douglas, *Obama and McCain Bring Health-Care Fight to Red States*, ANCHORAGE DAILY NEWS, Nov. 2, 2008, available at <http://www.adn.com/3046/story/575813.html>.

111. See, e.g., Paul Hitlin et al., *Gaffes Drove the Campaign Narrative Last Week*, JOURNALISM.ORG, <http://journalism.org/node/11881> (providing an overview of the 2008 Presidential Campaign for the week of July 7–13, noting a high level of coverage on gaffes and anticipating that coverage will continue to be dominated by such gaffes).

112. E.g., Charles Krauthammer, *A Question of Barack Obama's Character*, REALCLEARPOLITICS, Oct. 10, 2008, [http://www.realclearpolitics.com/articles/2008/10/obamas\\_character\\_still\\_questio.html](http://www.realclearpolitics.com/articles/2008/10/obamas_character_still_questio.html) (discussing Obama's ties with Reverend Jeremiah Wright); Brian Todd et al., *McCain Rejects Minster's Endorsement*, CNN.COM <http://www.cnn.com/2008/POLITICS/05/22/mccain.hagee/index.html> (noting the controversy over John Hagee's and Rod Parsley's endorsements of John McCain, and McCain's decision to reject both endorsements).

the tactics and lobbying ties of top campaign officials.<sup>113</sup> This highlights that voters are often interested in the people around a president. Even casual sports fans usually know something about more than one player on a given team, so it is not surprising that voters have some interest in a presidential candidate's team.<sup>114</sup> As long as the media and voters are going to be interested in people who seem to reflect on a candidate, it will be in a candidate's—and society's—interest for at least some of that focus to shift toward the people who will be making important decisions. Cabinet officials and Supreme Court justices will be at the top of that list.<sup>115</sup>

We recognize the argument that the presidential race should be about the candidate's character, his family values, his spouse's family values, and so on. Our proposal would distract from that—for which we make no apologies.

#### *E. Reducing the Incentives to Work on the Candidates' Campaigns*

The claim underlying this argument is that many of those who work on presidential campaigns or contribute money do so in the hope of being rewarded with positions in the administration. The competition among these campaigners is most intense for the most prestigious positions, such as judgeships, cabinet positions, and ambassadorships. Sometimes, the person doing the campaigning is

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113. E.g., Ken Dilenian, *Obama's Claim of Independence Questioned*, USATODAY.COM, Apr. 16, 2008, [http://www.usatoday.com/news/politics/election2008/2008-04-15-obamainside\\_N.htm](http://www.usatoday.com/news/politics/election2008/2008-04-15-obamainside_N.htm) (discussing Obama's ties to law firms, state lobbyists, and corporate executives); Menachem Rosensaft, *Meet John McCain's Pals*, HUFFINGTON POST, Oct. 20, 2008, [http://www.huffingtonpost.com/menachem-rosensaft/meet-john-mccains-pals\\_b\\_136085.html](http://www.huffingtonpost.com/menachem-rosensaft/meet-john-mccains-pals_b_136085.html) (discussing McCain's ties with Phil Gramm and Charles Black).

114. As a comparative matter, the average voter will likely know far more about the starting players on their favorite team than they will know about any of the people on a candidate's team (and maybe the candidate himself), but as an absolute matter many voters will still have interest in a presidential candidate's team.

115. What if McCain had said that the economy was in shambles and that he was going to ask Robert Rubin and Larry Summers to come back to run things on the financial front? Maybe Obama would have countered with someone better. Or maybe he would have said that he also would ask Rubin and Summers. That way—assuming the electorate agreed that the Rubin-Summers combination would be optimal—we might have had effective financial policy regardless of who was elected. One can spin out a similar story for the Supreme Court. If the candidates were to compete and there was a clearly optimal nonpartisan solution that the populace preferred—maybe a modern version of Learned Hand or Henry Friendly (neither of whom ever got on to the High Court)—we might even get a situation where the candidates would end up being forced to agree on the same candidate. The candidates would not like this because it would reduce their ability to pay back political favors. But the electorate would be better off.

not seeking the appointment for herself but wants input on whom the president selects. The incentive effects on behavior are the same, though. There is a tournament of sorts among supporters, rewarding those who do the most with appointments or the power to influence appointments. If candidates are forced to name names in the pre-election context, this will reduce the incentives for supporters to work hard since they will now know who will be receiving positions and who will not.

