

Cynthia Koch: And now after that wonderful opening session it is my great pleasure to introduce to you the moderator for our second session, archivist of the United States, Allen Weinstein, welcome again.

<applause>

Allen Weinstein: Let me briefly introduce the panel, although I think they're all well know to you. To my left is Professor Laura Kalman, who is professor of history at the University of California at Santa Barbara, Professor Kalman. To Professor Kalman's left is Professor Doug Brinkley, who all of you know. Doug is not only one of our finest historians but arguably one of our most prolific ones so he always has a _____. I don't know how he does it, at least one. And, Doug, you're still a professor at Tulane at this point?

Professor Douglas Brinkley: Yes.

Allen Weinstein: And to Doug's--

Professor Laura Kalman: We're having trouble hearing you.

Nina Totenberg: As a radio person you got to speak into the microphone.

Allen Weinstein: To Doug's left is the person who just told me to speak into the microphone is my old friend Nina Totenberg and Nina is, of course, the very prize-winning correspondent for National Public Radio on all affairs legal and otherwise. And to Nina's left is Ambassador Boyden Gray, who these days, I want to get your title correctly, these days is the U.S. representative to the European Union and welcome to Boyden here but also as someone who has clerked for Earl Warren and who was a major law firm before this overtook him. Let me do two things. Let me sort of lay out this is a very free form panel. We know that by the nature of the subject itself. The authors of this subject decided that they would encourage us to tell anecdotes or at least to tell inside stories is I believe the way they phrased it in the advertisement. I'm going to leave it to everybody here whether they want to tell an inside story or not. I'm going to raise two questions just to see whether they were stir some debate in the room. I brought a book with me by someone who I think some of you know, William Rehnquist, his little book on the Supreme Court and the former chief justice said at one point that Webster's dictionary defines the word "pack" as in court packing as "to choose or arrange a jury,

committee, et cetera, in such a way as to secure some advantage or to favor some particular side or interest." "Thus, a president who sets out to pack the court," Rehnquist says, "does nothing more than seek to appoint people to the court who are sympathetic to his political or philosophical principles. There is no reason in the world why a president" he continues "should not do so. One of the many marks of genius that our Constitution bears is the fine balance struck in the establishment of the judicial branch." He then goes on to say, "Presidents who wish to pack the Supreme Court, like murder suspects in a detective novel, must have both motive and opportunity. Here even Madison had both and yet even he failed." Let's talk about court packing a little bit and the definition of that. Has there been court packing since the famous court packing? But let's also raise a question that I've always been fascinated with. How do we describe-- at what point do we begin to describe a particular court with the identifier of the Chief Justice only one member whose court it supposedly is? What defines a court in terms of periodizing this very long period that we're dealing with? I'm just going to let you talk about that or anything else you'd like to talk about given the period limitations. And, Laura, we'll start with you.

Professor Laura Kalman: Thank you. One obvious question during the Truman-Clinton period is the increasing acrimony of the confirmation process. Between 1811 and 1894, more than one-quarter of the nominees to the court were rejected, but from 1894 to 1967 only one nominee out of 64, Judge Parker, was rejected. The confirmation process was only occasionally contentious as in the nomination battles of Brandeis and Chief Justice Hughes. One might even argue that the Senate during this earlier period for most of the 20th Century wasn't doing its job. Wouldn't the country in Charles Whitaker have been better off if the Senate had rejected Whitaker's nomination by Dwight Eisenhower? Whitaker was miserable on the Court and had to be hospitalized for depression. It's often said that the Bork nomination rang in the modern era of partisan court confirmation proceedings in which Senators, as Ted said, focused on nominees' ideology with the implication being that it was the liberals who first Borked a conservative nominee. The politicization of the confirmation process is sometimes considered the Bork battles most haunting legacy. During every presidential election since 1964, fewer Americans had participated in the political process. But as you'll recall they turned out in huge numbers for and against Bork and they watched the hearings on TV, thus Ethan Bronner [ph?] suggested that the combination of declining voter turnout and intense interest in the Supreme Court that you see during the Bork battle left us with one overriding question. Have Americans relinquished the power to define what it is to be an American to the U.S. Supreme Court? It's a good question but I'd argue that the politicization of the modern confirmation process began well before Bork when conservatives blocked Lyndon Johnson's appointment of Abe Fortas to succeed Earl Warren as Chief Justice in 1968. In the quarter century afterwards, four of 18 nominations were rejected, Fortas in '68, Hainsworth in '69, Carswell in 1970, Bork in 1987. One nomination wasn't acted on, Thornberry, and two were withdrawn, Douglas Ginsburg and Miers and there were

struggles over three others, the nomination of Justice Rehnquist as an associate justice and as Chief Justice, and the nomination of Justice Thomas. Rather than seeing the politicization of the confirmation process as a two-step process, as Ted White just suggested, I see it as a one-step process with the Fortas Chief Justice nomination in 1968 being the rubicon. And the Warren Court has cast a very long shadow. When the Nixon, Reagan, Bush I and Bush II administrations condemn liberal judicial activism they use the phrase often as a synonym for the Warren Court. Conservatives depict judicial activists as politically liberal judges who ignore the Constitution's plain words and use judicial power to substitute their own preferences for the will of the people. Judicial conservatives, on the other hand, are said to practice judicial restraint, defer to legislative bodies, and to respect rather than overturn the policy choices made by Americans through their elected representatives. Now without a doubt the Warren court was both liberal and activist, expanding civil rights and civil liberties. To conservatives its activism reflected the political backgrounds of so many of its members. Warren had been Governor, Black Senator, Goldberg Secretary of Labor, Fortas Undersecretary of Interior. These were fellows who had been active in politics who felt comfortable, conservatives said, transmuting constitutional law into politics. And the Fortas Chief Justice nomination hearings in 1968 became an occasion for rehearsing these accusations against the Warren Court. When Johnson had nominated his advisor and his attorney, Abe Fortas, to the Court in 1965, the Senate had overwhelmingly approved the nomination. This was the high tide of American liberalism. Fortas and Johnson, of course, remained close after that. You can find a typical day in Justice Fortas' life on any White House diary sheet in the Lyndon Johnson library. Eight-thirty Fortas might receive a call from Johnson about airline strike negotiations; 11:30 he might be at the White House for a meeting about Vietnam; then to the Supreme Court for an afternoon of work, punctuated by telephone calls from the White House on the special red phone in Fortas' office; and finally to the White House for a state dinner that might well feature entertainment that Fortas, an enthusiastic violinist had arranged. Meanwhile, the Warren Court marched forward with Fortas' enthusiastic participation. As a Supreme Court justice he joined enthusiastically in the Warren Court's liberal judicial activism and wrote opinions expanding civil rights and civil liberties including the rights of accused criminals. Well by 1968, many had come to believe that the liberal approach that the Johnson administration and the Warren court adopted on race and crime was not working. Though all presidential candidates tried to exploit the law and order issue in '68, as Ted suggested, Nixon did so best. The Warren Court became an issue with Nixon blaming crime on the Warren Court and pledging that as president he would appoint justices who favored strict construction. One of the many who listened to Nixon was Chief Justice Warren. That was why he went to the White House on June 13, 1968 and handed Lyndon Johnson a letter reading: "I hereby advise you of my intention to resign as chief justice effective at your pleasure." Clearly Warren, a Nixon enemy, thought that Nixon might win the election and was terrified by the sort of law and order Chief Justice that Nixon would appoint. At their meeting, Warren told Johnson that he hoped that the president would appoint a new Chief Justice who shared Warren and Johnson's commitment to social justice. Johnson

