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ADVISE AND CONSENT: THE SENATE'S ROLE IN THE JUDICIAL NOMINATION PROCESS

SENATOR PAUL SIMON*

When the Framers of the Constitution discussed naming federal judges, at first they proposed that the entire Congress—House and Senate—name the judges. They gradually realized that such a proposal would be unworkable, and then suggested that the Senate name the judges. It stayed that way until the final drafting session, when it was changed so that the President would name the judges but “by and with the [a]dvice and [c]onsent of the Senate.”¹

While Supreme Court appointments throughout our history have often reflected the political philosophy of the President making the nomination, Presidents have also considered the stability of the law when making appointments. Presidents often have considered, as a factor in the selection process, the harm to the nation that would be caused by creating a Supreme Court that swings back and forth depending on the whims of an administration.

At least eight times in this century, Presidents have nominated Justices who were of a different political party than the President. They also named people who differed with them philosophically. And so Herbert Hoover named Justice Benjamin Cardozo; Dwight Eisenhower selected Justices Earl Warren and William Brennan; Richard Nixon nominated Justice Harry Blackmun; and

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The contents of this article come from remarks made by Sen. Paul Simon, during the confirmation hearings on Judge Clarence Thomas to be Associate Justice of the United States Supreme Court. This text combines remarks from Simon's formal opening statement at the start of the Judiciary Committee confirmation hearing on Tues., Sept. 10, 1991, with passages from remarks made immediately prior to the Committee vote on the nomination on Fri., Sept. 27th. The editors combined the contents of these speeches in preparing this article. In publishing the remarks of Simon, the editors intend for the reader to appreciate the magnitude of this Supreme Court appointment, and how members of the committee approached the deliberations.

¹ U.S. CONST. art. II, § 2, cl. 2.

Gerald Ford nominated Justice John Paul Stevens. Democratic Presidents appointed conservative court members. John F. Kennedy named Justice Byron White; and Harry Truman named a Republican Senator, Justice Harold Burton. In each case the President, at least once, nominated someone who was of a different political philosophy. The nation and the law have been well served through this balance. But in recent years this sense of balance has diminished.

In the hope of repairing this process, I have introduced a resolution that proposes Senate consultation with the White House in the selection of future nominees to the United States Supreme Court. This resolution, aimed at restoring the practice of collaboration between the White House and the Senate in the nomination process followed by earlier Presidents, states:

“On the ‘Advice and Consent’ Responsibility of the U.S. Senate.”

Resolved,

Whereas the Constitution calls on the Senate to give “advice and consent” to nominations to the United States Supreme Court, and

Whereas in recent times the “advice” portion of this phrase has not been exercised by the Senate,

Therefore, be it resolved by the Senate, that it is the sense of the Senate, that

First, that the President, in determining whom to name to any future Court vacancies, should keep philosophical balance in mind, so that the law is not like a pendulum, swinging back and forth depending upon the philosophy of the President; and,

Second, that before a name is submitted to the Senate there should be informal, bipartisan consultation with some members of the Senate on who is to be named to the Supreme Court before a name is submitted to the Senate.²

Regardless of the political affiliation of the President, each of us in the Senate has the solemn and constitutional responsibility to cast our votes with care. We have taken an oath in this body to

² S. Res. 194, 102d Cong., 1st Sess. (1991).

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protect and defend the Constitution. We have not taken an oath to protect our political hides. We have not taken an oath to do all kinds of other things. We have taken an oath to protect the institutions of this country. In the case of judges there is a particular reason for the Senate to look carefully. Those appointed will serve a lifetime.

In approving a Supreme Court nominee, Senators must examine their consciences rather than public opinion. The questions we ask ourselves must go beyond the fundamentals of character and ability. Our decision-making must rest on a more solid base.

On the recent Supreme Court nomination of Judge Clarence Thomas, I asked myself six key questions:

1. Why did the President select him?

Only the President can answer this question fully, but two factors are obvious. First, he wanted an African-American, and I applaud the President for that. Diversity on the Court has always been desirable. Second, his criteria were more than simply seeking a fine legal mind, or even a fine legal mind of a Republican African-American. Had that been the measure, someone like William Coleman, the distinguished former Secretary of Transportation under President Ford, might have been selected, whose legal credentials are stronger, who would have merited the highest rating from the American Bar Association, and who would have breezed through this Committee. If the President had wished to join the majority of Republican Presidents in this century and chosen a highly qualified person, regardless of politics, many superior lawyers, scholars and jurists who are African-Americans could have been considered.

The President's criteria obviously included one other factor that excluded more obvious choices: someone whose views would satisfy the most rigidly conservative of the President's followers. The Senate must weigh whether this requirement of the President serves the best interests of the nation.

2. Has the nominee been candid with the Committee?

It is interesting that the words "candid" and "candidate" have the same Latin root, though in American political discourse the

two words have little to do with each other. That is true with this nomination. This nomination process has been a search for the "real" Clarence Thomas.

When Judge Thomas tells us that he does not recall ever having discussed the *Roe v. Wade*³ decision, handed down when he was in law school, and that he has no thoughts on it, that simply defies belief. Would we elect a President or Senator who told us that he or she had never discussed the *Roe v. Wade*⁴ decision and had no thoughts on it? Should we approve a Supreme Court nominee who gives us that answer?

