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## The Confirmation Process (The Judge Edward D. Re Distinguished Lecture Series, July 18, 1988)

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# LECTURES

## THE JUDGE EDWARD D. RE DISTINGUISHED LECTURE SERIES, July 18, 1988

### THE CONFIRMATION PROCESS\*

SENATOR DENNIS DECONCINI\*\*

At the very outset, I should like to state how pleased my wife Susan and I are to be here at St. John's. We have known about your school for many years. Thanks to our friendship with Chief Judge Re, I know of your many accomplishments, and of the many distinguished graduates who have attended this fine law school.

I wish also to thank Judge Re for having suggested that I be invited, and wish to thank your Dean for the kind invitation that I deliver this year's Chief Judge Edward D. Re Distinguished Lecture.

\* This lecture was given by Senator DeConcini on July 18, 1988, as part of the Judge Edward D. Re Distinguished Lecture Series.

\*\* United States Senator, Democratic Representative, Arizona; Member, Senate Judiciary Committee.

For my topic, I have chosen the responsibility of the Senate to advise and consent to the President's nomination of an individual to be a Justice of the Supreme Court of the United States.

With the exception of the power to declare war, I believe the Senate's responsibility of advice and consent to the President's nomination of an individual to be a Justice on the Supreme Court of the United States is the most important one granted to Congress by our Constitution. While granting to the Congress this momentous responsibility, the Constitution does not offer any guidance as to how to carry out this responsibility. There are no enumerated standards established by the Constitution, no objective criteria by which a nominee can be measured. The Constitution leaves these decisions up to the judgment and conscience of each individual Senator.

Nominations to the Supreme Court certainly garner the most publicity and interest, but the Senate also has an important role in confirming judges to what the Constitution calls "inferior Courts." I believe that these lower federal courts are the backbone of our federal judicial system. It is to the federal courts that the American people turn to vindicate their rights and to protect them from government abuses or from threats from the more powerful. One of my biggest regrets, which I think is shared by my colleagues on the Senate Judiciary Committee, is that we do not have enough time or other resources to scrupulously examine each and every nominee to each and every court. Today I will comment on the confirmation process for both Supreme Court nominees as well as for the lower federal courts.

Because my father was a lawyer and a member of Arizona's Supreme Court, I have been interested in our Constitution most of my life. As a member of the Commission on the Bicentennial of the United States Constitution, I have gained even greater respect for the wisdom and foresight of our founding fathers. The authors of the Constitution were worried that one branch of government would, over time, come to dominate the others. To prevent such an imbalance from occurring, they crafted a delicate system of checks and balances among the three branches. Congress, created by Article I of the Constitution, can enact laws, but these laws can be vetoed by the President or declared unconstitutional

by the courts. The President is granted the executive power, including the power to nominate judges, in Article II. The executive power of the President is checked, however, by the Congress' power to regulate spending and to give advice and consent on the nomination of judges. The Supreme Court is vested all judicial power by Article III. Although once in office, judges are entitled to remain as long as they wish, they must be appointed by the President and confirmed by the Senate. In addition, judges may be tried for impeachment by the Senate after the House has voted articles of impeachment.

Because the Constitution contemplates that the three branches of government be equal, the selection of federal court judges is just as important as the election of a new President or of a new Congress. As a matter of fact, the nomination and confirmation of federal judges, particularly, a Supreme Court Justice, is the pivotal point of our system of checks and balances. It is the fulcrum on which the system is most carefully and delicately balanced.

Until the very last days of the Convention of 1787, the drafters of the Constitution gave the Senate the sole power to appoint Justices of the Supreme Court. The provision giving the power to nominate was an eleventh-hour political compromise to placate those who wanted some role for the President.

Some would argue that the Senate should not consider a nominee's philosophy or ideology, but should only decide whether he or she has the appropriate intellect, temperament and integrity. Others argue that not only may the Senate consider philosophy and ideology, it must base its decision on the effect the nomination will have on future decisions of the federal courts.

Even some of the people involved in the process misunderstand the process. In 1970, President Nixon wrote an ill-advised and misinformed letter to Senator William Saxbe of Ohio. The President complained that the Senate had failed to "advise and consent" to his nomination and, in doing so, had denied him the right "accorded to all previous Presidents" to place nominees of his choice on the bench. The implication that the Constitution contemplates that the Senate's role in the confirmation process is simply to "rubber-stamp" the President's choice is clearly wrong.

