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JUDICIAL NOMINATIONS: A COOPERATIVE EFFORT

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Federal judicial nominations, especially those to the United States Supreme Court, attract substantial attention and debate.[1] When a President of the United States, who has the apparent backing of a large portion of the United States population, makes a selection for the highest court in the land, there are those who believe that the President's decision should not be "second guessed." This is especially true in today's society, where the President is of one political party and the other political party holds substantial sway in the body doing the "second guessing." It may be suggested that the duly elected, and substantially respected, republican President should not have to deal with confrontational Democratic party Senators. The President's nominations, however, must and will have to deal with the Senators. There are, in fact, two reasons why that confrontation will occur. First, and easier to explain, the Constitution requires that the nominations be submitted to the Senate for approval. Although more difficult to explain, and less likely to be universally accepted, the second reason is more important than the first. The second reason is that it is good for this nation that the Constitution requires that the nominations be submitted to the Senate for approval.

The Constitution of the United States does require that judicial nominations be approved by the Senate.[2] The use of the power to give "advice and consent" has been used in varying degrees by that legislative body throughout the history of the United States. It seems unlikely, however, that the Drafters of the Constitution

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[1] The manuscript for this article was written prior to the final weekend hearings on Associate Justice Clarence Thomas. Thinking people in the legal profession may want to consider for some time whether those three days of hearings and the final confirmation vote tend to support or discredit the arguments presented here.

[2] U.S. CONST. art. II, § 2.

could have assumed that the Senate would merely approve all nominations without any review. Surely the "advice and consent" authority was intended to have some meaning. In order to carry out this function properly, the Senate must conduct a review of the nominee being offered. It may be suggested, however, that throughout the nation's history, the Senate has routinely approved such nominations. This argument usually indicates that the complete investigations and comprehensive reviews are merely a modern innovation of the Senate. If the past practice of the Senate was to approve nominees without review, then the Senate failed in one of its constitutionally mandated responsibilities. In order to perform duties of office fully, Senators must investigate and carefully review nominees.

The second reason for complete review of judicial nominations may not be acceptable to some. It is good for the overall structure of this nation that judicial candidates must receive the approval of the Senate. The Senate provides a forum that is necessary due to the nature of things: the nature of humans, politics, and the courts.

Human nature should come as no surprise to anyone, but yet it constantly produces results that amaze all. A seat on the federal judiciary, especially one on the Supreme Court of the United States, is a lifetime plum that would excite any professional in the law. If given the opportunity, every such professional would exercise that role, at least, for a limited period of time. It is only with a hint of cynicism that the populace must admit that the nation needs to be careful of anyone who would want a job that much. Although it is difficult to admit, not every legal professional is honest, brilliant, willing to uphold the ideals of the Constitution, and dedicated to the traditions that have made the United States strong. These traits would surely be recognized as minimum standards for federal judicial officers, but not all legal professionals possess them. A person who desired the job could well be willing to hide a few flaws in an effort to pick the plum of the legal calling. One might well ask: "If the judicial nominee has nothing to hide, why would the nominee wish to hide it?"

There have been just enough examples of embarrassing public disclosures after nominees have agreed to have their Senate hear-

ings, to feel that the Senate hearings must be held. Many people with flaws in their past would probably decline the opportunity to have those flaws spread over the front pages of the major newspapers. That could easily be done by declining the nomination itself. This is where, however, human nature arises. There are those with flaws in their lives, or maybe just ineptness publicly proven, who will nonetheless agree to public interrogation. When this occurs, the display runs its course and the nominee is rejected. If offered the opportunity for a Supreme Court seat with no concern over public scrutiny, however, all manner of the dishonest and the inept would be willing to gain the seat. Unfortunate as human nature is, in order to maintain high standards for the federal judiciary, the fear of public scrutiny must remain a constant in the selection process. The investigatory process can remove the unqualified. In addition, the public scrutiny that actually occurs must remain sufficiently arduous to insure that the level of fear among the unqualified remains high enough so that they do not even take the chance of accepting nomination for such a high position.

