

Journal of Civil Rights and Economic Development

Volume 7
Issue 1 *Volume 7, Fall 1991, Issue 1*

Article 2

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COLLOQUIUM: THE JUDICIAL NOMINATION AND CONFIRMATION PROCESS

PROBING VIEWS AND ALLEGATIONS IN THE CONFIRMATION OF FEDERAL JUDGES

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Recent events have focused public attention on two critical aspects of the process by which the United States Senate decides whether to “advise and consent” to the appointment of federal judges. The first concerns the legitimate scope of questioning about a nominee’s views. The second concerns the appropriate procedure for ascertaining facts about allegations of misconduct.

I. SCOPE OF QUESTIONING

As the Supreme Court’s task of interpreting the Constitution has drawn it into decisions concerning a wide range of human activity, it is not surprising that keen interest should be expressed about the views of those being considered to become members of

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the Court. In an earlier time, when the business of the Court primarily concerned technical fields of law such as admiralty and commercial transactions, one could reasonably argue that inquiry of a nominee, beyond baseline matters such as education, experience, judicial temperament, and character, should be confined to ascertaining whether the nominee has demonstrated a high degree of proficiency in the substance of the law—whether the nominee has demonstrated the capacity to think carefully about legal issues, reason soundly, and write clearly and even forcefully.

Vital as these talents are to the craft of judging, they will not suffice to guide a selection process for judges who will be deciding what the general terms of the Constitution mean in specific contexts such as legislative reapportionment, abortion, prayers in public schools, or discrimination based on race, national origin, gender, poverty, or any other characteristic asserted as a basis for protection under the Equal Protection Clause. Nor will examining skillfulness in legal reasoning provide a basis for assessing how a nominee will adjust the crucial tensions in the constitutional matrix—between federal power and state power, between presidential power and congressional power, and between governmental power and citizens' rights.

When a nation proposes to entrust a person with a lifetime appointment to a federal court, with authority to make the vast range of crucial decisions that constitutional adjudication now comprehends, it is entitled to have an extensive basis for determining the general direction of that person's constitutional views. To state that proposition is not to take sides in the recurrent controversy as to the appropriate scope of the Senate's decision-making, once the President has selected a nominee. Whether Senators are entitled to oppose a nominee because of disagreement with the nominee's legal viewpoints or, more precisely, at what point the degree of difference between the nominee's views and those of a Senator justifies opposition, is an important matter, but it is an issue distinct from the scope of legitimate inquiry. It is not my purpose here to attempt to determine the appropriate substantive content of the "advise and consent" function. My focus is on the procedural issue. To enlist the analogy of litigation, the issue is not the standard of liability but the scope of discovery. Of course,

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the bounds of reasonable discovery are not entirely unrelated to the substantive standard at issue, or at least to the plausible outer limits of that standard. In urging fairly wide-ranging exploration of a nominee's legal views, I must acknowledge my premise that the advise and consent function includes the prerogatives of Senators to use *some* measure, however calibrated, to assess a nominee's legal views and interpose objection when those views are deemed unacceptable. I take it that even the broadest view of a President's power to nominate and the most limited view of a Senator's right to reject a nominee would acknowledge the legitimacy of opposing a nominee who favored a return to the "separate but equal" doctrine of *Plessy v. Ferguson*.¹

The scope of legitimate inquiry of a judicial nominee is usually viewed as a continuum ranging from the most general probing of judicial philosophy to the most precise questioning about specific disputes likely to come before a court. If the worth of a judge and the suitability of a nominee to become a judge depended only on the results the judge reaches, there would be a compelling argument that those making the selection of judges should inquire without limit, even as to likely results in impending disputes. Indeed, how is a President who campaigns on a promise to change the outcome of some Supreme Court cases to fulfill that promise without ascertaining the nominee's views on the correctness of those decisions and, equally important, on the nominee's willingness to overturn them?

But results, though obviously important, are not all that matters. Adjudication is a process that serves vital interests in our scheme of things, and maintaining respect for the integrity of that process is essential to preserving public confidence in the rule of law. We have already lowered that confidence to some degree by educating the public to the undeniable fact that the identity of a Supreme Court nominee will often affect the outcome of an issue last decided by a vote of five to four. In a democracy, that plain truth needs to be understood. But equally deserving of recognition, and much more difficult to communicate, is the more subtle idea that deciding a constitutional issue is something quite distinct

¹ 163 U.S. 537, 552 (1896).

from expressing a policy preference. As every judge knows, but as the public scarcely comprehends at all, there is a fundamental difference between having a legislative view as to whether some outcome is desirable and having a judicial view as to whether that outcome is constitutional, or between the legislative view that an outcome is undesirable and the judicial view that it is unconstitutional. And there is a difference between a legislative view that favors or opposes some policy and a judicial view that endeavors conscientiously to determine the meaning of legislation. Underlying these differences is the crucial distinction between a policy preference that a legislator might arrive at quickly because of basic philosophy, constituent pressure, or a combination of each, and a judicial view forged more reflectively in the context of a fully developed adversarial presentation of a concrete case. It is these fundamental differences that create a tension between the understandable interest in how a nominee might decide a case and the threat to the integrity of the judicial process by eliciting a pre-judgment of a case.

