

ORIGINALISM & JUDICIAL CONFIRMATION HEARINGS*

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Thank you for that very kind introduction. I am honored and, frankly, humbled to be here among so many distinguished guests. Before I begin my formal remarks, I want to express my deepest gratitude to Gene Meyer, Leonard Leo, and their staff for the outstanding work on this superb convention. It just gets better and better every year.

Today I would like to talk a bit about the judicial confirmation process. This is an area, of course, where the Federalist Society has made very important contributions over the last few years. Few organizations have been a more effective voice for restoring the federal judiciary to its proper constitutional role than yours. And many of us in the United States Senate are grateful to you.

I was pleased to see that this year's convention theme is "Originalism," because what I wish to tell you today about the confirmation process is that it could use a good dose of originalism. I believe the Senate has strayed very far from the original understanding of its role in the confirmation process, and where we are today is not a very healthy place to be.

In Article II of the Constitution, it says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . ." ¹ The meaning of this provision is clear. The President—and only the President—shall nominate, and, once this has been done, by the Advice and by the Consent of the Senate, the nomination is appointed. "Advice" in this provision does not mean advice in the nomination; it means advice in the confirmation.

* Presented at the Federalist Society National Lawyer's Convention in Washington, D.C. on November 10, 2005.

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1. U.S. CONST. art. II, § 2.

Thus, the text of the Constitution can only be read to mean that the Senate is not entitled to any role in the nomination of a federal judge. But if there were any ambiguity on this point, it is immediately clarified by looking to the earliest presidential practice. As law professor David Currie has written in one of his outstanding books on the Constitution in Congress, “no . . . practice [whereby the President consulted the Senate] emerged with regard to appointments; from the outset the President simply submitted the names and the Senate voted yes or no.”²

But this is not, of course, our confirmation process today. Some of my colleagues believe that they have a right to be consulted before the President nominates someone to become a federal judge. Many of my colleagues were upset, for example, that the President did not ask their permission beforehand on his latest Supreme Court nominee, Judge Samuel Alito. But, as I have noted, this purported right to consultation is a constitutional fiction.

Of course, this does not mean that the President may not choose, if he wishes, to consult with the Senate. And this President has done that. Judge Alito is President Bush’s third nominee to Justice O’Connor’s seat. In the course of replacing Justice O’Connor, the President asked the views of some eighty senators, the vast majority of whom he consulted on *multiple* occasions. By any measure, whether the one provided in the Constitution or the one created by some of my colleagues, this President has fulfilled his obligations.

Consultation is not the only way in which we have strayed from the original understanding of the Senate’s role in the confirmation process. One of my colleagues has been on a crusade in recent years to persuade the Senate to vote down judges with whom he has “ideological” differences. By “ideology” my colleague means the results the judge is likely to reach once on the bench. My colleague envisions a process whereby the Senate Judiciary Committee requires judicial nominees to tell us during their confirmation hearings how they expect to rule on a list of hot-button political issues. Then, if senators disagree with any of the results the nominee has said he will reach—or if they disagree with enough of the results the nominee has said he will

2. DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 25 (1997).

reach—they are supposed to vote against the nominee. My colleague has actually handed out this list of hot-button issues to judicial nominees, including Chief Justice Roberts. It includes some seventy or eighty questions.

Now, there are so many problems with this model of confirmation-by-ideological-interrogation that it is difficult to know where to begin in countering it. But let us start with the mechanism for the interrogation: the confirmation hearing. Would those who ratified the Constitution have understood it to guarantee the Senate the right to interrogate nominees through a hearing? We have a definitive answer to this question, and the answer is no. For well over 100 years, federal judges were confirmed by the Senate without so much as a single confirmation hearing. The first time a nominee was summoned to appear before the Senate Judiciary Committee was not until Justice Stone in 1925. Confirmation hearings did not become a regular part of the confirmation process until 1955. The hearing, it is clear, is not a constitutional entitlement.

Please do not misunderstand me: I am not advocating the end of confirmation hearings. But it is no coincidence that confirmation hearings became a regular part of the process around the same time that television became a regular part of our lives. They provide a good deal of free television time for us senators. But it must also be conceded that the confirmation hearing is nearly worthless as a means to learn anything about a judicial nominee. And this is due to the second reason that my colleague's model of ideological interrogation fails: judicial nominees cannot tell us how they will rule in any case that will come before them.

Beginning with the very first confirmation hearings, there has been a long and unbroken tradition of nominees not telling senators how they will rule on issues that are likely to come before them on the bench. This rule has now even been codified in the American Bar Association's canons of judicial conduct.³ The reasons for this rule are obvious. Judges can be neither independent of the Senate nor impartial to litigants if, as the

3. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (2004) ("A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.").

price for their confirmation, they are required to pledge to rule a certain way in a future case.

My colleague who endorses the model of confirmation-by-ideological-interrogation does not rest his view on the history and tradition of confirmation hearings. He goes all the way back to George Washington to find an example, he says, that supports his claim that those who ratified the Constitution understood the confirmation of federal judges to be based on their ideological views.

The example my colleague uses is the Senate's rejection of John Rutledge, whom Washington had nominated for Chief Justice of the United States. Rutledge was defeated by a vote of fourteen to ten, and my colleague tells a story why this was so: "[H]e was defeated not because of some personal foible—not because he smoked opium as a teenager or failed to pay his nanny tax to the British. . . ." ⁴ Instead, my colleague says, he was defeated "because of his views of the Jay Treaty." ⁵ The Jay Treaty, of course, set the terms for England's final withdrawal from the United States, and, back then, it was one of the hottest-button issues of the day.