announced he was nominating Fortas two weeks later. Initially, it seemed that the Fortas nomination would be approved, but it was ultimately blocked by Senate filibuster. Candidate Nixon encouraged conservatives to oppose the Fortas nomination on the grounds that its success would mean a continuation of the Warren Court's liberal judicial activism but Nixon kept largely silent about the Fortas nomination, limiting himself only to the general comment that the next president should name the next Chief Justice. Since Fortas was Jewish, Nixon was afraid that open opposition to the nomination would hurt his chance of getting the Jewish vote. And so, Republicans and conservative Democrats in the Senate did Nixon's work for him, alleging that Fortas was a crony of LBJ and had breached the principle of separation of powers between the White House and the judiciary by continuing to advise Lyndon Johnson as a Supreme Court justice, though Supreme Court justices had long advised presidents. Conservative Republicans and Democrats vociferously attacked the Warren Court for coddling criminals and protecting obscenity. Fortas undertook to defend himself in the court by becoming the first Chief Justice from the court's ranks to testify before the Senate Judiciary Committee. There he perjured himself. He said that Lyndon Johnson had never discussed with him any matter that might come before the Court, which wasn't true. He maintained he had attended White House meetings on Vietnam very infrequently and had said little at them when he had attended them often and said a great deal. Add his relationship with Johnson to conservatives' disapproval of the Warren Court. At one point they berate him for an opinion that was handed down seven years before he joined the bench and their sense that they have a chance to change the direction of the court and you have a recipe for defeat. Johnson's lame duck status and Fortas' identification with both Johnson and the Warren court made his nomination too tough a proposition. So by the time evidence surfaced late in the game that Fortas had accepted \$15,000 in lecture fees for teaching a summer course, money raised by his former law partner from Fortas' former clients, the nomination was already doomed but the lecture fees were nails in the coffin. Like Bork's nomination, the Fortas chief justice nomination was defeated largely for ideological reasons. The experience with Fortas and other Warren court members apparently turned conservatives against appointing politicians to the court. Interestingly, as John Dean tells us in his great book on the Rehnquist choice, Nixon himself did not believe that a Supreme Court justice needed prior judicial experience. Nevertheless, as conservatives called for justices who practiced strict construction and judicial restraint they increasingly said the court needed justices with prior experience judging. Except for Powell and Rehnquist, whose nominations were the result of last minute scrambling by the Nixon administration, conservatives came to demand prior judicial experience usually on the federal appellate court, except in the case of Justice O'Connor in nominees after Fortas. With what result? The Rehnquist court demonstrated that conservative justices can be as activist as liberal ones. It declared more federal laws unconstitutional in a shorter period than the Warren court and cut back congressional power. Now, the only justices appointed between 1937 and 1967 who had prior judicial experience were Rutledge, Minton, Harlan, Whittaker, and Stewart and Marshall. Now everyone is expected to have it. In his new book, "The Next Justice," Chris Eisgruber persuasively

contends that prior judicial experience adds nothing to the process. When commentators criticized the Miers nomination because Miers had no prior judicial experience, I cringed. The Supreme Court's docket is almost completely discretionary so the justice's job is very different from that of other federal judges. If presidents insist on prior judicial experience, they should select those who have been state Supreme Court judges, like Brennan or Suter because those dockets are also discretionary. My modest suggestion in concluding is that we recognize that the expectation of prior federal judicial experience is an historical accident related to the reaction against the Warren court and stop talking about federal judicial experience. What Supreme Court justices need are legal skill and an understanding of the purposes of judicial review. Certain law professors, lawyers, politicians, journalists, a Justice Totenberg comes to mind, scholars and others are as likely--

Nina Totenberg: Laura, I'm a college dropout. I can't do it.

Professor Laura Kalman: -- are as likely to have these gifts as judges. Thank you.

<applause>

Allen Weinstein: I think you'll agree we're off to a running start. Doug Brinkley. By the way, people can as they choose go to the microphone or speak from-- there's no enforced procedure here.

Professor Douglas Brinkley: Well, good afternoon. I want to thank the National Archives for holding this incredible event with all the Presidential Libraries contributing. And also one of the people in the front row, who always does so much to promote not just Franklin Roosevelt but presidential politics, Ambassador William vanden Heuvel of the Franklin and Eleanor Roosevelt Institute, thank you.

<applause>

Professor Douglas Brinkley: And I would be remiss if I wasn't slightly nervous to be talking in front of Justice Sandra Day O'Connor and it's so wonderful for you to come here and be with us and listen to historians and journalists and legal scholars talk, so your presence here graces us tremendously and thank you for being here.

<applause>

Professor Douglas Brinkley: I thought I'd begin trying to just sort of summarize a little bit of how presidents, particularly recent presidents, pick justices. The anecdote I decided to start with is if you could cut to June 13, 1967 when Lyndon Johnson is in the White House and he doesn't think he's going to pick Thurgood Marshall and he thinks he is, then he decides not to and Thurgood Marshall was generally depressed. He wanted the job. After all it's 1967 and Johnson had just pushed through his '64 and '65 historic civil rights legislation. It would have been a crowning achievement to have an African American join the Supreme Court. But out of nowhere on the 13th, Thurgood Marshall got a phone call from Ramsey Clark speaking to his secretary and Clark said, "I want to see you immediately." Attorney General Clark went and saw Thurgood Marshall and said "Get to the White House. The president wants to talk to you." He sat there and met with Lyndon Johnson in the oval office and they did just general chitchat for a few minutes. This is a transcript I was just going to read you for one second from Columbia University's oral history interview of Thurgood Marshall. So this is Marshall talking. He said, "We simply chatted about all sorts of things for a few minutes and suddenly Johnson looked straight at him and said, 'You know something Thurgood' and he said, 'No, sir, what' and he said, 'I'm going to put you on the Supreme Court.'" And his immediate answer was, "Oh, yipe!" He asked for clarification saying "What did you say?" And Johnson said, "That's it." And he said, "Okay, sir." Johnson had already had the press in waiting so Thurgood Marshall walks out. They make the announcement and a somewhat nervous Thurgood Marshall, it all happened so quickly on him, said "Well can we please, can I call my wife to tell her this before she hears about it on the wires?" And he said, "You haven't told Sissy yet?" And Thurgood Marshall said, "How could I have? You just told me. You've been with me every minute." And he dials. His wife gets on. And immediately Johnson grabs the telephone, as you all know he was apt to do, and says, "Sissy, this is Lyndon Johnson." She said, "Yes, sir Mr. President." And he said, "I just put your husband on the Supreme Court." And she said, "Oh, I'm sure glad I'm sitting down." And then Johnson got off the phone, looked at Marshall and he said, "I guess this is the end of our friendship" to Thurgood Marshall and Marshall said, "Yep, just about. There will be no more of that." And Johnson was a little startled by that answer and he went on and said, Thurgood Marshall said, "Well look you know, Mr. President, about Tom Clark and Harry Truman. They were as close as anybody and then that whole steel controversy came up and Tom had to really sock it to Harry and it strained their friendship," talking about Truman when he seized control of the steel industry and the Supreme Court had declared the action unconstitutional. And Johnson at that point looks at him and says, "Well you wouldn't do like that to me." And he looked at him and said, "Yeah, yes I would and no sooner than" and sort of snapped his finger "I would turn on you like that if I had to." And Johnson looked, paused for a minute, and said "Well that's the way I want it." Now whether Johnson really wanted it that way and whether presidents really want somebody who's going to be independent minded, somebody who's not a rubber stamp is doubtful. Johnson probably wouldn't have minded a Thurgood Marshall that would be upsetting other administrations but when you're president you like to feel you have the Court on your side. And in looking at these