Sometimes Senators themselves have a unique view of the crite-

ria that they should use in making their decisions. Senator Roman Hruska said about the Carswell nomination: "Even if he was mediocre, there are a lot of mediocre judges, and people and lawyers. They are entitled to a little representation, aren't they, and a little chance. We can't have all Brandeises and Cardozos and Frankfurters and stuff like that there." Now Hruska's statement sounds humorous in retrospect, but it is evidence of the irrefutable fact that in many cases, the arguments are made to support a political decision.

Let me quote two Senators' contrasting views on this question. "I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are really interested in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, and responsible job."

Compare that statement with another Senator's view. "Several Senators have indicated that they do not believe it to be within the purview of authority of the membership of the U.S. Senate to question the philosophy of an appointee to the highest court in the land. I do not accept this theory as valid, particularly in view of the fact that the philosophical biases of present day members of the Supreme Court have such a bearing upon their own interpretation of the Constitution."

Those arguments sound familiar, don't they? We heard them stridently expressed from the day Judge Bork was nominated last year. The proper role of the Senate was one of the primary issues debated during the months leading up to Judge Bork's defeat. However, the aforementioned quotations are twenty years old. They were expressed at the time of the confirmation of Justice Thurgood Marshall. The first was by Senator Ted Kennedy, who last year argued that Judge Bork's philosophy would set America back thirty years. The second quote was by Senator Strom Thurmond who last year argued that only qualifications, temperament and integrity should be considered.

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It has been quite interesting for me to be on the Judiciary Committee with these long-time antagonists. But they are merely carrying on a debate that has continued for the entire history of our constitutional system. Times and circumstance do change, don't they?

In fact, there are two myths that have developed recently about the confirmation process that I would like to address today. The first is that the "politicization" of the confirmations of the federal judiciary is a new phenomenon. The truth is that the first rejection of a Supreme Court nominee on political grounds occurred in 1795. President George Washington nominated Associate Justice John Rutledge to be the Chief Justice. Rutledge was well qualified and had been an author of the first draft of the Constitution. But two weeks after he was nominated, he made the mistake of criticizing a 1795 treaty between the United States and England. Proponents of the treaty in Rutledge's party joined with the opposition party and defeated Rutledge's elevation by a vote of ten to fourteen.

In 1835, President Andrew Jackson nominated Roger Taney to the Supreme Court. This time the debate was along party lines with the Whigs opposing Taney and the Democratic Republicans supporting him. The primary issue of the debate was the constitutionality of the Bank of the United States. Although Taney's opponents were successful in postponing his confirmation by a vote of twenty-four to twenty-one, his nomination was resubmitted and the Democratic Republicans were successful in confirming him to be Chief Justice.

President John Tyler nominated six men to the Supreme Court in 1844 and 1845. Only one was confirmed. Five others were rejected or not acted on, not because they were unqualified, but because of the political unpopularity of President Tyler. In the years succeeding Tyler, President Polk was able to win confirmation for two of his three nominees, but President Millard Fillmore was only successful once in four tries.

During the stormy presidency of Andrew Johnson, Congress was so anxious about the effect his nominees would have on Congress' Reconstruction efforts that it reduced the size of the Court from ten Justices to seven. Johnson was thus denied the opportu-

nity to appoint any Justices. When President Grant was inaugurated in 1869, Congress immediately raised the number of Justices back up to nine.

Sometimes the squabble has been more personal than between political parties. Democratic President Grover Cleveland twice attempted to nominate fellow New Yorkers to the Supreme Court, and twice he was stopped by a rival Democratic Senator from New York. Cleveland and Senator David B. Hill differed on patronage matters and Hill twice was able to stop Cleveland's nominees through the use of senatorial courtesy. Cleveland was finally able to name the Senate Majority leader to the seat.