The nature of politics is not unlike the nature of humans. It is a civics class cliche that our government is a balance of powers. Each branch serves special functions while limiting the power of the other branches. Each branch also has varying degrees of accountability to the population as a whole. That is reflected by the range of accountability between the House of Representatives and the Supreme Court. The House of Representatives is highly accountable, since its members stand for re-election every two years. In contrast, the Supreme Court is less accountable, as Justices enjoy lifetime tenure. Senatorial accountability seems at a medium level because of the six-year terms. The vague presidential accountability is, of course, an amazing feature of the Constitution with election through electors and the ability to hold only two four-year terms. Each of the branches of government and the voters who placed them in office, have differing goals and world views. Each is seeking to represent a constituency that has immediate desires that may not always be reflective of long-term benefits. The Supreme Court, with the least accountability and longest term, must, by the nature of our government, reflect the long-

term interests of the nation. Consequently, the appointment process of the Supreme Court—and to a lesser extent the lower federal judiciary—must be immune from daily crisis.

If the President of the United States were allowed to select the members of the federal judiciary without any outside scrutiny, the maintenance of the long-term good served by the courts would be lost. This is not to say that the office of President is so devious that it cannot be trusted. It is just to recognize that the office of President is held by a person who must be expected to act as a human. In fact, if any single person, or single body in government, were allowed to select the federal judiciary without outside scrutiny, long-term goals would be lost.

The President, for example, has a particular agenda. The President feels, one may assume, that an agenda keeping with the ideals of the Constitution, is good for the general population, and will continue the strength of the United States. It is, however, an agenda that reflects a popular political campaign with some degree of accountability to the voters. The history of the world, to say nothing of the history of the United States, reflects numerous popular ideas that flourished in one decade only to be thoroughly renounced in the next. If a popular President were allowed to pack the judiciary in a manner unchecked by outside review, a stagnation of the country could occur. As the nation moved forward by renouncing old agendas, it would be saddled with a judiciary unable to move. A second body of government reviewing the selection process may help prevent such a disaster. This is especially true when that body may be dominated by an opposing political party. The Senate may be expected to investigate fully every nomination and make the nominee stand the test of public scrutiny with hopes that the ultimate judicial officer can stand the test of time.

It may, at times, be suggested that the Senate is seeking to thwart the will of the majority by confronting the choices of a popular President. This overlooks the fact that the Senators are themselves popularly elected officials. They may be of a different political party, and representatives of different collections of people, but they are democratically elected officers. Many of them, in fact, may be more popular to their constituencies than the popu-

lar President is to his.

It may also be claimed that some of the individual Senators are not worthy to challenge the nominees. It may be claimed that since these Senators have sufficient flaws of their own, they should remain silent. This claim also overlooks the nature of the election process. The Senators, as does the President, stand for election in the states. The voters of those states have listened to campaigns and have had the opportunity to become aware of all flaws in their elected officials. Those voters, however, have determined that, among their choices, the person they elect as Senator is to serve them in Washington. Should they decide that the Senator is no longer competent to serve, the voters will tell the Senator when it is time to stay home.

Everyone who ever served on a committee has either heard or made jokes about the committee process.[8] That process is frequently long, tiring, and subject to compromise. The political process in the United States is a committee process. Decisions are not made by one person; decisions are made through layers of representatives. It may be said, only partly sarcastically, this is why we call our government a democracy rather than a tyranny. It can be frustrating for the populace to see a popular President select a popular judicial nominee only to have the process bogged down for weeks in long, tiring hearings. This is, however, the nature of our politics. This process allows the political system to bring all ideas into focus and to bear on the important decision of judicial selection. It may be frustrating, but it is necessary to retain the balance of power within this nation.

The nature of the judiciary itself may be the strongest reason for substantial review of judicial nominees. The federal judiciary, especially the United States Supreme Court, holds a unique position in our form of government. The power of any one legislator is diluted by the fact that there are so many of them. The power of the executive is filtered through the political process which requires that the President receive the approval of numerous people before being placed into office. The members of the judiciary have neither of these criteria for authority. One Supreme Court

[8] A camel is a horse put together by committee.

Justice, on a closely divided Court, however, can hold great power. In addition, that one Justice may emerge from a dimly lit past to great prominence with little known about that past. The hearing process is necessary to insure at least three criteria. First, the country needs a jurist to be a competent legal mind and not a neophyte to grand issues. The jurist should be committed to great ideals and not tied to some passing fancy. Finally, it is necessary for the jurist to be a sufficiently learned scholar to be able to write persuasive prose.