factors when we pick who is going to be our nominee for the Supreme Court, I think you can get it down to a handful of general things to keep in mind at any given moment and it doesn't matter what the administration is. First it's the timing of the vacancy that moment when it suddenly happens. We have an election coming up. People are very-- Democrats are pushing Hillary Clinton, for example, very hard saying, "You know there may be two justices to fill and if we don't the right will have the Supreme Court forever." The timing of appointments it's largely out of control. The composition of a Senate at any given time is a key factor. I think the president's public approval rating and when they're popular it's certainly much easier. I think whether the attributes of the departing justice who just left sometimes you want to pick somebody who somehow is in a tradition of that particular justice. It's a consideration that gets weighed in. And finally a realistic pool of candidates, we may have as Nina just said many of us adore her but if she didn't finish her schooling as she said she's probably not realistic even though many of us would want her and so it weeds out a lot of people. Incidentally, all of the Supreme Court justices have one thing in common really. It's not in the Constitution. They're lawyers, by and large, I mean that's what people immediately are starting to look at lawyers. Ironically in the founding of our country being in the Supreme Court was not considered that big an honor early on. In 1791, for example, John Rutledge resigned from the Court to become the head of the Supreme Court of South Carolina saying it was a more important post at a state level. And John Jay had been on the Supreme Court. He ended up, of course, our first Chief Justice John Jay and he quit because he wanted to be Governor of New York which he thought was more important than being Chief Justice of the Supreme Court. When President Adams wanted to get Jay back in the Court his response, John Jay, was that the court lacked, and this is an exact quote, "energy, weight, and dignity" compared to being governor. So it changes as we know in 1803 with *Marbury v. Madison* in many ways for how coveted becoming Supreme Court justice is. I won't go through all the different, over 150 people nominated for the Supreme Court. Sometimes they get rejected by Congress. Sometimes they're withdrawn by a president. Sometimes something will happen or it will lapse in the Senate. But four out of every five of our nominations in American history for Supreme Court have been passed. Besides their being lawyers we'd been talking about these other considerations, one that I think is becoming less prevalent is one that's been touched on today and that's picking a major political figure to mark. It used to be you always hear it and you still get rumors. Mario Cuomo will come into the court. It turns. It doesn't happen as much. But certainly Franklin Roosevelt did that with Hugo Black, Senator of Alabama. He did it with Frank Murphy, Governor of Michigan. There are stories about Dwight Eisenhower doing it with Earl Warren as a kind of a payback for backing him in '52. Certainly Warren Harding did it in 1921 when he had appointed William Howard Taft who went from the presidency to the Supreme Court. But it's been touched on by a few scholars today. You also see presidents sometimes making appointment decisions in a sense a bipartisanship if it's needed usually if there's a crisis at hand. Abe Lincoln picked a Democrat, Stephen Field, in 1863 during the Civil War. You have FDR in 1940 as been alluded to with Harlan Fiske Stone. He also of course put people like Frank Knox and Henry Stimpson,

Republicans in, to kind of get bipartisanism for World War II. Eisenhower in '56 specifically when he picked William Brennan wanted a Democrat, particularly a Catholic Democrat was the specification. But I think this appointing of politicians has eclipsed in many ways. Today presidents tend to choose those who are sitting judges. Six in fact of our current judges were from federal courts beforehand. I think no longer is a nominee's political prominence more important than their philosophical compatibility with the sitting U.S. President and the legacy that that president wants to push forward. The problems with the Senate always having no real criteria and each member in the U.S. Senate doesn't have a rule for picking when a nominee comes in front of them. They can freelance and do what they want. And you have moments where good people are shot down, John Parker in 1930. Herbert Hoover had picked him but he was considered anti-labor and was nixed. Of course, Nixon having trouble with his two Supreme Court choices. And most famously in recent memory, as Laura has mentioned, Bork, Robert Bork who was really rejected for philosophical reasons. There was a need to kind of stop the Reagan revolution on the part of Democrats. With Bork brings to mind though is one reason presidents do want to have somebody that's like a rubber stamp. It comes out with, you can see a great story with Theodore Roosevelt. TR was a booming intellectual, loved to have the smartest people, picked Oliver Wendell Holmes, Jr. to the Supreme Court and there shortly just two years later Holmes voted against major TR anti-trust case and Roosevelt was so livid that Holmes wasn't a rubber stamp, wasn't grateful. Here's Roosevelt's comment about Holmes: "I could carve out of a banana a judge with more backbone than Holmes." I think you get that. You see Dwight-- I think this comment by Eisenhower incidentally on Earl Warren that "It was one of my biggest mistakes I ever made picking Warren," it was a comment Ike made and it's been used a lot but Eisenhower has appointed federal judges and Warren. He was very proud of a lot of that Warren did also. It gets a little _____ but that's another case of Warren in some ways turning on Eisenhower. Certainly Nixon felt the pangs of that when a number of his judges voted against him in the United States vs. Nixon with the subpoenaed White House tapes during Watergate. One of the final comments I want to make, I think there were a couple of sea changes in this nomination process in modern times, which is what we're supposed to focus on. I think Truman when you look at it, Truman had four nominations to the Supreme Court. All of them he knew personally very well, Burton, Vincent, Clark, Minton. They were all friends of his. Eisenhower at '52 called Truman's appointments cronyism. And Ike appointed Herbert Brownell to start establishing a criteria for nominations based in part for the first time on American Bar Association ratings and how have they operated at judge that kind of scrutiny we're getting today. Eisenhower kicked in. Yet Eisenhower wasn't pure on this either. He wanted to try to reform a kind of cronyism of appointing yet he picked Earl Warren because he gave him political support. His next appointee or nominee John Marshall Harlan, II was the law partner of Brownell, who was supposed to be doing the kind of screening oversight. And then he picked Brennan specifically because he wanted a Catholic Democrat at that moment in time. And when he went with Whittaker and Stewart he was looking for a moderate to conservative, particularly wanting somebody from Ohio I mean so he had a

kind of thing. So all of these factors I think come into the mix. What we can say as historians is that the Warren court was a revolution in this country and once the Supreme Court started with the Warren court becoming a focal point of controversy into the '60s with all of the sweeping things that it did and you started by 1970s and '80s having a general trend among Senate committees which would intensify their scrutiny of presidential nominations. They were no longer unhurried examinations. The Senate in fact this intense personal scrutiny became part of almost a mandate that a Senate Judiciary Committee would take upon itself. I think because of that now it's a very difficult and because of these 5/4 decisions we're at this place here where who gets picked means so much. The stakes seem so high that I don't know how people survive being nominated. It's to be looked at every decision you ever made, any letter. People go back to childhood scribbles, what movies you watch. I mean it's become a very difficult process right now. And I do also notice a trend and I think you're starting to see younger-- it used to be at TR's time you would pick a senior person by age. I think you're starting to get younger justices because presidents want their legacy to reflect decades down the line. They don't want to pick somebody for the court that might get ill or quit ten years from now. They're trying to look at somebody who could be there for 20 or 25 years. Thank you.

