



FROM THE ARCHIVES

3 Must-Have Supreme Court Nomination Documents



EDUCATION

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From the Archives brings primary source documents and exploration into the classroom. These educational resources, carefully curated by our Education team, are meant to enhance historical discussions around relevant topics of today in history, civics, geography, and economics.

“3 Must-Have Supreme Court Nomination Documents” looks at President Ronald Reagan’s appointment of Supreme Court Justice Antonin Scalia in 1986. Primary Source A outlines the suggested qualities of an ideal candidate for President Reagan to nominate to the Supreme Court. Primary Source B provides a Memo to the President from Peter J. Wallison, Counsel to the President, in which Wallison provides background information with a few potential questions for both Justice Rehnquist and Judge Scalia. Primary Source C is a transcript from President Reagan’s August 9, 1986 Radio Talk on the appointment of the Supreme Court Justices. Each of these documents showcase the amount of thought and consideration the president must take when nominating a Supreme Court Justice.

Suggested Classroom Activities:

1. Students read Primary Source A and have a brief discussion as to why these qualities may have been important for President Reagan to consider when thinking about his nominations. Are there any qualities you feel are missing from this list? Have the students draft their own recommendations to the president today. What qualities would they include and why?
2. Have students compare and contrast Primary Source A with Primary Source A3 from the *Appointing a Supreme Court Justice: The Case of Sandra Day O’Connor*. What qualities and recommendations have changed from 1981 to 1986? Have the students research what historical events may have influenced these changes.
3. Present your students with a scenario. A Supreme Court Justice has suddenly passed away and it is their job as Counsel to the President to make a recommendation to the president on Supreme Court nominations. Modeling their report on Primary Source B, have students draft a Memo to the president with their recommendation and potential questions that the president may want to ask. Use contemporary articles as a research starting point.
4. Tweeting History! Today is Saturday, August 9, 1986. Your students are journalists working for a major newspaper publication and have been tasked to cover the Presidential Radio Talk given by President Ronald Reagan. Have the students construct an informative tweet (140 characters or less) that summarizes the president’s message to the American public. #hashtags encouraged.

Developed by
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The ideal candidate for this President to nominate to the Supreme Court would be:

1. Conservative;
2. Intelligent;
3. Likely to exercise strong leadership on the Court;
4. Have predictable, well-formed views;
5. Easily confirmable;
6. A politically popular choice;
7. A good speaker and leader outside the Court;
8. Young and in good health;
9. Unlikely to quit; and
10. A good administrator (especially for Chief Justice).

For the remainder of this memorandum, I will describe in greater detail these characteristics.

I. CONSERVATIVE

The first characteristic is the most important but also the hardest to define. In particular, a decision will have to be made at the outset whether, by "conservative," we mean those who eschew all judicial activism, or those who embrace activism for conservative ends, or whether either approach is acceptable. If we include conservative activists, then there is the additional question of what a conservative activist is: someone who favors libertarian principles? who favors the government in most cases? who is a member of the Chicago school? who shares the New Right's social agenda?

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Of course, the only intellectually honest thing to do is to require that our candidate renounce judicial activism, period, no matter how laudable the ends sought.

II. INTELLIGENT

This quality overlaps with several others, but deserves separate mention. Without intelligence, a justice is necessarily less predictable (he can be lead astray), less likely to provide effective leadership, and harder to confirm. Most important, however, he is less likely to write good opinions and form the law the way it should be, the sine qua non of a great justice.

III. LEADERSHIP ON THE COURT

Voting the right way is not enough. The ideal justice must convince other justices to vote the right way, too, and he must work with them to build majorities and insert the best language possible in opinions. To do this he must be intelligent enough to be respected by the other justices; be willing to work harder than he would if he were doing just "his" work; be aggressive but congenial and diplomatic; and have a taste for Court politics and argument. He must know how to co-opt others, and when to compromise himself. Some judicial experience is probably useful for all this.