It is an accepted assumption that the country needs competent members of the federal judiciary. No law firm in the country would ever consider sending a neophyte, new associate to argue a case before the United States Supreme Court. As a nation, we should not send neophyte legal minds to decide those major cases. It must be realized that, merely because a lawyer has been in practice for a while and has caught the attention of the American politicos, does not mean that the lawyer is a competent legal mind. The United States Supreme Court routinely decides major issues of constitutional law which have an impact on civil and human rights in this country. The Supreme Court should be populated by people who understand those rights.

An interesting example to consider is Justice William O. Douglas and freedom of religion. In 1947, Justice Douglas joined with a majority that approved public expenditures for bus rides to church-sponsored schools.[4] In 1951, he wrote the majority opinion that allowed school release time from public school for religious instruction.[5] That opinion contained the memorable phrase, "We are a religious people whose institutions presuppose a Supreme Being."[6] By 1970, however, Justice Douglas dissented to a case which approved tax exemption for churches. In his dissent, he indicated that his vote with the majority in the 1947 case was probably wrong.[7] In the twenty-year span between 1951 and 1970, Justice Douglas participated in numerous decisions concerning freedom of religion. Legal scholars and historians would

[4] Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947).
[5] Zorach v. Clauson, 343 U.S. 306, 312-15 (1952).
[6] *Id.* at 313.
[7] Waltz v. Tax Comm'n, 397 U.S. 664, 703 (1970) (Douglas, J., dissenting).

delight in reading those opinions to watch the growth and progress of the mind of a public figure on an important issue. As a nation, however, the average citizen should be horrified to find out that a Supreme Court Justice was trying to gain an education while writing the law of the land.

During the hearings for a member of the federal judiciary, committee members may want to avoid asking for an opinion on a specific case. Nevertheless, the hearings should test the nominee's competence on major issues courts could expect to consider.[8] One can well imagine that the Supreme Court will consider abortion decisions in the coming years. The abortion decisions are reported at great length in the news media. Legal journals discuss and dissect the right of privacy as it relates to abortion through thousands of pages. Average citizens have drawn lines and publicly demonstrate to express their views on this issue. One could expect that a nominee for high office should have read, studied, thought and formed opinions about the basic issues concerning this matter. For a nominee to appear to have no opinion on this matter should be considered prima facie evidence of incompetence. Abortion, for that matter, should be just one of the major issues that competent legal minds consider. Freedom of speech, freedom of religion, federalism, neo-states' rights, and rights of the criminally accused, are just some of the major issues that federal courts will have to decide. The nation should demand that competent legal minds decide these issues.

If the nominee is competent, the nation should demand that future jurists be committed to enduring ideals. With just a little luck, the Constitution may endure forever. Although one should not expect any Supreme Court decision to remain valid for such an extended period of time, the nation does have to live with bad decisions for a long time. Frequently, what becomes viewed as a bad decision was a decision which appeared correct at the time it was decided. To pick just two examples—freedom of speech suf-

[8] An interesting example from a lower federal judge can be found in Wallace v. Jaffee, 472 U.S. 38, 48 (1985). That decision resulted from a federal district court judge who apparently believed that the "[f]ederal Constitution imposes no obstacle to Alabama's establishment of a state religion." *Id.*

fered when the Supreme Court allowed Eugene Debs[9] to remain in jail, and human rights were denied with the Dred Scott decision.[10] These two opinions, however, were in keeping with the views and, unfortunately, passions of the time. Legislators are elected to represent the current will of the majority. The executive is elected to push a popular agenda. When the United States Supreme Court follows a current fad, the nation suffers. The history of the greatness of this nation will not be based upon slavery, internment of Japanese-Americans, Communist black lists, or other equally grotesque features of American life. Those once-popular ideals are dark pages in our past. The greatness of the nation is its underlying belief in human rights. By offering a home to the poor, hungry, and suppressed of the world, the United States supports the highest ideals of human development. When the popular will, and that will's elected representatives, stray into some fad, the judiciary is the body that must retain the spark of greatness for the nation. Hearings for judicial nominees must inquire into the commitment to human rights and the free human spirit.

It may appear trite to suggest that a nominee must exhibit writing skills. Writing skills, however, underlie every other strength of the courts. The legislature represents the will of the majority and controls the purse strings. The majority can hold the legislature immediately accountable, while enjoying taxes or economic benefits. The executive commands vast armies of soldiers and vast armies of bureaucrats. The soldiers stand ready to put down rebellion, while the bureaucrats control daily lives. The judiciary, however, has no real power. While the judiciary is constantly put in the position of having to tell the majority of the population that the majority's will is unconstitutional, the judiciary has no way to effectuate its view except through persuasion. When, for example, the United States Supreme Court wants to move the legislature, the executive, and the general population, the only way the Court can accomplish its goal is through the power of the written word.