<applause>

Nina Totenberg: We'll probably talk plenty today too but not right this minute. I do think all's fair in love, war, and journalism and therefore that Justice O'Connor should be able to get on National Public Radio this evening and give her account of what I say here today.

<laughter>

Nina Totenberg: It's so difficult I think to compare the nomination process in different periods of time and to peg what the reasons are for those differences. There's no question that it's very different today than it was ten years ago, 20 years ago, 50 years ago, 75 years ago. We didn't even have people appearing before the Senate Judiciary Committee. I think the first time was in the 1930s. So everything's different, our mode of communication. Our instant communication is different. But you can tell one thing and that is if a president does not want to have a big confirmation fight he doesn't have to. I say he because so far we haven't had a she. There are ways to avoid it. There's a famous story about the nomination of Justice Cardozo who the president, President Hoover showed a list of potential nominees or people he was considering to I think it was the chairman of the Judiciary Committee and the chairman said, "Well the list is fine but it's upside down." Cardozo had been last and Cardozo got the nomination. President

Clinton was toying with the idea first of Cuomo, who eventually turned him down, then with Bruce Babbitt and Senator Hatch told him that while he couldn't be sure that he would be defeated there would be a lot of votes against Babbitt, particularly from the west where there were people who very strongly disagreed with his policies as Secretary of Interior. And therefore, and so Clinton said to Hatch, "Well who would you suggest?" And Hatch by his own statement said, "Well I think you would have no trouble with either Ruth Bader Ginsburg or Steve Breyer. And in the end, Clinton decided he didn't want to expend his political capital on a Supreme Court fight and he picked those two, first Ginsburg, then Breyer. And then too the body politic is so different today. If you look back at the Hainsworth confirmation hearing I should have checked these numbers but my recollection is that there were guess how many Republican votes against Hainsworth. I'm not saying that they were right. I'm just saying how many were there? You figure five, ten? No. Fifteen? No. Nineteen Republican votes. There were as I recall eleven votes against Carswell. Bill Coleman who would become Gerry Ford's secretary of transportation was then lobbying against Carswell and he went to see the then Republican leader Hugh Scott who had already voted against Hainsworth and Scott said to him, "Look, I can't vote against Carswell. I'm the Minority Leader, the President's leader in the Senate. I can't do that. So you can't expect me to do that. But I'll tell you where the votes are." So he helped him defeat Carswell without himself voting against Carswell. Those numbers just don't exist today. There's a much more clearly divided body politic between Democrats and Republicans. There are very few genuinely very conservative Democrats and there are very, very few genuinely moderate to liberal Republicans. Those are animals that don't exist currently. And so to compare that time with now is in some ways fruitless. What will change it? Allen started out with quoting from the late great Chief Justice Rehnquist's article about presidents considering trying to pack the courts and that they should do that if they possibly got the opportunity and then had the motive. The danger of course is that the Senate will do it back to you and in some respects that's what happened to President Reagan and Robert Bork. President Reagan had a very announced agenda for what he wanted in a justice at that moment. When he named Justice O'Connor he was very clear about the fact on the campaign trail if he had the chance he would name the first woman to the court. And, although there were people who tried to talk him out of it, when he got that chance he didn't wait. He leaped at it. And because that was a different era in American politics there really were very few Republican women or probably women on the bench at all to choose from. I'm not denigrating Justice O'Connor. I'm only saying that she would be and has been the first person to tell you in her own books that she wasn't the best qualified person in the country. I would argue that she was in some ways but she certainly wasn't the most experienced but he picked her. He met her. He liked her. He saw what kind of a justice he thought she would be and that was good enough for him and he picked her. And then he moved on to his next nominee and that was Bork. And by then there was a fairly long check off list of subjects on which the president wanted assurances what kind of a nominee he was getting and that was based on his experience in California when he didn't pick people who had been on the courts to the state supreme court and he got

burned a couple of times. People turned out not quite like he expected. He wanted some predictability and that was the way he thought he could be assured of it. But when you say that out loud and you pick somebody who is pretty far to one side you have to figure that if the other side of the political debate controls the Senate, they're going to push back and that's exactly what they did. And finally on the subject of why presidents pick nominees and peculiar reasons, one of my favorite stories was the choice of Abe Fortas to sit on the Supreme Court at all, not his nomination to chief justice. And the story which maybe my mind is playing tricks on me but I think Abe Fortas told me this story when I went to see him as a rather young reporter and batted my eyelashes at him. The story is that Johnson had to send 50,000 more troops to Vietnam and Fortas was very ambivalent about going on the Court. I think he really wanted to but it meant a severe loss of income and his wife wasn't pleased about that. And Johnson called him in and he said, "Abe, I'm sending 50,000 more troops to Vietnam today and you to the Supreme Court so you'll be the headline." So with that I think I'll quit while I'm ahead.

<applause>

Allen Weinstein: Thank you, Nina. As long as we're throwing in stories about government jobs, there's the famous Truman story of the fact that he said that every time that he appointed someone to the court or anything else he makes 99 enemies and one ingrate.

<laughter>

Allen Weinstein: I want to return to that theme in a second but before we do that I really didn't do justice. We're very fortunate to have in addition to these extraordinary academics and journalists on the panel someone who's actually helped appoint judges at one time or another probably in his life and that's Boyden Gray who after he himself was a clerk for Earl Warren for a long period of time, he was White House counsel in the administration of George H. W. Bush having previously served for Vice President Bush. And so, Boyden, the benefit of your experience in this process, what have we got right, what have we not gotten right?

Ambassador C. Boyden Gray: Well, out of solidarity with Nina, I will not stand up. I'll be non-academic about this. I can't resist some anecdotes because people have been telling anecdotes so I have to tell counter anecdotes. I did clerk for Warren and he would tell us. He would have these wonderful Saturday lunches with his law clerks. And one of the more amusing stories was about Whittaker, whose come up, who had a nervous breakdown. And he would say that Whittaker would sit there in the conference which is where the justices decide what cases to take and how to resolve them. He'd sort of say,

“Well if I vote for the petitioner the respondent will be upset, but if I vote with the respondent, the petitioner will be disappointed.” Then there were rating systems that would go out sort of like Americans for the conservative this or liberal that and he would be rated 80 percent conservative, the very highest rating. Douglas apparently was much, much lower. But he’d go around with his little slip of paper saying to the other justices, “Do you really think I’m 20 percent communist?”