Though the public understands and will accept that the identity of judicial nominees will affect results, it is entitled to have a judicial system administered by those who have not committed themselves to specific outcomes of specific cases. When the cases arrive, the judge will be expected to do something significantly different from the legislative task of expressing a policy preference. The judge will be obliged to act like a judge—to make a reasoned adjudication. Of course, that adjudication will be influenced in part by the judge's views about the adjudication process, but it should not be influenced by a predisposition to an outcome already determined. The independence and lack of bias properly expected of judges do not require that they have not thought about the governing principles that affect the resolution of close questions. But they do require an honest capacity to apply the sum total of one's judgment and intellect without a predetermined answer to a specific controversy.

The nominee should not be asked for the outcome of a specific case for the obvious reason that the nominee, as judge, must be eligible to act like a judge. That does not mean, of course, that a judge cannot properly adjudicate a case calling for resolution of

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an issue that the judge has previously adjudicated. The judge must adjudicate, and is entitled to act, with respect to recurring issues. But taking a position on the outcome of a case in the course of securing the approval of those responsible for making or confirming a judicial appointment is not the process of adjudication.

If the outcome of a particular case is not within the proper scope of inquiry of judicial nominees, is the line to be drawn at that point or further back along the continuum toward general philosophy? I would draw the line right at that point and permit a wide-ranging inquiry of all views that can fairly be expressed without prejudgment of particular cases. Though the judge is not being selected to express personal views on public policy, the judge is being selected to adjudicate, and those making the selection are entitled to know what the nominee thinks about the important principles that will guide the process of adjudication. It is not enough to elicit general statements about “judicial restraint” versus “judicial activism,” or about “original intent” versus “interpretation,” nor should the inquiry be considered useful when it has ascertained only that the judge is committed to “applying the law” rather than “making the law.” These vague formulations are virtually useless.

Those determining who should become lifetime members of the federal judiciary should ascertain what the nominee thinks about matters both general and specific. On general matters, what is the role of courts in a constitutional democracy? What are the sources of interpreting the Constitution? Are the clauses of the Constitution of equal weight? If there are differences, what determines the weighting? Is the adjudicative task the same in applying the Constitution to contests between federal and state power, between presidential and congressional power, and between governmental power and citizens’ rights? What are the criteria that guide the judicial branch in determining when to adhere to precedents and when to revise or overturn them? How should courts determine the meaning of statutes—from text alone or from text and some or all sources of legislative intent, and is the process of statutory interpretation the same for all categories of statutes?

On specific matters, is there a legitimate role for substantive

due process, and, if so, how can the doctrine be applied without trenching on legitimate areas of legislative policy? Should equal protection analysis be subject to differing levels of scrutiny, and, if so, what are their characteristics? What principles can usefully delineate the line between free expression and regulated conduct? What tests might usefully adjust the delicate tension between the Establishment Clause and the Free Exercise Clause? Is there a constitutionally protected right to privacy, and, if so, to what categories of activity does it apply?

As inquiries such as these are pressed, there is some risk that an answer might move into the sphere of prejudgment of specific cases. The risk does not mean the inquiry should be abandoned. It means only that both the questioner and the nominee should proceed with considerable care. Not every question will be appropriate. Not every question need be answered. The nominee will not have a fully developed view on every question. On some topics, the nominee will have given little, if any, thought and might quite legitimately prefer to defer formulating a position until the issue is fleshed out by the context of concrete cases. Just as each nominee will have to decide where to draw the line, so will each Senator asking the questions. The result need not yield a neat pattern. But in the aggregate, the questioning can elicit a considerable basis for informed judgment. Ultimately, the Senate will have to decide whether the nominee has answered to a degree sufficient to enable the Senate to discharge its "advise and consent" responsibility. If the nominee declines to provide an adequate basis for decision, the Senate should not hesitate to reject the nominee solely on that ground.

During the process by which I was selected to become a United States Circuit Judge, I experienced an inquiry of considerable substantive content. Between 1977 and 1980, President Carter had committed himself to selecting circuit judges only from lists of candidates submitted by citizens' commissions, established in each of the judicial circuits.² Along with some forty others under consideration for two newly created judgeships on the Court of Appeals for the Second Circuit, I appeared for an individual inter-

² See 42 Fed. Reg. 9659 (Feb. 14, 1977).

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view before a thirteen-member group—seven lawyers and six non-lawyers. The chairman was Lawrence E. Walsh. The interview lasted for about an hour. The questions were focused and penetrating. Some concerned what I have characterized as general aspects of adjudication. Others became quite specific. I was pressed in particular about my views of the appropriate scope of affirmative action in the context of judicial remedies for discrimination. I thought the entire inquiry was fair and appropriate, and I endeavored to answer as fully as I could. On occasion, I conceded that I had not yet formulated a position which would enable me to be fully responsive to a particular inquiry. Ultimately, my name was included on a list of eight candidates forwarded by the citizens' commission to the President, from which two nominations were made. The ensuing Senate hearing on my nomination was far less searching.³

The Senate Judiciary Committee would do well to conduct for all nominees for the federal courts at least as extensive an inquiry as was pursued by the lawyers and non-lawyers of the citizens' commissions during the administration of President Carter.

