The Tensions of Judicial Appointment

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The rancor that exists around the nomination of judges to the federal court continues to rise as the battle over the partisan control of our government intensifies. Perhaps no other decision of our president results in greater division between the two political parties' partisans than his choice for the federal bench. After a brief overview of the framers structuring of the judicial selection process, an analysis of the modern selection of federal judges by the executive branch will reveal the changing patterns of judicial appointment. The political and philosophical implications of the current selection process of judicial appointments will be addressed, highlighting a few of the more revealing battles between the president and Congress.

Development of Constitutional Procedures of Selection

For nearly the entire constitutional convention in Philadelphia in 1787, the delegates debated the manner in which federal judges were to obtain office. Many of the delegates, such as George Mason and Oliver Ellsworth, pushed for judges to be selected by the national legislature, as was the practice in most of the states at the time. Alexander Hamilton, James Madison, and others instead insisted that judges should be appointed by the president (Farand 1967). After extensive debate the delegates reached an impasse and referred the matter to a special committee. Perhaps out of frustration, the delegates unanimously accepted the current arrangement of appointment by the president with confirmation by the Senate.

While it took months for the delegates in Philadelphia to determine the method of selection, a consensus developed concerning the term of federal judges. After little debate the delegates decided to follow the English tradition of allowing judges to serve life appointments "during **Good Behavior**." This is a lower standard than is required

for officials within the executive branch, who can be removed from office for "treason, bribery, or other high crimes and misdemeanors." As a result, it has been exceedingly rare for federal judges to be removed from office. Only 13 judges throughout our history have been impeached, and the majority of these either were acquitted by the Senate or left office before the Senate could hear the case.

Much debate has ensued concerning the intent of the Framers in establishing the **advice and consent of the Senate** procedures concerning judicial appointments. Some commentators, Alexander Hamilton chief among them, believed that the Senate would only play a minor role in determining the makeup of the federal judiciary. Hamilton wrote in *Federalist No. 76*:

> The person ultimately appointed must be the object of his [the president's] preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them.

Hamilton believed that the Senate's role in the process was simply to ensure that truly "unfit" nominations would not make it to the federal bench. Contrary to this limited role, many of the framers called for a more robust role for the Senate. Indeed, the Senate rejected one of George Washington's selections for the U.S. Supreme Court in 1795.

A more complex debate has ensued over the role partisanship should play in the process. Henry Abraham, a political scientist who researches the courts, writes that the "delegates simply assumed, perhaps a mote naively, albeit quite understandably, that those selected as federal jurists would be chosen on the basis of merit. Period." (Abraham 1999, 18) Other commentators disagree with this assessment and suggest that the founders were fully aware that the appointment and confirmation process would be partisan and expected politics to play a role in the process as it does in other executive appointments. This debate is likely to never be resolved.

How Does the Nomination Process Work?

The process of nomination to the federal bench differs depending on the level of the court vacancy. What is normal for a U.S. District Court or Circuit Court of Appeals

vacancy is very different for the process followed for a vacancy in one of the nine seats on the U.S. Supreme Court. In actuality it is more accurate to say that the Senate has the power of appointment at the district court and circuit court of appeals levels while the president is left the power to confirm. When a vacancy occurs on a district court, a senator from the president's party who represents that state will submit a list of names to the president's staff for consideration, and if the president seeks to circumvent such consultation, the senator may invoke a tradition called **"senatorial courtesy."** According to that tradition, if a senator invokes senatorial courtesy, the president's selection will have a difficult time being confirmed. If no senator from that state is from the president's party, the president will likely consider the opinions of other high-ranking officials from his party in the state. The president is then likely to accept this recommendation as his first choice for the open post.

The same process is followed when a vacancy occurs on the U.S. Circuit Court of Appeals. Since a circuit court has jurisdiction over several states, by tradition the senator of the president's party who is from the state in which the departing jurist resided has a large say over who the new appointee will be. If there are two senators of the president's party who are from the same state in which a vacancy occurs, the nominee must usually be acceptable to both of the state's senators. Finally, even if both of the senators from a state are from the opposition party of the president, it is likely they will have significant leverage in the final choice of the president with their influence in their own chamber.

A different process exists concerning the selection of nominees for the U.S. Supreme Court. While each nomination differs depending on the balance of partisan power in the nation's capital and sitting president, a general pattern has developed. Typically, a subset of the president's advisers along with the high-ranking staff of the Department of Justice compile a list of candidates and assemble background files on these individuals. The individuals on this list may be submitted by interest groups, internal executive branch officials, members of the judiciary and Congress, and even the president himself. Candidates who survive a first investigation are sent extensive questionnaires about their personal lives and judicial philosophies. The answers to these surveys are forwarded to officials at the Department of Justice, the president's inner circle and, if the president desires, to the **American Bar Association's (ABA) Standing Committee on the Federal Judiciary**. If the ABA committee's recommendation is favorable, the FBI is asked to do a security check and the ABA issues a more formal report. However, the ABA's role was drastically reduced by President Bush in 2001. Speculation exists for the reasons behind the limitation of the

ABA's role, but many insiders believe it stems from the treatment of Ronald Reagan's appointment of Robert Bork to the Supreme Court. (See below for more information on the Bork nomination.)