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IV. PREDICTABLE, WELL-FORMED VIEWS

There are two parts to this characteristic: we must know what he thinks now, and he must have thought about issues enough that he will be unlikely to change his mind. For either, several years of federal judicial experience (since so many issues critical to us are dealt with little if at all by state courts), some time in academia, or a considerable body of written work introduced elsewhere is desirable. In particular, we should have a good idea of the candidate's views in the critical areas: criminal justice, civil rights, justiciability, and separation of powers, and the role of the courts generally.

Finally, and although I am somewhat uncomfortable with this notion, the justice should probably have some general ideas ahead of time of where he wants to take the law. Unfortunately, the Court does not merely decide cases: it also decides which cases to decide, and it writes opinions which govern the way future cases are decided in the Supreme Court and elsewhere. Thus, the ideal justice will have given some thought to which cases he will want the Court to pick and what language to include in opinions -- the better to shape the law.

V. EASILY CONFIRMABLE

This characteristic and the next one are intended to be mirror images of one another, though there is some overlap:

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by "easily confirmable" I mean primarily that there is an absence of downsides; by "politically popular" I am referring to the presence of "upsides."

One perennial objection to candidates is that they lack "judicial temperament." I think this means essentially that the candidate is ill-tempered and speaks without thinking, so candidates with some reserve are to be preferred.

Other downsides that will make confirmation more difficult or even impossible include past personal scandals (particularly regarding finances, sex, and drinking); identification with racist or other unpopular groups (including clubs); a reputation as being stupid, a political hack, or a crony of some Administration official, especially the President; and a poor ABA rating.

In the long run, most of these don't matter once the candidate has been on the bench for awhile. However, if they prevent confirmation, they are bad not only for the candidate per se, but also because a defeated candidacy limits the choices available for the next nominee (Blackmun was an alternative choice). Even if ultimately confirmed, a stormy confirmation can embarrass the President and cost political capital that could be spent elsewhere, and may result in the new justice taking longer to gain acceptance from his peers and exercise his full power on the Court.

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VI. POLITICALLY POPULAR

This should be the least important characteristic, since it is so hard to predict what will make a candidate popular, and because the good that such popularity can do the Administration is ephemeral compared to the bad an inferior justice can do on the Court.

That said, Sandra O'Connor is a happy example of how a good pick can pay political dividends. The candidate most likely to be politically popular would be photogenic; glib; female or a member of some racial or religious minority or ethnic group; respected by the press; or associated with a popular cause. Geography has been a factor in the past; the Court seems to have its share of westerners, now, but there are still no southerners.

VII. EFFECTIVENESS OUTSIDE THE COURT

Along with political popularity, this should be the least important consideration. Nonetheless, it is true that -- perhaps increasingly -- justices give influential speeches and interviews, ask for legislation from Congress, and make suggestions to the Executive Branch. So, it is a plus if a candidate can do this sort of thing effectively -- (though it may be an even bigger plus, on balance, if he refrained from doing it at all).

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VIII. YOUNG AND IN GOOD HEALTH

This characteristic and the next are important since we would like our appointees to be around for as long as possible. At some point, extreme youth (less than 40) can become a liability, however, making confirmation more difficult and the press bad. But, a nominee 55 or younger and in good health is highly desirable.

IX. UNLIKELY TO QUIT

Besides dying, a justice can leave the bench by resigning. It is not impossible for these resignations to take place sooner (Goldberg) rather than later (Stewart), so some thought should be given to what sort of candidate is likely to leave prematurely. This may be another reason why extreme youth is not all to the good: after ten years on the Court a justice is more likely to look for new worlds to conquer if he is then forty-five, rather than sixty-five. The other reason for quitting would be, presumably, unhappiness with the job. For this reason, the candidate should be not only grudgingly willing, but positively enthusiastic about joining the Court; also, because the job is, or is to some, arduous, he should be under no illusions as to what work is required, and he should be able to do it. All of this argues again for someone who has some familiarity with what justices do or some experience doing it -- i.e., as a sitting judge or academic, and preferably as both.