The written word, therefore, must accomplish two goals in

[9] Debs v. United States, 249 U.S. 211, 216 (1919).
[10] Dred Scott v. Sanford, 60 U.S. (19 How.) 392, 452-54 (1857).

every crisis. The language must be sufficiently clear and convincing to legitimize the Court's decision. The general population must feel that although it disagrees with the Court, the words of the Court are the law of the land. In a sense, the words must become politically sacred. Second, the words must be sufficiently elegant and eloquent to inspire the nation. When the United States Supreme Court strikes down legislation as unconstitutional, the words of the opinion move the country as a whole to a higher ideal. The nation must not only accept the opinion as the law of the land, but should also be persuaded to move toward concern for the greater rights involved. Several examples may be helpful to illustrate this issue.

While Justice Douglas was trying to decide where he stood on freedom of religion, Justice Black wrote a dissent to the school release time case. Justice Black said:

> Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government.[11]

The wavering of Justice Douglas is not persuasive. The use, however, of powerful images by Justice Black makes his opinion strong.

In the area of free speech, another example can be seen in Justice Holmes's dissent to one of the first World War speech cases:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[12]

[11] Zorach v. Clauson, 343 U.S. 306, 319-20 (1951) (Black, J., dissenting).
[12] Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

When Chief Justice Rehnquist wanted to dissent to the flag burning cases, he quoted the entire John Greenleaf Whittier poem, *Barbara Frietchie.*[13] Although *Barbara Frietchie* is a delightful poem and enjoyed by children throughout the United States, the "Market Place of Ideas" that was created by Justice Holmes is an image that will last as long as this nation endures. Respect for the court system is based upon the ability of the opinions to instill that respect. That respect can only be instilled by language that touches ideas, images, and emotions deep within each citizen.

With so many important criteria to consider, the hearing process may be almost too abbreviated to cover its mission. No law firm would advance a junior associate without watching some years of work, writing, and skill development. No law school would tenure a professor without requiring that the professor do substantial writing to develop and express ideas. The Senators, during hearings for judicial nominees however, seem content at times, to accept candidates with little experience and no written expression of their positions. The best evidence of a nominee's competence, ideals, and skills would lie in written work. When the nominee has written in legal journals or court opinions, those ideas had to be considered, refined, and expressed in a competent manner. Those ideas would then be available for subsequent review by the nominee to re-affirm, further develop, or reject. The nation as a whole could then consider these works in reviewing the nominees for judicial office. To allow a nominee to occupy such a position without such evidence seems remiss. To allow a nominee to occupy the position of Justice of the United States Supreme Court without extensive forms of such evidence should be unthinkable.

In summary, selection to the federal judiciary, especially the United States Supreme Court, should be a time-consuming process. We do not want Justices of the Supreme Court subject to the will of the majority to the extent that they must be accountable every two years for another election. We have a House of Repre-

[13] Texas v. Johnson, 491 U.S. 397, 424 (1989) (Rehnquist, C.J., dissenting). For a wonderful presentation of *Barbara Frietchie,* consult J. THURBER, THE THURBER CARNIVAL (1931). In this work, James Thurber provided a series of drawings to help illustrate the poem.

sentatives to serve that function, and it is not one that we want served too often. By standing for election every two years, the candidates must be subject to testing on every current whim or fancy of the public at large. In times of crisis, frequently elected officials may find themselves appealing to the base instincts of voters. This appeal may take the form of claiming they are protecting some security of the voters when, in fact, it may be the security of the job of the elected official that is at stake. This nation does not need and could not long tolerate a judiciary that appealed to base instincts. Federal judges are appointed for life and must seek to bring continuity to the grand experiment that is the United States. Justices on the Supreme Court write the traditions that become the law of the land, and they must stand for higher ideals. Those Justices must reflect the hopes of the "American Dream" while standing above the daily strife. If nominees wish to be a part of that tradition, they must be ready to endure scrutiny of the details of their lives. It is only through this detailed, confrontational and sometimes troubling process that the nation may be assured that each new member of the federal judiciary will meet the standards set by the jurists of the past.