<laughter>

Ambassador C. Boyden Gray: I see Senator Sarbanes here and I have to tell this maybe totally apocryphal story about how Breyer got appointed. They’re in the oval office. Everyone is waiting out in the Rose Garden for the announcement. And Clinton starts talking with Breyer right there and Lloyd Cutler, of course, being the White House counsel. “You know it would be interesting if we put Sarbanes on the Supreme Court. Then we could put Smoke, who was then the mayor of Baltimore, into the Senate and then a whole bunch of things could flow from this. It would enhance the vote in the Senate.” And apparently Cutler said, “Mr. President, you are going right now to the Oval Office to announce Judge Breyer” and grabbed him. Then there’s the story of Brennan. Maybe it was an Irish Catholic he wanted but I’m told the story partly is that Brownell had one of his staff go to check him out and he heard him give a speech and it was a law and order speech and it fit with the profile and they were very, very thrilled. But what happened was that Brennan actually was substituting for his Chief Justice. He was on the New Jersey Supreme Court. And he gave the speech that his Chief Justice would have given. It wasn’t his speech. Then there’s the story of Goldberg being talked off the court so that Johnson could put Fortas on the court and I’m told that the reason was, and Goldberg bought it, can you believe that, that he wanted to get Fortas out of it because Fortas was lobbying and using his name and just creating all kinds of problems for Johnson. So Johnson kept saying to Fortas, “I want to put you on the court,” and Fortas would keep saying, “You know it’s like St. Augustine, Mr. President. Oh, Lord make me chaste but just not now.” But eventually it worked and of course it did get Fortas in trouble because Fortas eventually had to leave the court. And I don’t think _____ I don’t think that was the rubicon really. But then there’s the story-- it is true that Holmes didn’t follow what Roosevelt wanted him to do but they remained very, very good friends. And then there’s the story of the wedding of Alice Roosevelt Longworth and belonged to a social organization at Cambridge University and they were both members of it which is partly why they were friends, but the wedding was a wedding of this particular occasion. I’m told that Roosevelt told his daughter, “You have to marry someone who’s in this organization who is also in politics” and there was only one person who qualified and that was Nicholas Longworth. So there was a wedding and the steward of the club presided over the punch bowl. That’s what he would do at these weddings. And Holmes was at the wedding and he sees the steward, whom he loved, who was black, and he goes out, leaves the receiving line of the line waiting and goes and hugs for quite a lengthy period

of time and apparently foreign diplomats' wives were fainting in the receiving line because they had never seen such a spectacle. I could go on. Stories are really great that you pick up when you do this job which I had of helping pick judges. I don't think Fortas was the rubicon. I think it was Bork. I think as Allen Brinkley has said-- Douglas Brinkley I mean that four out of five made it but one out of five has been kicked out by the Senate over the course of the last 230 years. It isn't just recently. What's happened recently is the spectacle of the hearing process and the public campaign and all of that that attended the Bork and also Thomas hearings and then the use of the filibuster which was also very, very controversial. And the issue so far as I can see it from my days and then having to testify many, many times, not many but several times in Congress about this issue is whether judicial philosophy is a grounds for either picking and/or rejecting a Supreme Court nominee. And arguments when I was in the White House about advise and consent and the Constitution I think says the president shall nominate and with advise and consent of the Senate appoint, advise and consent modifying a point, not nominate. But that was and has been an argument. Is philosophy a grounds for rejecting, many, many arguments about that? One of the more amusing occasions was when Senator Schumer, I don't think Senator Sarbanes was there at this particular occasion, but Senator Schumer had a set of hearings about this question of can philosophy be used as a grounds for rejecting a Supreme Court nominee? And I was paired with my then partner Lloyd Cutler, he to be the liberal and I to be the conservative. And what the staff hadn't realized was that there wasn't any difference in view between Lloyd Cutler and me or there wasn't any difference between me and Lloyd Cutler I should say. But Lloyd had a long track record of saying philosophy was not a legitimate criterion for rejection. So it was very frustrating for Senator Schumer to hold this hearing with Lloyd and I agreeing about absolutely everything. I wonder how long that staffer lasted. I don't know. But this has been I think the single biggest issue. And from my vantage point I suppose it's because I'm a conservative or Republican or maybe even a libertarian some would say that I think it's been since the fights have been ugliest by the Democratic side in my opinion, and I'll get back to Fortas in a second, the question has been is the court there to do legislative type work? And it's a complicated argument because it has been pointed out the Republican nominees, at least the conservative ones who've survived that way have tended to throw out more legislation than Democratic nominees, so it complicates the argument. Who are the judicial activists? So it's a very, very rich argument and people like Mike McConnell can write about this much better than I can and the historians can too, but I would say on balance that the issue has been in the modern period is the court to have this sort of quasi legislative function. And the presidents that I know about and have served have always said the nominee should really not be making law. I know I'm over simplifying and I'll get pushed back from the panel up here and from people in the audience but that's the way many of us have seen it. On the question of Fortas, this is a personal, it has some sort of personal relevance to me because I was scheduled to clerk for the Chief Justice and those of you have done this job of clerking know that it's the most exciting life. It's downhill ever after. Even being last counsel was downhill and it's a marvelous experience and you don't want to

lose it. Well if Fortas had been confirmed, I wouldn't have been Warren's law clerk or at least he wouldn't have been Chief Justice. And so it was something I was paying a lot of attention to at the time. And Fortas also was a classmate of mine while I was at the Yale Law School and my father was very fond of him and always thought that Fortas was the smartest man he ever knew and because of his friendship with Fortas and Paul Porter my first job as sort of a summer associate was at Arnold, Fortas, and Porter. So there is sort of this personal ties here. But Fortas was on the floor for only about five days and they had a test vote. He couldn't even get a majority, let alone _____ was about 48 votes was all he could get and within six or seven hours of the vote he had withdrawn his name from consideration. Normally in those days a filibuster would entail a half a dozen cloture votes usually with-- the pattern then was on the fifth or sixth vote they'd get cloture because the people who were for extended debate believed that they had extended the debate and now the majority was entitled to have an up or down vote. But he never even tested the system beyond four or five days. We know how long these matters hang in the air today. I hope that we'll get back to the point where Lloyd Cutler would say "Philosophy is not grounds for rejection. It is the grounds for picking a president because that's what he's authorized by the Constitution to do." And we ought to take the Supreme Court a little bit in wider politics than it is. We can't expect that much of it. It cannot sustain that level of politicization in my opinion and so I hope the whole thing cools down. Maybe with the confirmation of Roberts and Alito without a whole lot of fanfare that we are back on the road again to being a little more sensible about this.

Allen Weinstein: Thank you, Boyden.

<applause>

Allen Weinstein: Before we turn to your colleagues let's just take stock of where we're at, at this point. Thank you for that analysis of the reasons for the way in which people are chosen to the Supreme Court these days. Apparently one would summarize that is the damndest collection of reasons because there's been no single reason there. Now we have an argument over the rubicon. Some of you think the rubicon was crossed with Fortas. Some of you think it was crossed with Bork. How many of you think it was crossed with Bork?