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X. A GOOD ADMINISTRATOR

All justices have some administrative responsibilities, so a reputation as an excellent administrator -- or as a terrible one -- is relevant. In the case of the Chief Justice, however, this characteristic is more than relevant: it may even be critical. Some experience in administration, preferably with the government, is definitely desirable.

CONCLUSION

Putting all of this together, the ideal candidate would be an intelligent conservative with a forceful but congenial personality and a vision of where the Court should go. He should have some federal judicial or academic experience (preferably both) so that his views are predictable and settled; some administrative experience in government is also desirable. He should be no younger than 40 but no older than 60 (and preferably 45-50), in good health, desirous of spending the rest of his life on the Supreme Court, and aware of what the job entails (here again, judicial or academic experience is useful). Obviously, he should be scandal-free and have judicial temperament. It would be nice if he was a telegenic one-armed Armenian who gave good speeches, but that is not essential.

Roger Clegg
633-3425

file
SCTHE WHITE HOUSE
WASHINGTON

June 11, 1986

MEMORANDUM FOR THE PRESIDENT

FROM: PETER J. WALLISON 
COUNSEL TO THE PRESIDENTSUBJECT: Questions for Prospective
Supreme Court Nominees

To assist you in choosing among the candidates for possible nomination to the Supreme Court, I have set forth some brief background information together with a number of potential questions for Justice Rehnquist and Judge Scalia. The questions are designed to elicit answers revealing the candidate's philosophy, commitment to being a judge and other personal qualifications. Justice Rehnquist is a candidate for elevation to Chief Justice. Scalia is also a candidate for Chief Justice, or, if you name Justice Rehnquist as Chief Justice Burger's successor, as a candidate for Associate Justice to succeed Justice Rehnquist.

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Background on Justice Rehnquist

Justice Rehnquist has been an Associate Justice of the U.S. Supreme Court since 1971, when he was appointed by President Nixon. He has been described as the intellectual leader of the conservative bloc on the Court and has consistently supported federalism and strong law enforcement positions. Justice Rehnquist is 61 years old and questions have been raised about his health and his continuing commitment to the Court's work. Even if his health is good, he may not be able to serve more than 10 to 15 more years. Justice Rehnquist has a proven track record, and observers of the Court believe that he can forge majorities for his positions. Some of Justice Rehnquist's statements when he was a clerk to Justice Jackson, particularly on race relations, could be controversial. (The Justice Department's summary on Justice Rehnquist is attached.)

You should stress to Justice Rehnquist his excellent contributions to the Court's opinions, and the high regard in which he is held by everyone in the Administration.

Questions

1. What are the critical issues that you think the Supreme Court will face over the next five to ten years?
2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?
3. In which direction do you see the Court moving on the issue of federalism?
4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?
5. How should judges interpret the Constitution and define rights?
6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?
7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?
8. Do you have any hesitancy taking on the additional administrative and other responsibilities of Chief Justice?
9. Would you remain on the Court if someone from outside the Court were nominated for Chief Justice?
10. Is there any reason why you might not want to go through a confirmation process at this time?

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Background on Judge Scalia

You appointed Antonin Scalia to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. If you nominated him to the Supreme Court, he would be the first Italian-American to receive that honor. Judge Scalia is regarded as one of the intellectual leaders, along with Judge Bork and Justice Rehnquist, of judicial conservatism. Judge Scalia served as Assistant Attorney General in the Ford Administration, and has been a professor of law at the University of Chicago, Stanford and other top schools. He is an expert in administrative law and has argued against excessive government regulation. His judicial decisions have strongly supported the principle of "separation of powers." He has thus recognized the importance of deference to the Executive Branch in matters involving the military and the conduct of foreign relations. Judge Scalia is regarded as a forceful individual capable of personal as well as intellectual leadership. He is 50 years old. (The Justice Department's summary on Judge Scalia is attached.)

