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A Deferential View in Supreme Court Confirmation Decisions

According to the Advice and Consent Clause in Article II, Section 2 of the U.S. Constitution, the President of the United States has the power to nominate and appoint judges of the Supreme Court *by and with the consent* of the Senate. The Senate Judiciary Committee conducts hearings, personally interviews the nominees, votes and reports its recommendations to the full Senate. The Senate then votes to confirm (support) or oppose the nominees' appointments.

Unfortunately, the Constitution does not include any guidance concerning *how* the Senate should evaluate the president's judicial nominees. As a result, there is some disagreement amongst Senators and commentators as to the exact nature of the evaluation. Along with qualifications and character, many believe that a Supreme Court nominee's political ideology should be a factor in determining their appropriateness to sit the bench in the nation's highest court.

Completely excluding ideology as a factor in the Senate's confirmation decisions is not only unlikely but unnecessary. However, rather than seeking out nominees whose political ideals strictly align with their own, Senators should consider if the nominees' views are reasonable and consistent with a broad range of political beliefs.

According to Wm. Grayson Lambert, the author of "The Real Debate Over The Senate's Role in the Confirmation Process", a lack of clear instruction in the Constitution leads to debate that "typically turns to pragmatic arguments about which approach best achieves the purposes of the Senate's involvement in the confirmation process" (Lambert 1285, 1286). Lambert adds "the real issue that divides commentators and senators" are the following questions: "What is the relationship between law and politics, and how does that relationship inform the Senate's role in the confirmation process?" (Lambert 1286)

There are two major approaches that senators take when evaluating judicial nominees: the "assertive view" and the "deferential view." Proponents of the former approach "focus explicitly and specifically on a nominee's ideology, voting to confirm only those nominees whose ideological views fall within a certain narrow range" (Lambert 1286). Adherents of the latter approach] "argue that the Senate should be more deferential to the president's nominee and should confirm any nominee who falls within a broadly defined "mainstream" of political and judicial thinking" (Lambert 1286).

According to Lambert, "if the truth lies somewhere in between these extremes – if law and politics are to some degree intertwined – then judges' decisions will be influenced by both their ideological views and traditional tools of judicial decision-making. If this underlying disagreement is understood, senators and scholars can more productively debate the Senate's role rather than dwelling on issues that are merely incidental to their real difference of opinion" (Lambert 1287).

In order to delve more deeply into the nature of both the assertive and deferential views, it is necessary to review the historical record concerning the original understanding of the

Advice and Consent Clause. The Constitutional Convention adopted the clause on September 4, 1787 after considering and discarding various alternatives. The Convention originally proposed that the national legislature be charged with the task of choosing a national judiciary, shortly followed by the suggestion that the Executive branch (President) should assume this role. However, some delegates of the Convention were concerned that the Legislature would be ill-equipped to decide what constitutes good judges while others felt it was unwise to give so much unchecked power to a single person. The Convention later struck the language concerning the Legislature and gave appointment power to the Senate. A compromise was finally reached whereby the Executive would appoint judges while the Senate would provide advice and consent.

Today, proponents of the assertive view believe that, by including the Senate in the process, the Framers (of the Constitution) endorsed ideology as a consideration when confirming Supreme Court justices. Conversely, proponents of the deferential view believe the Convention kept Congress from assuming a more prominent role by granting the President the power to nominate federal judges and permitting the Senate to give its consent. Unfortunately, the history surrounding the origin of the vaguely-worded Advice and Consent Clause is lacking in clear guidance. Even so, proponents of *both* the assertive and deferential view can find support for their respective positions in historical records. While this does nothing to advance a particular view, it seems clear that neither approach can clearly negate the other based upon historical practice alone. According to Lambert, “neither side can make a persuasive case because of…counterarguments” and, subsequently, “the debate over the Senate’s role in the confirmation process remains unsolved” (Lambert 1308, 1309).

Currently, so much credence is given to the political ideology of Supreme Court justices that researchers are busy devising statistical models to track and predict their ideological positions based upon votes cast. In their article, "What Can We Learn About the Ideology of the Newest Supreme Court Justices", researchers Stephen, A. Jessee, and Alexander M. Tahk discuss the challenges of obtaining information from the nominees themselves during confirmation hearings. By way of example, they cite Chief Justice Roberts' response to Senator Joseph Biden during Roberts' 2005 confirmation hearing: "the independence and integrity of the Supreme Court requires that nominees before this committee for a position on that court not forecast, give predictions, give hints about how they might rule in cases that might come before the court" (Jessee, Tahk 1).