We have no quarrel with the foregoing; it strikes us as an accurate portrayal of incentives. Yes, there will be fewer incentives to work hard on a campaign for those who are hoping to leverage their work into an appointment. And that will make it more difficult for the candidates to run their campaigns. Maybe candidates will end up having to work harder on fundraising. But is there a net social loss? Reducing the candidates' ability to use the prospect of future appointments as a carrot to induce effort from campaign staff increases social value in that having fewer patronage-based appointments should result in better-quality appointments overall.<sup>116</sup>

#### VI. CONCLUSION: WORTH MOVING BEYOND THE STATUS QUO?

In light of the above, and dozens of other objections that we have not anticipated, would it be a good idea for the rules of the presidential election game to be changed—to push candidates to give specific answers about who their nominees for cabinet and Court positions will be? There are potential downsides. The candidates might refuse to answer the questions. Or there might be large-scale capture by interest groups. We believe, however, that the odds are in our favor that inducing greater competition over the names of prospective nominees will yield improvement over the status quo.

The gains would flow from forcing information out of the candidates. Voters would have more information in two ways. First,

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116. A related objection is that the election process, where various contenders for appointments compete to show the presidential candidate which of them is more loyal and capable (e.g., by demonstrating good or bad judgment in what they say to the press), supplies useful information to presidential candidates. But characteristics like loyalty and judgment will likely have been demonstrated for months (if not years) before, and any additional seeming increment of those characteristics shown during the campaign may not reveal accurate information. Anyone can put on a good show for a couple of months, if the incentive is a top spot in a new administration.



the public would know who key members of an administration would be. The public could evaluate the president's choices, rather than guess about them based on reports of whom the president seemed to favor or who worked tirelessly on his campaign. Second, the identity of those nominees would provide information about the other people that the president might appoint, and more generally about the sorts of policies that the president might pursue. Naming names is a costly signal—and costly signals yield more information than does cheap talk. This information will be particularly valuable for presidential candidates whose prior public careers have been fairly short, which describes a good percentage of recent presidents.<sup>117</sup> More broadly, the choices made would give us important information about the potential president. Is he willing to take risks by nominating potentially controversial candidates? Does he choose people with lots of government experience or outsiders? Does he seem more comfortable with people of a certain temperament?

And while we have nothing against discussions of the trivial—we like political gossip as much as the next person—naming names would allow for more substantive and informative news stories about the candidate's people, and with any luck would reduce the space devoted to pure fluff. In each of the last two presidential races the *New York Times* saw fit to devote front-page space to an article about the person who carries the Democratic nominee's snacks.<sup>118</sup> These gentlemen seem like nice people,<sup>119</sup> but does the public gain insight into the likely policies of a President Kerry by learning that he likes peanut butter and jelly sandwiches, or the policies of a President Obama by finding out that he likes Met-Rx protein bars? More useful would be profiles of the people that a candidate was actually going to choose for policy positions. Such profiles are not terribly useful when many names are bandied about; these discussions have

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117. Eisenhower had no previous experience as an elected official; Kennedy had a fairly short legislative career prior to his presidency; Carter had a single term as Governor of Georgia; George W. Bush had a term and a half as Governor of Texas.

118. See Ashley Parker, *On the Court and on the Trail, One Aide Looms Over Obama*, N.Y. TIMES, May 27, 2008, at A1 (profiling Reggie Love, Barack Obama's "body man," who says that his job is to "Take. Care. Of. Stuff," for example procuring Met-Rx protein bars for Obama); Jodi Wilgoren, *Part Butler and Part Buddy, Aide Keeps Kerry Running*, N.Y. TIMES, April 28, 2004, at A1 (profiling Marvin Nicholson, John Kerry's "body man" who is identified as the "chief of stuff"—for example procuring peanut butter and jelly sandwiches for Kerry).

119. One of the authors has met both and can attest that they seem quite likable.

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at most a snippet about each of the people who might be a prominent cabinet member or a Supreme Court justice. And the discussions often spend a fair amount of time speculating about whose star is ascending and whose is falling. Such guesswork can make for a parlor game, but its value is limited. By contrast, if we had actual names, then we could learn more about them and as a result learn about the policies that the administration would likely pursue.

Ultimately, the desirability of a competition over names is in the eye of the beholder. But note a broader dispositional factor that looms large: one's attitude toward change. For those wary of change, our proposal will be anathema. For those sympathetic to it, it may be welcome. It likely comes down to your sympathy for Edmund Burke versus your sympathy for a quotation made famous by Ronald Reagan: "Status quo, you know, that is Latin for the mess we're in."<sup>120</sup>

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120. See President Ronald Reagan, Remarks at a Reception for Members of the Associated General Contractors of America (Mar. 16, 1981), available at <http://www.reagan.utexas.edu/archives/speeches/1981/31681c.htm>.