With the FBI report and, prior to President Bush, the formal recommendation of the ABA in hand, the president contacts the potential nominee and conducts an interview in Washington, D.C. If the president is satisfied with the nominee, the nominee's name is announced and he or she is officially nominated to the bench.

When a nomination arrives in the Senate it is transferred to the Committee on the Judiciary. After providing time for the committee's senators and staff to prepare, the committee will hold hearings concerning the nominee in which the nominee and other interested parties will testify. Once the hearing is complete, the members of the committee will vote and make a recommendation to the full Senate. The Senate will then consider the candidate and, with the support of a majority of the senators, make a formal recommendation to approve the nomination. Nominees receiving this recommendation are then sworn in as federal judges.

It would be remiss to not mention a last check of the Senate. This is the power of the filibuster. The filibuster refers to the ability of any senator to take the floor during debate to prevent the vote on any motion or nomination. Under current Senate rules, a formal motion of cloture must be approved to force the end of a filibuster. Cloture requires the consent of at least 60 of the 100 senators. As a result, a minority of 41 senators can prevent the approval of any nomination. Another tactic in recent years is "the hold," a process whereby a single senator might request a delay in considering a judicial appointment until some "question" is resolved. The hold is a technique more likely to be used in lower court appointments.

Prior to 1968 there is no record of a filibuster being used to prevent the approval of a judicial nominee. Abe Fortas, an associate justice on the U.S. Supreme Court, was nominated by Lyndon Johnson for the position of chief justice, but his nomination was thwarted by a coalition of Southern Democrats and Republicans who used the filibuster to prevent his approval by the full Senate. That filibuster was based on the fact that Fortas had continued to advise President Johnson on political matters even after his appointment to the Court, and the revelation of this continued relationship was perceived as a violation of checks and balances between the presidency and the Court. Today, the blockage of judicial nominations in the Senate is commonplace by both parties using the filibuster and other procedural rules. During 2005, in frustration with the successful use of the filibuster by the minority Democrats, an attempt was made by Republicans to alter the ability of the filibuster to prevent judicial

nominations. The "**nuclear option**," as it came to be called, suggested changing the Senate filibuster rules allowing a simple majority of the Senate to vote directly on the approval of a judicial nominee. The nuclear option was forestalled by a coalition of senators referred to as "the Gang of 14," led by Republican John McCain and Democrat Joseph Lieberman, who preserved the strength of the filibuster in judicial nominations; at present, the nuclear option has simply been removed from Senate consideration.

The Process in Motion: Recent Approval Battles

It is difficult to judge the influence of each selection process on future nominations, however, three nominations in the past quarter century stand out for their influence on the current politics of the nomination process. The nominations of Robert Bork, Clarence Thomas, and John Roberts all shed a different light on the nomination and confirmation process.

Robert Bork was introduced by President Ronald Reagan as the replacement for the moderate Lewis Powell Jr., who had served on the Court since January 1972 (see Bronner 1989). While Ronald Reagan introduced Bork as an "even-handed and open-minded" judge who was neither a conservative nor a liberal, Bork is more accurately described as a true conservative who practices an **original intent** manner of constitutional interpretation. Bork had previously served in numerous capacities in Washington, including as the country's solicitor general and as the acting attorney general under Richard Nixon. Bork is famously responsible for firing Special Prosecutor Archibald Cox, who was investigating the Watergate scandal; this firing is now known today as the "Saturday Night Massacre." Prior to his nomination to the Supreme Court, Bork served as a justice on the Circuit Court of Appeals for the District of Columbia.

Bork's nomination was met with immediate derision by the Democratically controlled Congress. Within an hour of Reagan's announcement, Senator Ted Kennedy, an influential member of the Committee on the Judiciary, took to the Senate floor and, on a nationally televised broadcast, denounced the appointment and suggested Bork supported segregation and banning the teaching of evolution. The hearings conducted before the Committee on the Judiciary concerning the Bork nomination are some of the longest on record, lasting 12 days and producing a written transcript of more than 6,000 pages. The senators examined every aspect of Bork's judicial philosophy and his long political career. In response, Bork was forthcoming and detailed in his answers.

After the exhaustive process, the committee reported Bork's nomination to the full Senate with only 5 of the 14 members of the committee supportive of his appointment. In the end, only 42 senators voted to support the Bork appointment, and the vacancy on the Court was eventually filled by the more moderate Anthony Kennedy.