There have been fewer rejections of Supreme Court nominees in this century, but I do not believe the Court has been any less politicized. Robert Bork was the sixth nominee rejected by the Senate since 1930. In that year, Herbert Hoover appointed a North Carolina judge who was bitterly opposed by the NAACP and by labor. The judge was defeated forty-one to thirty-nine, but went on to issue several decisions on the court of appeals very favorable to civil rights. The man who was named subsequently to the seat, Owen J. Roberts, proved to be much more conservative on the issue.

That brief history brings us up to the political battles that many of us can recall. Fortas, Haynesworth, Carswell, and Bork all were nominated and were either rejected or withdrew in the last twenty years. I will discuss the Bork and Ginsburg nominations in a moment because I was personally involved. I do not think that it is necessary to go into the others because many of you know the details as well as or better than I do, and I can offer no particular insights. Suffice it to say, these battles were highly political and reflected a strong disagreement throughout the country about the decisions of the Supreme Court under Chief Justice Earl Warren.

Mentioning the Warren Court brings up two other ways that the Supreme Court and the appointment and confirmation process are involved in politics. First, the Supreme Court has been an issue in many presidential campaigns throughout our history. In 1800, Thomas Jefferson ran against a federal judiciary that was solidly and actively Federalist. The 1857 *Dred Scott* decision was an important factor in Abraham Lincoln's election in 1860. Since

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*Dred Scott* decided that Congress could not limit slavery in the territories, the Republicans argued that the only acceptable solution to the problem of slavery would be to gain control of the White House and the Senate, and appoint and confirm Justices who would overturn *Dred Scott*.

In the 1924 election, the Court's propensity for overturning progressive laws was a primary issue. The progressive candidate, Senator Robert LaFollette, proposed a constitutional amendment that would preclude lower federal courts from declaring acts of Congress to be unconstitutional and that would allow Congress to "override" the Supreme Court's unconstitutionality rulings by simply re-enacting the laws.

As many of us remember, Richard Nixon ran against the Warren Court and its liberal rulings. During the campaign, Earl Warren had already announced his plans to retire, and the debate on the doomed confirmation of Abe Fortas to replace him was going on in the Senate. Nixon promised that if he was elected he would appoint Justices who would reflect his own conservative law and order image. His first nominee, of course, was Chief Justice Warren Burger.

The flip side of politics in the confirmation process, of course, is politics in the appointment process. President Reagan and Ed Meese's political interest in naming Robert Bork to the Supreme Court was certainly not the first time that politics was considered in the appointment of Justices to the Supreme Court. I think that it is fair to say that politics of some kind is always a factor in naming Justices. There have been cases of Presidents appointing political friends to uphold their policies, and of Presidents appointing political enemies to remove them as rivals. There have been cases of Presidents trying to persuade sitting Justices to retire so they can appoint replacements, and of Presidents trying to create more seats on the Court so that they can make appointments. I do not find such political considerations at all inappropriate. I believe them to be part of the system of checks and balances established by the Constitution. But if it is appropriate for the President to make an appointment on a political basis, then it is equally appropriate for the Senate to consider politics in deciding whether to confirm the nominee.



The second myth about the confirmation process is that the Senate, and in particular the Judiciary Committee, consistently rejects or delays consideration of presidential appointments to the federal judiciary. In the more than eleven years I have been in the United States Senate, there have been only sixteen roll call votes on judicial nominees. The first 7 years of the Reagan Administration, the Senate confirmed 349 Article III judges. Not a single lower court judge was rejected on the floor, and only one was rejected by the Judiciary Committee. The record for the first 7 years of the Reagan Administration is: 3 successful Supreme Court nominees (including Rehnquist's elevation) and 1 unsuccessful nominee, and 349 successful Article III judges and 1 unsuccessful one. To be honest, I must add that there were several nominees whose names were withdrawn, and one who died, who probably would not have been confirmed. In addition, I think that it is fair to say that several of the nominees that the Senate is presently considering will not be confirmed.

But all in all, I think that the process has worked pretty well. The President has fulfilled his responsibility for appointment and, although I wish that he would appoint more minorities and women, overall I think he has done rather well. The Senate has fulfilled its responsibilities of advice and consent, and I think we have performed that responsibility equally as well. The record will show that despite political differences, the Senate has confirmed many highly conservative nominees, most by voice vote. For example, we have confirmed Ralph Winter for the Second Circuit, Richard Posner and Frank Easterbrook for the Seventh, J. Harvie Wilkenson for the Fourth, Alex Kozinski, John Noonan and Steven Trott for the Ninth and Robert Bork, Kenneth Starr and Douglas Ginsburg for the D.C. Circuit. All of these judges are recognized as strong conservatives by their writings, speeches and, in most cases, their strong ties to President Reagan, Ed Meese and the Department of Justice.