You should stress to Judge Scalia your admiration for his work on the D.C. Court of Appeals.

Questions

1. What are the critical issues that you think the Supreme Court will face over the next five to ten years?
2. What role should the Supreme Court play in resolving disputes between Congress and the Executive Branch?
3. In which direction do you see the Court moving on the issue of federalism?
4. Should the Supreme Court continue to move away from the decisions of "the Warren Court" in the area of criminal justice and law enforcement, or has a reasonable equilibrium been reached?
5. How should judges interpret the Constitution and define rights?
6. Given the current composition of the Court, how would you establish a consensus among the Justices for your views?
7. Are there any personal or health reasons why you would not be able to make a full commitment to this position?
8. Do you have any hesitancy whatsoever taking on the great responsibility of work on the Supreme Court?
9. Is there any reason why you might not want to go through a confirmation process at this time?

(Dolan/PMR)
August 8, 1986
10:30 a.m.

RR

Judges

PRESIDENTIAL RADIO TALK: SUPREME COURT JUSTICES
SATURDAY, AUGUST 9, 1986

My fellow Americans: Shakespeare's reminder that "the world is full of ornament" and the "outward shows" are "least themselves" has always had a special relevance for the political world but it was especially so last week here in Washington.

The United States Senate began hearings on the nominations of William Rehnquist and Antonin Scalia, men I've named to the position of Chief Justice of the Supreme Court and Associate Justice of the Court. These hearings are a healthy process, mandated by our Constitution. Even though they produce a lot of outward show and ornament, they provide the American people with an opportunity to evaluate for themselves the quality of a President's appointments.

To be sure, there were many serious allegations by political opponents of Justice Rehnquist and Judge Scalia. One Democratic Senator announced he would vote against Justice Rehnquist even before the hearings started. There were dark hints about what might be found in documents Judge Rehnquist wrote while a Justice Department official many years ago. To deal with these unfounded charges, I took the unusual step of opening the files of the Justice Department so the Senate Committee could see the documents themselves. Of course, there was nothing there but legal analyses and other routine communications. The hysterical charges of "cover-up" and "stonewalling" were revealed for what they were -- political posturing. I was sorry to have to release

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these documents, but Supreme Court nominations are so important that I did not want my nominees to enter upon their responsibilities under any cloud. And so I was delighted that when all was said and done, our nominees emerged unscathed from last week's hearings.

Justice Rehnquist, recognized even during his early years as a brilliant mind, graduated first in his class from Stanford Law School. He clerked for the Supreme Court, an early mark of distinction in any legal career. He then returned to Arizona to practice law, coming back to Washington some years later to serve as an Assistant Attorney General in the Department of Justice.

Most important, for the past 15 years he has served as a Justice of the Supreme Court with extraordinary diligence and craftsmanship. His opinions are renowned for their clarity of reasoning and precision of expression. And when his colleagues on the Supreme Court learned that I would nominate Justice Rehnquist to preside as Chief Justice, they were unanimous in expressing pleasure and approval. It's hard to imagine higher praise for anyone in the legal profession than that.

Turning to Judge Antonin Scalia, he's regarded in the legal profession as a superb jurist, a first-class intellect, and a warm and persuasive person. He has served in the Department of Justice, taught law at the University of Chicago and the University of Virginia, and served since 1982 as a judge on the U.S. Court of Appeals here in the District of Columbia. The American Bar Association gave Judge Scalia -- as they gave Justice Rehnquist -- their highest rating. I might add that as

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the father of nine children, Judge Scalia holds family values in high esteem. And I was especially delighted with his nomination because Judge Scalia is the first Italian-American in history to be named to the Supreme Court.