But this story, entertaining as it is, turns out to be not quite right. When George Washington nominated John Rutledge in 1795, he immediately became Chief Justice because the Senate was in recess at the time of his nomination. While the Senate was still in recess—and while he was serving as Chief Justice—he traveled to South Carolina and delivered a blistering speech in opposition to the Jay Treaty. Witnesses to the speech reported that "Rutledge talked like a crazy man." ⁶

When the Senate got wind of his speech, most of its members were outraged. It was the height of arrogance—and, as one historian has described it, "judicial tactlessness" ⁷—for a sitting Chief Justice to so brazenly and publicly insert himself into the middle of one of the most controversial political questions of the day. This mixture of politics and judging was not one that the Senate thought appropriate, and they voted against Rutledge

4. Senator Charles Schumer, *Questioning Judicial Nominees: A Duty Not A Privilege*, Address Before the Center for American Progress and American Constitution Society (July 14, 2005), available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005/PR41769.Court%20Questions.071405.html.

5. *Id.*

6. RICHARD BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* 357 (1942).

7. *Id.* at 356.

both because they thought his judicial temperament lacking and because the content and delivery of the speech suggested even to those in the Washington Administration “proof of the imputation of insanity.”⁸ The founding generation thought that temperament and competence, not ideology, was the proper basis for evaluating judicial nominees.

But this, of course, has not stopped my colleagues from trying to extract campaign promises from judicial nominees. And some of them have been so frustrated by their inability to do so that they have turned to a new tactic: inferring that a nominee will rule a certain way by virtue of the clients he or she has represented as a lawyer. We have seen this tactic used repeatedly against President Bush’s nominees.

For example, there is a very fine judge on the United States Court of Appeals for the Sixth Circuit: Jeff Sutton. In private practice, Judge Sutton enjoyed a very successful practice representing state governments. Now, state governments get sued all the time, and, when they are sued, they often invoke their sovereign immunity from suit. Judge Sutton handled a number of these cases for state governments, and some of them went to the Supreme Court.

Unfortunately for him, the cases that went to the Supreme Court involved plaintiffs who were suing for disability discrimination. Thus, his nomination was bottled up for years in the Senate and his detractors charged that he was hostile to the disabled. That’s right ladies and gentlemen: if you represent a client who has been sued by a disabled plaintiff, you may be branded hostile to the disabled in this confirmation process.

Judge Sutton is only one example. I see my colleagues judging lawyers by the clients they represent time and time again. The most recent example involved Chief Justice Roberts. Some repeatedly charged that Chief Justice Roberts was hostile to women because of arguments he made on behalf of the federal government while he served in the Solicitor General’s office. If you have ever defended a client against charges of sex discrimination, you too may be hostile to women.

8. Letter from Edmund Randolph, U.S. Sec’y of State, to President George Washington (July 29, 1795), *reprinted in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 773 (Maeva Marcus & James Perry eds., 1985).

We do not need to pause long in order to demonstrate the utter bankruptcy of this approach to evaluating judicial nominees. Criminal defense attorneys, for example, represent some pretty unsavory characters. Should they all be disqualified from service in the federal judiciary on the ground that they must sympathize with murderers? Of course not.

Not only is this tactic without any conceivable merit, it has the potential to undermine our adversarial process. We should not discourage lawyers from taking clients who need their help. Everyone deserves the best possible legal representation they can find. In our system of justice, clients are not supposed to be judged by their lawyers. They are supposed to be judged by a jury of their peers.

Can there be any doubt at all that those who ratified the Constitution would not find favor with this notion that judicial nominees should be rejected if they have represented unpopular clients or made unpopular arguments? In a word: no.

In 1770, for example, John Adams took the case of British soldiers who had fired into a group of colonists in what became known as the Boston Massacre. Responding to criticism of his representation of the accused murderers, Adams famously explained, “facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.”⁹ If John Adams could represent enemy combatants, surely Chief Justice Roberts and Judge Sutton can represent governments accused of discrimination.

Perhaps most disturbing of all is what some will do to judicial nominees when nothing else works: manufacture allegations of ethical impropriety. We have seen this already with Judge Alito’s nomination to the Supreme Court. In light of his sterling credentials, Judge Alito’s opponents cannot attack him on his qualifications. In light of his long record on the bench, they cannot attack him because they do not have enough information about him. In light of his thoughtful, even-handed approach to the law, they cannot even attack him on his ideology. So, with nothing left, they have tried to accuse him of sitting in a case in which he had a conflict of interest, a case

9. John Adams, 3 *LEGAL PAPERS OF JOHN ADAMS* 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

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involving a Vanguard mutual fund he did not even own. There is absolutely no merit to these charges, but that will not stop his opponents from trying to find something—anything—to hinder his nomination. As Nan Aron, the president of the Alliance for Justice said recently, “You name it, we’ll do it” to oppose Alito.¹⁰

My friends, the Federalist Society has done so much in the cause to confirm first-rate judges. But, as this list of current follies indicates, there is still much work to do. And I, for one, look forward to working with you in the future as we try to return our judicial confirmation process to one the founding generation would have been proud of.

10. Jim Drinkard et al., *Senate Battle Brewing on Alito*, USA TODAY, Nov. 1, 2005, at A1.