II. RESOLVING ALLEGATIONS OF MISCONDUCT

There can be no doubt that allegations of misconduct are properly within the scope of an inquiry into the fitness of individuals to become lifetime members of the federal judiciary. The issue posed by such allegations concerns procedure—how should such allegations be investigated and how should fact-finding be conducted to resolve allegations that are not demonstrably groundless?

For any allegation of substance, the investigative stage is appropriately handled by the Federal Bureau of Investigation. Differences of opinion will inevitably arise as to which allegations merit an FBI investigation, and careful judgments will have to be made. Few events in a person's lifetime serve so clearly to identify one's friends and one's enemies as the prospect of appointment to the federal judiciary. Discretion must be exercised in separating malicious gossip from factually supported allegations.

³ See *Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 111-15, 118-24 (1979).

Of those allegations with sufficient substance to merit investigation, some will turn out upon investigation to be groundless. The serious question is how should fact-finding be conducted in those instances where investigation develops conflicting evidence concerning allegations of substance.

There is a reasonable argument that fact-finding to resolve such allegations should be conducted in open hearings. Public interest in the allegations will normally be intense, and there is a risk that public confidence in the fact-finding process would be impaired if it were conducted behind closed doors. If only results of the fact-finding were disclosed, some could legitimately question whether the public would accept either a rejection or an approval of a nominee. These are substantial concerns, but in my view, they are outweighed by the shortcomings of trying to perform serious fact-finding as to allegations of misconduct in public hearings.

The Senate hearing is part of a political process. Fact-finding is an adjudicative task. When those in the political process endeavor to perform a fact-finding task as to matters of alleged misconduct by a judicial nominee, there is an apparently irresistible tendency to politicize the process, a tendency that public hearings magnify to an unacceptable degree. Senators understandably see public hearings as a forum in which to persuade the public that the allegation is either true or not true. An objective inquiry to ascertain the facts of the alleged misconduct does not occur. Instead, as recent events have shown, the Senators divide at the outset, based on their views of whether the nominee should be confirmed. Senators of the party whose President made the nomination seek to disprove the allegation, and most Senators of the opposite party seek to prove the allegation. Now, the adversary process has its strengths, and a proceeding is obviously not inevitably worthless as a fact-finding exercise simply because the questioners take sides at the beginning of the process. But when the adversary process functions well, as it usually does in a courtroom, it does so under the firm control of an impartial hearing officer, with the authority and inclination to enforce rules of evidence and keep the inquiry tightly focused. An adversary process conducted in a public Senate hearing, no matter how fair minded the committee chair may be, is doomed to degenerate into an intensely partisan battle, in

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which the emergence of truth would be almost an accident. Television, of course, only compounds the problem.

A comparison may usefully be drawn between a Senate hearing into allegations of misconduct by a judicial nominee and the process by which the federal judiciary resolves allegations of misconduct against federal judges. By statute, complaints of misconduct by federal judges may be filed by any person.⁴ Most are dismissed without a hearing, either because the complainant is misusing the misconduct procedure as an avenue for pursuing matters that may be raised on an appeal or because the allegations are demonstrably frivolous. On rare occasion, a complaint survives dismissal by the chief judge of the circuit and a special committee is formed.⁵ The committee consists of the chief judge of the circuit and an equal number of circuit and district judges. Typically, the committee consists of five judges.

The special committee conducts an investigation, requesting assistance from the FBI where appropriate. The committee conducts a hearing to which the complainant, the accused judge, and other witnesses are called to testify. The hearing is not open to the public. A transcript is made. The judges pose questions in a serious effort to ascertain whether the allegations are true or false. The committee submits a report of its findings and recommendations to the judicial council. The council may dismiss allegations determined not to be established, or take a variety of disciplinary actions for allegations that are established.

Though special committees have been infrequently required in the twelve years since the judicial misconduct statute was enacted, they have functioned effectively in a variety of circumstances, including an allegation of sexual misconduct. The inquiries of which I am aware have been conducted thoroughly and fairly. Confidentiality has been scrupulously maintained. No doubt the luxury of not having to seek reelection contributes to the constructive environment in which federal judges administer the judicial misconduct statute, and it would not be realistic to suppose that a Senate hearing on misconduct allegations against a judicial nominee

⁴ 28 U.S.C. § 372(c) (1988).

⁵ *See id.* § 372(c)(4).

could be conducted in precisely the same manner. But the judicial misconduct hearing, conducted behind closed doors by disinterested officials who are endeavoring conscientiously to find facts, rather than bolster preconceived positions, provides a useful model for the Senate Judiciary Committee when it is obliged to consider misconduct allegations against judicial nominees.

CONCLUSION

A broad-ranging inquiry into the views of judicial nominees and a discreetly conducted inquiry into allegations of a nominee's misconduct would enhance the Senate's constitutional obligation to "advise and consent" to the appointment of federal judges.