Beyond their undoubted legal qualifications, Justice Rehnquist and Judge Scalia embody a certain approach to the law -- an approach that as your President I consider it my duty to endorse, indeed to insist upon.

The background here is important. You see, during the last few election campaigns, one of the principal points I made to the American people was the need for a real change in the make-up of the Federal judiciary. I pointed out that too many judges were taking upon themselves the prerogatives of elected officials. Instead of interpreting the law according to the intent of the Constitution and the Congress, they were simply using the courts to strike down laws that displeased them politically or philosophically.

I argued the need for judges who would interpret law, not make it. The people, through their elected representatives make our laws, and the people deserve to have these laws enforced as they were written.

Of course this upsets those who disagree with me politically -- and I have a lurking suspicion that politics had more than a little to do with some of the tactics used against Justice Rehnquist. But I'm confident that mindful of their superb legal qualifications, the Senate will confirm Justice Rehnquist and Judge Scalia. And I can assure you: We will

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appoint more judges like them to the Federal bench. If I may quote Shakespeare again now that the political commotion of the confirmation hearings is over: "All's well that ends well."

Until next week, thanks for listening and God bless you.

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EDUCATION



About Us

The Walter and Leonore Annenberg Presidential Learning Center (APLC) at the Ronald Reagan Presidential Foundation is committed to engaging the future leaders of America in the study of our nation's democratic process with the aim of developing proactive informed, educated, and conscientious citizens and leaders.

Programs

- **Speaker Series for Students:** The Speaker Series for Students is designed to bring students into contact with leading thinkers, practitioners, and heroes in the field of civic engagement. Past events have included a Veteran's Day panel, Buzz Aldrin, Medal of Honor recipients and Justice Sandra Day O'Connor.
- **Educator Programming:** The APLC develops project based, backwards designed curriculum, and distributes this to educators at no cost. By creating and distributing free curriculum resources, the APLC shares information about both its programming and the current state of civics education. This classroom curriculum is available for free on our website: www.reaganfoundation.org/lesson-plans-overview.aspx
- **Professional Development:** Over the years we've collaborated with some of the finest professional development organizations in the country to offer high quality training and resources to teachers. We've worked with the National Constitution Center, Gilder-Lehrman, Constitutional Rights Foundation, the National Writing Project, and the California History-Social Science Project. We offer free professional development sessions for educators from Elementary through High School. With the goal of embedding civic learning in the classroom, our Educator Professional Development sessions tackle important skills such as developing student writing and communication skills. Professional Development is offered both onsite and on-line.
- **Leadership and the American Presidency:** The *Leadership and the American Presidency* is a program designed to facilitate leadership development among undergraduate students through the unique lens of the American presidency. The accredited course is grounded in real history as students critically examine the leadership journeys of presidents in relation to their own lives. Students hear from real leaders in the fields of business, government, and the nonprofit sectors learning lessons on leadership, while simultaneously applying all of these skills in the real world in an internship setting and in an authentic culminating course assessment. Utilizing Washington DC as a classroom, presidential sites will be leveraged to capitalize upon power of place and result in a meaningful and transformative leadership experience for students.

Scholarships and Awards

The Ronald Reagan Presidential Foundation has awarded more than \$1,000,000 in scholarships to students across the nation. We aim to recognize students whose leadership, communication, drive, and citizenship reminds us of our 40th President.

- GE-Reagan Scholarship Program
- Ronald Reagan Presidential Foundation Scholar Program
- Great Communicator Debate Series
- Ronald Reagan Student Leader Award Program

Learn about these opportunities to recognizing outstanding students on our website: www.reaganfoundation.org/scholarships

Class visits to the Discovery Center

The Discovery Center allows students to face the responsibilities and challenges faced by the Executive Branch, military, and media. Students have the opportunity to role play in a realistic, interactive environment. Learn more about the Discovery Center and how to visit here: www.reaganfoundation.org/DISCOVERY-CENTER.aspx