Justice Roberts makes a good point. Inquiring after a nominees' basic judicial philosophy seems harmless enough, but grilling nominees about how they might decide future cases in an effort to exact ideological currency is not only inappropriate, but could undermine the insulating nature of judicial independence. The public's desire to know a justice's ideology is secondary to the integrity and purpose of the Supreme Court which, by its very nature, should not predetermine judicial outcomes.

There are other researchers who count the votes of Supreme Court justices, albeit with very different results. In their article, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?", Lee Epstein, Andrew D. Martin, Kevin M. Quinn and Jeffrey A. Segal examine the likelihood that justices' political ideology will change over time, or "drift." As it turns out, knowing the justices' political ideology *at the time of appointment* might not even be an accurate indicator of future behavior. The authors indicate that, despite widely shared beliefs

to the contrary, "several analysts now contend the ideological drift is not just possible but likely" (Epstein et al. 1485). Their analysis indicates that "virtually every Justice serving since the 1930s has moved to the left or right or, in some cases, has switched direction several times" (Epstein et al 1486). Based on this, we have no reason to believe that nominees, no matter how carefully chose, won't drift at some point in their judicial careers. The authors' research results also "suggest that a close relationship exists between our expectations about a nominee's ideology and the ideology he or she reveals during the first few terms in office" (Epstein et al 1540). They add that "predictions of stability might be right in the short term…but may not survive in the longer term. The ideological boxes to which Presidents, senators, and the public place Justices at the time of their nominations are not so tightly sealed" (Epstein et al 1540).

Given the fact that justices' political ideology will apparently change over time, it is even more imperative that ideology is not the driving force behind their nomination or confirmation. Ideology will most certainly be a factor, but it becomes far less important in light of the fact that so many justices have drifted from previously-held stances.

Even though the Supreme Court nominees selected by the president may not retain the same ideology over time, there are many practical ways in which he can influence the Court's decisions while he is in office. According to Brett W. Curry, Richard L. Pacelle, Jr. and Bryan W. Marshall, authors of "An Informal and Limited Alliance", some of the tools at his disposal include judicial appointments, using the Office of the Solicitor General to advance his agenda before the Court, bringing negative sanctions if the Court issues unfavorable decisions and using the bully pulpit to initiate legislation or push for constitutional amendments overturning judicial decisions. The President is also in a unique position to determine "the extent to which the Courts

decisions will be implemented and respected" (Curry et al 225).

So how much power does the president gain over Supreme Court decisions through future nominee appointments? Joseph E. Whitmeyer seeks to answer this question in "Presidential Power over Supreme Court Decisions" by quantitatively assessing how much power presidents have and how much they use it. (Whitmeyer 118). He found that "what matters most for appointment power is the number of appointments made" and added that presidents tend "to exercise appointment power less in earlier…appointments" and are more "likely to have maximum appointment power at the end of their terms" (Whitmeyer 118). By comparing presidents' appointment power to sitting judges' power through voting, Whitmeyer found that "the most powerful president is considerably more powerful than the most powerful sitting justice" (Whitmeyer 119).

It seems clear that, given the president's relationship with the Supreme Court, the political ideology of its justices will be important to furthering his national goals. Like the Senate, he will want to ensure that the choices made in the Court facilitate his political agenda. And a certain amount of cooperation does seem reasonable, considering that the Constitution gave the president – not the Senate – the power to nominate federal judges. Some believe that this fact obligates the Senate not to lightly oppose the president's nominees. Lambert put is thusly:

> When analyzing these considerations, adherents of the deferential view argue that senators should give the president's choice a presumption of confirmability because "the Constitution…puts a requirement on [senators] not to replace [their] judgment for [the president's]. This deference means that votes against a nominee should presumably be

> "the exception, not the rule and that a senator should vote against a nominee only "in an extraordinary circumstance." Under this approach, a senator votes for or against a nominee based not on whether the senator would have nominated that particular person [themselves] but rather based on whether the nominee is a reasonable choice to sit on the federal bench (Lambert 1295, 1296).

At the end of the day, the disagreement concerning different approaches to Supreme Court justice nominations comes down to a question of "the proper relationship between law and politics" (Lambert 1327). Proponents of the deferential view seem to understand this concept better than their assertive view counterparts but, even so, healthy discussion and debate is needed to address the underlying issue and focus on solutions.

Interpreting laws and determining their Constitutionality is vital to democracy. The justices of the highest court in the land play an important role in our success as a nation as they are called upon to render important decisions that affect us all. We rely upon them to give us thoughtful and wise answers untainted by narrow political ideology. Broadly defined political and judicial thinking paves the way for much healthier discourse and is something to be encouraged and cultivated. We need qualified Supreme Court nominees with good characters who will make reasonable decisions based on beliefs that are consistent with mainstream America. If we hope to fill these important seats with qualified judges, we cannot afford to concern ourselves too much with ideology.

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