Professor Douglas Brinkley: I'm Bork.

Nina Totenberg: I don't know. I think it's a combination. I don't think it's that simple unfortunately. Nothing is that simple.

Allen Weinstein: I'm just trying to derive the rationality that we can derive from this process here. By the way, the line in terms of your nomination is getting longer out there. They do want to talk to you.

Professor Douglas Brinkley: The reason I think the rubicon is with Bork and not Fortas is Fortas went forward. Bork didn't and it's the rejection of a career of a man like Bork and what it did to him personally that started I think kind of the corrosive politics. I'm not saying that people that went after Bork were the reason for it but I do think it was a sea change because you look at Clarence Thomas-- Mr. Gray knows well-- I mean what happened then with Clarence Thomas and all it started a kind of a circus trial I think because the information age was clicking in, in the '80s. I mean when it was beginning of the ability to find information on people in a way that hadn't been as easy. After all it becomes the era of DNA suddenly in the '80s.

Nina Totenberg: Then why not Hainsworth? Hainsworth was squarely rejected and he was overwhelmingly rejected and he didn't leave the federal courts and he remained a very respected judge and it didn't sort of-- it didn't do the same thing.

Ambassador C. Boyden Gray: It wasn't a spectacle. It wasn't the spectacle.

Professor Douglas Brinkley: He wasn't the spectacle. With Vietnam and the anti-war protests and Cambodia and Laos it kind of stayed except for real watchers of the court as just only modestly big in breaking news, where Bork kind of I think just blasted the country wide open and I'm not sure we've recovered from Bork and Clarence Thomas' experiences.

Professor Laura Kalman: Historians always try to push things farther back than anyone wants to push them back. So maybe I'm wrong about Fortas but I think that the Fortas Chief Justice nomination was a circus. I also realize that reasonable people can disagree but both Bruce Murphy and I think that there was a filibuster but I realize that not everyone.

Nina Totenberg: You know I think one of the things that-- I hate to admit this-- that's been around as long as I have and covered as many confirmation hearings as I have, first of all I think Justice O'Connor's hearings were the first where television cameras and microphones were actually allowed in the room. So the very first one I covered was Fortas and people would come out of the hearing room. And like, for example, a guy like Tunney was very good at sort of summarizing what had just happened so you could get a sound byte out of him and that's why he was highly prized Senate material at that

moment. But when you've covered that many, what I saw when I was a very young reporter, very young, incredibly young--

Allen Weinstein: How young?

Nina Totenberg: -- was that-- and if you read the transcripts of the Marshall and the Brennan and the Stewart confirmation hearings, we forget that there were Dixiecrats [ph?] then and they were often on these nominations and that's part of the Fortas story is that they weren't particularly interested in confirming Fortas to Chief Justice. So in the '50s and '60s and even the '70s sometimes, in the '50s and '60s they were clearly just sort of beating on people because of their previous decisions because after all Stewart and Warren were recess appointees. Their previous decisions about race they were just beating the holy bejesus out of them but there were only a few of them so that didn't work. And so the next thing was that the law and order questions, which were legitimate questions after all, became for the Dixiecrats sort of a surrogate issue. So you had Strom Thurman saying to I think it was Abe Fortas, "Miranda, Miranda, Miranda, I want that word to ring in your ears."

Professor Laura Kalman: Mallory [ph?].

Nina Totenberg: Mallory, you're right, Mallory, sorry Jack. That was Jack McKenzie [ph?] telling me, correcting me, Mallory. So it was very complicated. I think the Fortas vote or non-vote was a filibuster but I also think Boyden is right. Fortas didn't have the kind of support that would have been needed to block a full-fledged filibuster and everybody understood that very quickly. When Senator Griffin said he was going to filibuster the southerners weren't going to help and even the good government people sort of smelled a rat. The Phil Hart's [ph?] of the world smelled a rat.

Ambassador C. Boyden Gray: I should add, which I didn't I think say before is one of the things that was operative in the Fortas case, he just didn't get enough votes to get-- he didn't even get 50 votes let alone 60 on that first test vote and he was gone. He pulled out. A filibuster is something that lasts more than sort of two or three days, believe me, then and today. But what I didn't say, what was an undercurrent was the scandal, not the fact that he was a crony of Johnson's but that he was a crony of a lot of people who were creating huge conflicts of interest for him. And, of course, I was then luckily clerking at the time that he had to be talked off the court and Mitchell went to Warren and Warren wouldn't tell us what Mitchell told him, but he did tell us that Mitchell was quite racist about it and said, "Look, what you know about is just the tip of the iceberg. I'm going to lay out everything and you have a choice of talking him off gently or blowing the court up as we make this stuff public about what he's been taking under the table." The public

doesn't know about what he was taking under the table. I never found out about it, but this was already an undercurrent when he was rejected and he pulled out in September of 19 whatever it was '68 or '69.

Allen Weinstein: Let's leave Abe Fortas, may he rest in peace, to his legacy. Let me ask before turning to audience questions I have one question for all of you. Has it occurred to anyone other than me here that one of the things that happens is that people get nominated because they're supposedly X or Y. They have certain ideologies that get them the nomination. They get confirmed. They go into the court and lo and behold they are profound disappointments to the people who nominated them because they're not playing X or they're not playing Y. They're not behaving according to the type they were supposed to be behaving from. First of all, is that the case? And, secondly, why is that the case? There are some exceptions but I think increasingly one could almost talk about the attitudinizing of the court, the individuation of court justices. It's very hard for people to play a role if they feel they don't have to play a role. Institutionally, they get caught in a whole lot of imperatives. Does that make any sense to anybody except me?

Nina Totenberg: Well there are a lot of famous cases of people who voted in ways that-- you've heard some of them-- but I think I'd argue that presidents in modern times with a couple of notable exceptions have been pretty successful at predicting what kind of people they were nominating and usually I think President Reagan was right. If you had somebody who's on the court, on the federal court for a long time, you can see what kind of a judge that is and you're not going to get a surprise. The obvious different person like that is Justice Suter who had been on the federal court for about 14 seconds but he'd been on a state court for a long time and I've always thought that this was the hubris of the chief of staff Mr. Sununu who thought he knew him. I nominated him to the state Supreme Court. I know him and he was not as conservative as President Bush I think may have thought when he nominated him. But by and large I don't think that Justices Alito and Roberts or Justice Thomas or Justice Scalia have been any surprise at all to the presidents who appointed them and I doubt very much that Justice Ginsburg or Justice Breyer is a surprise to President Clinton. I even think that probably Anthony Kennedy is not a huge surprise either.

Professor Laura Kalman: And I wonder if Earl Warren was really that big a surprise to Dwight Eisenhower. I mean Earl Warren was someone with a very progressive record to whom he owed a favor. When he appointed Brennan and he was looking for a Catholic Democrat he might well have anticipated that that person wouldn't rule his way on every issue. So I think that there's sort of a myth of the surprise justices.