I know that some of you may be interested in my comments on the nomination of former Judge Robert Bork to the Supreme Court. Let me start off by saying that I believe that the confirmation process worked, and that it worked well. Many of those who criticized the process afterwards were the same ones who were

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praising the same process a year earlier when Justice Rehnquist was confirmed. Many of the same elements that existed during the Bork debate had also existed during the Rehnquist confirmation. When Justice Rehnquist was considered by the Senate for confirmation as Chief Justice, thirty-three Senators voted no. I supported Justice Rehnquist through the Committee and the floor, and I believe that the process was very similar.

I believe that Chairman Biden was eminently fair to all concerned and conducted a scrupulously fair hearing. All sides were heard and no attempt was made on the part of the Democrats or Chairman Biden to slant the hearing in any way.

When I met with Judge Bork before the hearings began, I told him that I was very interested in hearing his views on constitutional issues. I told him that I had been very dissatisfied with the responses given to the Committee the year before by Justice Scalia, and that if he took the same tact I would be hard-pressed to vote for his confirmation. Judge Bork assured me that he believed that the Committee had every right to know his views on constitutional and other legal issues. He told me that with the exception of issues that might come before the Court, he would endeavor to inform the Committee of those views. I respect Judge Bork for the responsible way that he went about informing the Committee of what it needed to know before it could vote on his confirmation.

I have read and heard criticisms of the process that was followed in the Bork hearings as somehow undermining the dignity of the Supreme Court. This criticism holds that it is inappropriate and unseemly for the Committee to inquire into a nominee's views on specific issues. I reject that criticism, generally because I believe that such inquiries are the only way that the Committee can satisfactorily fulfill its responsibility of advise and consent.

Leaving further debate on that issue to the future, I would argue that such inquiries were especially necessary in this case. Judge Bork had made harsh criticisms of the rulings of the Supreme Court one of the central themes of his legal career. He established his name in the legal community, and I might add in the political community as well, by disagreeing with the decisions of what he called the activist Court. He was adjudged, and I think

rightly so, as one of this country's leading constitutional scholars. He did not stop this activity with his appointment to the D.C. Circuit. Both prior to and while on the Circuit Court, he regularly commented on constitutional issues and expressed his views on the constitutional questions of the day. Judge Bork had every right to express these views and the Committee had every right to question him about them.

The Committee would have abdicated its responsibility if it had allowed the nominee to suddenly don a cloak of dignified, nonpartisan impartiality. On October 12, 1985, Justice William Brennan gave a speech at Georgetown University entitled *The Constitution of the United States: Contemporary Ratification*. If Justice Brennan was selected by the next President to be Chief Justice, or if he had delivered this speech as a member of the court of appeals and later was nominated to the Supreme Court, he would certainly have been asked about this speech by the conservatives on the Judiciary Committee. In my view, it would be Justice Brennan's responsibility to discuss with the Committee the views expressed in that speech.<sup>1</sup> Judge Bork was nominated because of his views and it was proper and necessary for the Committee to examine them.

The other popular issue of discussion related to the Bork confirmation hearings is the furious lobbying that took place. Having participated in only three other Supreme Court confirmation proceedings, I cannot really comment on whether such activities were unprecedented or not. I would imagine that a lot of outside activity took place during the confirmations of Thurgood Marshall, Abe Fortas, Harold Carswell and Clement Haynesworth, but no one can deny that the techniques of grass roots lobbying have become more sophisticated and effective over the years.

I guess the two questions that people are interested in are: was it fair and was it effective. To the first question, I would say that it was not absolutely fair on either side, but it was not so unfair as to be outside the normal extremes of political debate. The difference is that the hyperbole and exaggeration were applied to a person and not to an issue. To say that a proposed act of Congress will

<sup>1</sup> Justice Brennan's speech sharply criticized the doctrine of original intent and discussed his views of the Constitution as an evolving document.