The Bork nomination is the first that truly energized the entire interest group establishment that had grown in Washington over the past 50 years. Interest groups as varied as the National Organization of Women, the American Civil Liberties Union, the NAACP, and Planned Parenthood all mobilized to convince the Senate to reject his nomination. In the two-and-a-half months between his appointment by Ronald Reagan and his eventual rejection by the Senate, millions of dollars were spent and countless hours were occupied concerning the outcome of his appointment. Even today, to be **"Borked"** is used to describe a coordinated attack against a nominee to prevent his or her approval by the Senate.

If the Bork nomination revealed the contentious side of the confirmation process, the approval of Clarence Thomas may be regarded as the darkest days for the process. Thomas was chosen by the first President Bush to succeed the first African American seated on the Court, Thurgood Marshall, in the summer of 1991 (see Mayer and Abramson 1994). While Thomas maintained the racial balance on the Court, his conservative judicial viewpoints differed dramatically from his predecessor. Thomas had served in numerous positions under the tutelage of John Danforth, who at the time of Thomas's appointment to the Supreme Court was serving as a senator.

Thomas's most influential government position had been chairman of the Equal Employment Opportunity Commission (EEOC) under Ronald Reagan. While Thomas was originally challenged by women's rights groups for his disapproval of the *Roe v. Wade* decision that established a woman's right to choose whether to have an abortion at least in the early stages of pregnancy, his nomination appeared headed for a quick approval by the Committee on the Judiciary. As the committee's hearings neared their end, National Public Radio's Supreme Court correspondent Nina Totenberg reported that Anita Hill, now a law professor at the University of Oklahoma but previously a member of Thomas's staff at the EEOC, claimed to have been sexually harassed by Thomas.

On October 11, 1991, Hill was sworn in before the Senate Committee on the Judiciary to provide her testimony. Hill claimed that on numerous occasions Thomas made inappropriate sexual gestures toward her when they worked together at the EEOC. Hill's testimony was both graphic and riveting to the national media. The

committee called forth numerous other witnesses who either corroborated Hill's testimony or supported Thomas in his full denial of the charges leveled against him. Thomas lashed out at the committee, testifying that:

> This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree. (Senate Judiciary Committee Hearing, 1991)

After extensive debate the committee sent the Thomas nomination to the full Senate without a recommendation. In the closest vote in over a century, the Senate approved Thomas to the Supreme Court by a vote of 52-48.

A final exemplar of the appointment process came with the recent appointment to fill the vacated seat of the Chief Justice William Rehnquist upon his death in 2005. Originally appointed by President George W. Bush to replace the retiring associate justice Sandra Day O'Connor, John Roberts's nomination was transitioned to that of chief justice upon the unexpected death of Rehnquist. Following a successful career in both private and public legal service, including service as one of Chief Justice Rehnquist's law clerks, Roberts was prominent on the short list of potential Supreme Court justices after he took a position on the Circuit Court of Appeals for the District of Columbia in 2003. Described as a judicial minimalist whose opinions stick narrowly to the context of each case and who favors precedent and a limited role for the judiciary, Roberts's supporters expected little opposition to his nomination.

The Roberts nomination and hearings process is exemplary because it highlights the differing philosophies concerning the role of the Senate in the confirmation process. During his hearings before the Senate Committee on the Judiciary, Senator Orrin Hatch asserted that the Senate must apply a "judicial rather than a political standard to evaluate Justice Roberts's fitness for the Supreme Court." Senator Hatch asserted "judges interpret and apply but do not make the law." (See *Confirmation Hearings on the Nomination of John G. Roberts Jr.*) Justice Roberts built Senator Hatch's assessment into an analogy: "Umpires don't make the rules; they apply them. I come before the committee with no agenda. I have no platform. Judges are not

politicians." He assured the senators that if seated on the Court, he would "remember that it is [his] job to call balls and strikes and not to pitch or bat."

Democratic Senator Charles Schumer argued instead that "the most important function of the hearings . . . is to understand your legal philosophy and judicial ideology." He believed it is the Senate's right to inquire into the detailed beliefs of the nominee. He stated that the nominee "should be prepared to explain [his] views on the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers' rights, women's rights, and a host of other issues."

Both Hatch and Schumer had distilled valid yet inconsistent views on what Supreme Court justices do and how the Senate should evaluate them. For Hatch, a nominee's political values were irrelevant because judges were expected to be neutral arbiters, akin to umpires not politicians. For Schumer, a nominee's political beliefs were the fundamental aspect of the confirmation process because an individual's political beliefs determine the direction of their votes on future cases (see Eisgruber 2007).

After the committee discussion, the Roberts appointment was recommended by the committee for approval by the whole Senate. He won broad support from members of both political parties in the vote before the full Senate to become the seventeenth chief justice of the United States Supreme Court and was approved by a vote of 78-22.

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