Ambassador C. Boyden Gray: Let me just jump in. Warren had a deal because he threw the delegation to Eisenhower that he would have the first opening. No one expected Vinton. Anyway, he dropped dead or something. I think that's a surprise. I mean he was not the one they expected to retire first. So Warren goes to Eisenhower and says, "Okay, Mr. President." And he said, "Well I didn't mean chief justice." And Warren said, "Well you said the first opening."

Professor Douglas Brinkley: I think the surprise factor comes when presidents get the blowback from public opinion that they're not expecting. I edited Ronald Reagan's White House diaries and President Reagan loved Sandra Day O'Connor. She was from El Paso. She had been at Lazy B cattle ranch, southern Arizona. Nancy Reagan came from Arizona. It was his idea of a western conservative with Sandra Day O'Connor. He loved her, Ronald Reagan, and he in his diaries was stunned to find the blowback within the ranks of the conservatives over the abortion issue, which Reagan said, "I'm not going to worry about essentially these people that are fire bombing her are much more extreme than I even thought," meaning his own party people that were complaining about her and he had to stand up. He was very taken aback by that and I think President Bush, George H.W. Bush, 41, was taken aback with Clarence Thomas by the blowback he got from the civil rights community. I think that feeling that he would be able to go through that you wouldn't have all African Americans trying to go after him and bury him. So I think the surprise factors come when the presidents make their decision. That's obviously their best judgment or they wouldn't have picked them but the sort of cultural wave that hits them and once it starts it's like a wildfire and I think we're living in that kind of culture.

Ambassador C. Boyden Gray: I just have to respond to this, two points about Thomas. The president was not surprised. In fact, he pulls Thomas into his house. I wasn't there and neither was Thornburg or Mrs. Bush. And he says, "This is going to be the roughest ride of your life. I'll stick with you if you stick with me. Will you make that commitment?" President Bush knew this was going to be awful.

Professor Douglas Brinkley: But he didn't know about tapes coming out of vendors. People were going to start looking at what movies you're watching.

Ambassador C. Boyden Gray: He knew. I'm telling you he knew it was going to be-- he didn't know Anita Hill was going to surface.

Professor Douglas Brinkley: If he knew that that was going to be the case that he was going to put him through that it wouldn't have gone through. I agree with what you're saying.

Ambassador C. Boyden Gray: I'm there. I'm there and I'm telling you he knew.

Professor Douglas Brinkley: I'm interviewing these people from the administration and that's not _____.

Ambassador C. Boyden Gray: Well you better interview me.

Professor Douglas Brinkley: Well, I'm dealing with the president himself.

Allen Weinstein: I want the audience to understand you've just seen historical analysis in action here. Okay, to the audience questions, to what extent do you think the candidate pool for justices has been reduced by a reluctance to be made a spectacle or to be Borked?

Nina Totenberg: I'm sorry. I couldn't hear you.

Allen Weinstein: To what extent do you think the candidate pool for justices has been reduced by a reluctance to be made a spectacle or to be Borked?

Nina Totenberg: I don't think it's been reduced.

Allen Weinstein: You don't think it's been reduced, anybody?

Nina Totenberg: I don't think it's been decreased, not significantly. It might be somewhat decreased to be on a federal court if you know that every little thing you've done and they do this to you these days when you're being proposed for the D.C. Court of Appeals. You're going to get fairly closely examined. But being on the Supreme Court what always amazes me for not just this job but other big jobs is that people who do have something to hide still take them and still get in so much trouble. Thank God from people like me.

Allen Weinstein: A question for Mr. Gray. It says are you arguing that judicial philosophy should not be a requirement for rejection but is a legitimate basis for nomination by the president?

Ambassador C. Boyden Gray: Yes, thank you. And it cuts both ways and we may have a Democrat soon and you can hold me to my words.

Allen Weinstein: We'll do that. How would you explain the reason why Republicans in the Senate gave their unanimous support for Ruth Bader Ginsburg and Steve Breyer and the contentious hearings that confronted John Roberts and Samuel Alito?

Nina Totenberg: Well I told you the reason. Those were by Democratic standards pretty conservative nominees and they were suggested by Senator Hatch who said, "I can get them through." I think that's absolutely the reason. And I don't think if you actually read the transcripts of particularly the Ginsburg hearing I don't think you'll find it any more contentious actually. The vote was not-- there were many more votes against both Alito and Roberts, although Roberts carried half the Democrats. But the hearings were-- she was asked many, many questions and on a lot of issues and she actually, I was actually quite surprised when I went back and reread them at how many she answered. She didn't answer some, like death penalty questions. She said it was established law but beyond that she would not answer any questions. But on a lot of questions you wouldn't think she did answer.

Professor Douglas Brinkley: It was just early in the Clinton administration also. I mean that was just the new president coming in, in '93, so I think it may have been a different situation for her.

Nina Totenberg: Ninety-four was when he lost the Senate.

Professor Douglas Brinkley: Yeah but it was--

Nina Totenberg: Ninety-four was when he lost the Senate.

Professor Douglas Brinkley: I was thinking post impeachment. I wonder if you think she could have gone through after all that impeachment?

Nina Totenberg: Yeah, I think so.

Ambassador C. Boyden Gray: One of the things, she was on the D.C. Circuit for 12 years and I know a little. I don't want to bore people with how I know something about this but I think it's true that and this is really quite extraordinary if you think about it if it is true, but I

think it's true that the two judges who voted most together when they overlapped on that court were Ruth Bader Ginsburg and Clarence Thomas. So she came off the Court of Appeals with such a very different D.C. circuit. It's a very different docket than the Supreme Court. But she came off that court with a very mainstream, if not conservative for 12 years.

Nina Totenberg: And she also had a voting record on the D.C. circuit that was closer to Bork. She voted more often with Bork than any other Democratic nominee, so you're not talking about-- if you look at her earlier off the court views you could portray her if you want to as a somewhat radical. You could try anyway. But you can't with 12 years on the D.C. circuit and that's why she was a Republican favorite.

Professor Laura Kalman: Could Miers have been confirmed?

Ambassador C. Boyden Gray: No.

Professor Laura Kalman: Because of the conservative Republicans?

Nina Totenberg: No, it's worse than that.

Ambassador C. Boyden Gray: It doesn't have anything to do with the fact that she was too conservative. Some recent commentary, well she was-- they withdrew her because they didn't think she was conservative enough or they withdrew her because she was stupid. No, she wasn't qualified. I mean she wasn't up to the level unfortunately. She could have been presented as a Powell but unfortunately because of the tradition that Professor Kalman has talked about you almost need to be an appellate judge and you certainly do need to be an appellate judge to understand the-- to go through the grilling that the Judiciary Committee is now used to giving and if you can't do that, if you can't perform at that level of scholarship which she wasn't trained for, nor would Powell have been, then I think you can't make it and that's one of the--

Nina Totenberg: I don't agree with you.

Ambassador C. Boyden Gray: You don't agree with me, good.