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end life as we know it on this planet is different from saying that an individual's confirmation to the Supreme Court will have the same result. The difference is that the individual has feelings and has family and friends who are hurt by such statements. But in reality, such statements are no different than those made by Bork's supporters, that his confirmation would bring peace, prosperity and law and order to our lives. I don't know who started it and I don't think that it really matters. The day after the nomination was announced, both sides were using it for their own purposes. I do not find such tactics inappropriate or unsettling for political questions such as this. I think that it got a little out of hand this time, because both sides tried to outdo each other, but in general it did not trouble me.

That brings up the question of "Did it work?" I certainly wouldn't deny that all of the publicity and controversy did result in increased public awareness and interest in the issue. The more public interest, the more pressure on Senators to make the right decision. Because of the greater public interest, I was able to discuss the issue with more of my constituents to determine their views. I believe that the lobbying did play a part in the result, because more people became aware of the potential effect of the decision on their lives, but I believe that my decision would have been the same anyway. I based my decision on Judge Bork's responses to my questions and to the questions of my colleagues on the Committee. The procedure that I followed was to determine how Judge Bork's responses satisfied the criteria that I have established for confirming judicial nominees, which I will discuss in a moment.

The Ginsburg case was quite unusual, in my opinion. Although Ginsburg's nomination was never actually received by the Senate, the confirmation process did begin. Ginsburg did go through the FBI background investigation and he did make the rounds of meeting the Senators on the Judiciary Committee. The Judiciary Committee staff did begin its investigation of the announced nominee. When I met with him I thought that he was intelligent, articulate and conservative, and expected that he would have little problem being confirmed. But I think his mistake was miscalculating the overwhelmingly intense scrutiny that a nominee to the

Supreme Court undergoes.

In the normal case, it is a thousand times more intense than for a court of appeals judge. But in the Ginsburg case, he underwent almost no scrutiny for the court of appeals. Ginsburg was nominated to the court of appeals on September 23, 1986, and was confirmed by the Senate fifteen days later. I believe that he just underestimated the level of scrutiny that he would face for the Supreme Court. Fortunately, judicial nominations are no longer being handled as casually as was the Ginsburg nomination at the end of the last Congress.

I think that Ginsburg's biggest problem was that he was nominated by a conservative and supported by conservatives, and he ended up having a problem that conservatives couldn't live with. He lost his base of support and the other Senators who probably would have voted for him were not enough to get him through. To get confirmed to the Supreme Court, you need avid supporters, and Ginsburg lost his.

I base my decisions on the nominee's legal abilities and experience, temperament, integrity, and on whether or not I believe they will decide the cases before them based on the Constitution, statutes, regulations, and, to some extent, the precedents that have become part of our jurisprudence. I would be opposed to any nominee whose intentions are to ignore the precedents of the Court and lead it in radically new directions. I must be satisfied that in the guise of "judicial restraint" or "judicial evolution" a nominee is not, in reality, a judicial activist bent on imposing not just a conservative or liberal philosophy on the court and on the nation, but instead a radical philosophy.

The question is not whether I agree with a nominee's opinions more often than I disagree with them. I will not prepare a scorecard of opinions or decisions and vote according to the hits and misses. If I were to do so, I might find the score in his favor. But this is not a game. There is no next day for the losing parties in the Supreme Court or often even in the lower courts.

The question that I ask myself at the end of confirmation hearings is whether I am comfortable with the approach that the nominee takes in applying the Constitution and federal laws to the facts presented. Do I believe that faced with difficult decisions

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with wide-ranging implications, the nominee will listen carefully to the arguments on both sides and then apply the appropriate law in an objective and unbiased way? Or, do I reluctantly conclude that an otherwise qualified nominee will find an intellectually supportable and highly articulate way to decide the case as he or she wants it to come out? Federal judges should not be result-oriented. In my judgment we already have too many judges like that.

The ultimate question I must decide is whether I feel secure trusting our individual liberties and freedoms to the nominee. Only history can tell us if we are right or wrong in our determination. In the meantime, I will continue to do the best I can to judge whether a nominee measures up to the standards which I have established for making my confirmation decisions.