His frequent attempts in testimony to escape past writings and statements would have been more understandable if he had simply said, "I changed my mind." He strained to please an audience of fourteen on this Committee, and may have succeeded with a majority, but his lack of candor troubles me.

While I differ with Judge Robert Bork in philosophy, and for that reason voted against him, his frankness with the Committee I respected and appreciated.

If evasiveness before the Committee is rewarded, we have warped the process. Judge Thomas's evasiveness adds to my doubts.

3. Isn't it important to have an African-American Justice on the Supreme Court?

It is desirable, but as Justice Thurgood Marshall said, "I think the important factor is to pick the person for the job, not on the basis of race one way or the other."

A majority of the national African-American organizations either oppose Clarence Thomas or have remained silent. Their concern is understandable; from the perspective of those of us who have labored in the civil rights field, too often he has been on the wrong side of issues.

Two other factors are important to the minority community. One is the political reality that so long as Clarence Thomas is on the Supreme Court it is not probable that another black will be

³ 410 U.S. 113 (1973).

⁴ *Id.*

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named. That means that for three or four decades the lone person of African heritage will, if judged by his record, be taking stands that the large majority of blacks do not hold. Their voice and yearning for justice will be muted.

In his writings and speeches and in his life, Judge Thomas has stressed self-help, which we all laud. However, Judge Thomas also has often harshly criticized another foundation of opportunity in our society: the laws that offer the helping hand sometimes needed by those who are less fortunate and less able. When a nominee comes before us to be elevated to the highest court in the land, I want to know that the nominee is a vigorous champion for the less fortunate and for the powerless. The test of whether we are a civilized society is not whether we treat the elite well, but how responsive we are to those who do not have the political or financial reins of power, the least fortunate among us. Unfortunately, even the casual comments of a Justice Thomas would be seized by some as an excuse to preserve the status quo. It would be good to have an African-American in this position of great influence, but not if the price is to compromise the future of millions of others less fortunate.

4. *Will he, like Justice Marshall, champion the cause of those who are not America's elite? Will he fight for basic civil liberties, for the freedoms that are the heart of this nation?*

The record is not encouraging. Even without Clarence Thomas on the Supreme Court, it will take decades to undo the damage the current Court is doing to the basic rights of Americans. We face a bleak period in the history of the Court and should not make it bleaker.

I am concerned with the erosion of basic liberties that is taking place on the present Court. The *Rust v. Sullivan*⁵ decision is potentially the most significant assault on our basic liberties since the Supreme Court, during World War II, approved the federal government's taking from their homes Japanese-Americans who had committed no crime. If the logic of the *Rust* decision is upheld, that the federal government can restrict speech if it provides fi-

⁵ 111 S. Ct. 1759 (1991).

nancial support, then libraries that receive federal support can be told what books they may have, and universities can be told what they may teach. This decision will be revisited both by Congress and the Court. I do not expect the nominee to tell me how he would rule on *Rust v. Sullivan*,⁶ but I want to sense the philosophical moorings that will shape how he votes.

I want someone to whom every American can look and say, "There is a champion of my liberty." That should be true of men and women, the old and the young, the able and the disabled, for people of every region, religion, color, national background, and station in life. That is an extremely high standard, but it is an extremely high court to which this nominee aspires.

Judge Thomas's struggle in early life is important, but so far has not been a great influence on his public record. And as Cook County Commissioner Danny Davis has commented, "Where you stand is more important than where you are from."

Because the Thomas testimony too often lacked credibility, we are forced to judge by the record. That record suggests that the privileged of our nation will have a champion, rather than those who yearn for opportunity. The record suggests that working men and women too rarely will find him in their corner.

In part, he is here because he became a hero to the far right. They have every reason to applaud his nomination, but those same reasons give me pause.

5. If we turn him down, won't President Bush nominate someone with similar views?

The majority of Republican Presidents in this century have nominated at least one Supreme Court justice with significantly different views than the President. Those who suggest George Bush's inflexibility place less faith in the President than I do. He has the ability to rise to statesmanship, as so many of his predecessors have. If he does not, the Senate has no commitment to approve the next nominee. During President Tyler's term, the Senate refused to confirm five nominees. That course of action is unlikely, because the President will understand, if this nominee is

⁶ *Id.*

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rejected, that the Constitution calls on the Senate to “advise and consent,” not simply consent. The White House should keep in mind the full phrase.

6. *Could I be wrong?*

I hope I am.

Judge Thomas may well be confirmed, and the probability is that his record will predict his future, as it has for most Justices. Nothing would please me more than to discover I erred in my judgment. He does have, as one witness testified, “a capacity for growth.”

I do not cast my vote with absolute certainty that his court record will reflect his public service.

One of my colleagues on the Committee suggested to me that his public record reflects the fact that he worked for the Reagan Administration; he did what he could to please them, but now he will be free to be himself, and that may be a very different Clarence Thomas. I hope he is right, but I have doubts. This is not a trial where someone is going to be found innocent or guilty. We are not trying anyone. In that case the benefit of the doubt should go to the accused. In this case the benefit of the doubt will have to be resolved in favor of protecting our freedom and our people: I vote no.