Nina Totenberg: I think that Louis Powell could have gotten through that kind of a grilling but I do not think she could have. And the questionnaire that she filled out for the

Judiciary Committee was the most deficient document of its kind that I have ever seen and I've probably seen hundreds of them. I mean you cannot fill out a questionnaire like that. Imagine if you had someone applying for a job as anything who said, "Well I got an honorary degree but I can't remember when. I was on such and such a board but I don't know what years. I can't answer that question other than with a formulaic one phrase answer even though I know the question was just for me." I mean it was an astonishingly deficient document. And the fact that, and I know Tel Olson agrees with me on this, the fact that she was allowed to submit it to the Judiciary Committee suggests to me that there were people within the administration who were sandbagging her because somebody should have said to her, "Don't do that. That's a rough draft, the roughest of rough drafts and you can't do that."

Allen Weinstein: Let me try another question about federal judges. The conversation about surprise speaks to approving only long-term federal judges. Might there be advantages for diversity?

Nina Totenberg: Might there be?

Allen Weinstein: Advantages for diversity.

Nina Totenberg: There are lots of advantages.

Allen Weinstein: Okay, so you're not saying that one should approve only long-term federal judges?

Nina Totenberg: No, I don't like that idea.

Ambassador C. Boyden Gray: I think it's too limiting to limit the pool to appellate judges but I don't think it's, again Professor Kalman, I don't think it's conservatives who have done this. I mean the criticism, one of the major criticisms of Thomas is he only served 16 months.

Professor Laura Kalman: Right. I think George Mitchell would have been a great Supreme Court justice.

Allen Weinstein: Would a Republican-controlled Senate have approved the Bork nomination?

Professor Douglas Brinkley: I think yes.

Ambassador C. Boyden Gray: Yeah.

Professor Douglas Brinkley: Yes.

Professor Laura Kalman: Yes.

Nina Totenberg: Yes and he wouldn't have-- first of all his hearings wouldn't have been in September. They would have been earlier. They wouldn't have gone on for whatever it was, 13 days. Larry Tribe wouldn't have been able to present the cases against him as sort of a huge, enormous thing. And he would have had a lot more sympathetic treatment from more Republicans on the committee. So the whole sort of atmospherics would have been different.

Professor Laura Kalman: And the Scalia and Rehnquist Chief Justice nomination hearings before the Republicans lost control though contentious are fine, right?

Nina Totenberg: Fine?

Professor Laura Kalman: I mean the candidates get approved.

Nina Totenberg: Yeah.

Allen Weinstein: Okay. Do you believe the president has more legitimate discretion to choose than the Senate has to approve or reject?

Ambassador C. Boyden Gray: Well I'll repeat my answer, yes. I think the president's got the constitutional obligation and opportunity to nominate by himself and then the Senate has to reject or not but the president has a lot more leeway in this than the Senate and I think that was designed by the framers. And one of the points is if you don't like what a president is doing that all gets thrown into when he's up for re-election.

Allen Weinstein: Okay. This is an interesting one. By what process could a sitting Supreme Court judge be removed from the bench, for ill health, mental or physical

malfeasance, not carrying out his or her duties, anybody? How could a sitting Supreme Court justice be removed?

Ambassador C. Boyden Gray: Well someone help me out with the histories, _____ big fight and it's never been tried again. I think it has to be--

Allen Weinstein: With great difficulty.

Ambassador C. Boyden Gray: It's very difficult. I think it has to be well the kind of malfeasance that Fortas might have been subjected to charges of I mean.

Nina Totenberg: High crimes and misdemeanors.

Ambassador C. Boyden Gray: Yeah, I mean very, very high standard.

Nina Totenberg: There is nothing in the Constitution, I don't think that says just because you're sick you can be removed. I don't know what the statute says about whether there's anything to be done for the Supreme Court. You can remove people from the lower courts under a very elaborate procedure. But historically when people get very infirm they send an emissary. I think it was-- I can't remember who the justice was who was sent to tell Holmes, I think it was, that he was too old that he was getting a little dotty and he had to leave. The time had come. And whoever it was, and I can't remember, said and a dirtier day's work I've never done so there have been several who have done that kind of work.

Allen Weinstein: Final question, lessons, lessons from this experience over the last 30 or 40 years. If you were sitting down with a party leader talking about nominations for the Supreme Court the kind of person that should be nominated, the kind that should be avoided, what are the lessons? All you expert analysts of this process what have you learned?

Professor Douglas Brinkley: I think the vetting process has begotten so tough in politics and the court that you really have to scrutinize who you're going to put up for nomination. It's not good enough anymore that it's a political fit that kind of an individual is a friend or is maybe a bipartisan appointment, all those considerations. I think now it's just vetting, vetting, vetting that you really don't want to get blindsided by picking somebody and have the media scrutiny process boomerang back on you and you end up being damaged. Your administration gets damaged. You have a black eye. You've got

to go back to the well. It seems to be the classic way now to put whatever party is in power to be kind of taken down a peg. It's not by coincidence. I think Bork at the same time with Iran Contra. William Luctenberg [ph?] wrote the great book "In the Shadow of FDR" in the 1980s during in the shadow of Ronald Reagan and there was a blowback attempt to kind of stop all of that and the Supreme Court nominations are the blowback moments in each administration. And a corollary to that is I think that it matters a lot to legacy. Arguably the current presidents, and one has to go to the Bush library at Southern Methodist University and say "What are his accomplishments as president?" People are going to talk about homeland security and not being bombed after 9/11, et cetera, the bull horn moment. But I think probably Supreme Court nominations for the conservatives are the big thing that he accomplished, so your presidential legacies are being really looked at a lot now as in this closely polarized country of if you can get your person through and if they are either continuing of a more liberal agenda or are they hard right? The abortion issue, of course, Roe v. Wade, as Sandra Day O'Connor knows as well as anybody it's just growing in the sort of litmus test status.

Allen Weinstein: Professor Kalman, lessons learned.

Professor Laura Kalman: I really wish that we didn't expect all of our Supreme Court justices to have spent time on the federal circuit courts of appeal.

Ambassador C. Boyden Gray: And I would say in response to that it's not the conservatives as I said before who have gone with this trend. I think it's both parties will do this because it is safer.

Professor Laura Kalman: It's easier.

Ambassador C. Boyden Gray: And you had the vetting. The process goes through at least once before, sometimes twice, and you are going to feel safer notwithstanding the fact that both Bork and Thomas had been appellate judges. But you're going to feel safer. The pressure pushes you in that direction.

Allen Weinstein: Nina.

Nina Totenberg: Well I'm not a politician so I'm not sure but I think in some respects if you had somebody who had been thoroughly vetted who didn't have a judicial record you might be safer too but it takes more work and it is a little more of a high wire act. In the last analysis I still think if you really consult the other party at all in a serious way you may not wish to, I mean George W. Bush wanted a kind of person on the Supreme Court and

got more or less what he wanted I think in Chief Justice Roberts and Justice Alito that the Democrats were not going to basically agree to. So that's off the table. But if you aren't as committed to one side or the other if you have a less dedicated perhaps is the right word, adjective, view of it then you have a little wiggle room and you can give a little and I think your chances of not having that kind of a spectacle are better but that's the only thing I can come up with.

Allen Weinstein: That's enough. Thank you very much. Thank you all for your patience.

End of Session 2