George W. Bush Presidential Library

Collection: Counsel's Office, White House

Series: Kavanaugh, Brett – Subject Files

Folder Title: Judges - Confirmation Considerations

Ed/Jennifer/Viet

Statement of Cass R. Sunstein
Karl N. Llewellyn Distinguished Service Professor of Jurisprudence
University of Chicago, Law School and Department of Political Science

Mr. Chairman and Members of the Subcommittee:

I am grateful to have the opportunity to appear before you today to discuss the issue whether "ideology" should matter in the process of appointing and confirming federal judges.

My basic conclusion is simple. "Ideology" should certainly matter, both for the President and for the Senate. At least this is so if "ideology" means the expected approach, and general patterns of votes, of a potential judge. Almost everyone would agree that the President should not nominate, and the Senate should not confirm, someone who thinks that the Constitution does not protect private property, or permits schools to be segregated on the basis of race, or allows government to suppress political dissent. Because of his unique constitutional position, the President's choices are certainly due a large measure of deference. But it is perfectly appropriate for the Senate to ask whether a nominee's general approach, or likely pattern of votes, fits within the acceptable range of views, given the current nature of the federal judiciary, and existing trends within the federal courts as a whole.

To offer somewhat more detail: In an era in which the federal judiciary is dominated by left-wing judges, interpreting the Constitution to fit with their own views of public policy, it would be perfectly appropriate for Senators to insist that the President appoint people who will have a more modest view of the judges' role in the constitutional order. In an era in which the federal judiciary has a good deal of diversity, is respectful of its own limitations, and has no particular "tilt," it would be appropriate for the Senate to allow the President to appoint the judges he prefers, so long as they are competent and have views that do not go beyond the pale. But in an era, like our own, in which the federal judiciary is showing too little respect for the prerogatives of Congress, an excessive willingness to intrude into democratic processes, and a tendency toward conservative judicial activism, it is fully appropriate for the Senate to try to assure more balance, and more moderation, within the federal courts.

My testimony will come in three parts. Part I briefly discusses the constitutional background. Part II discusses the nature of the federal judiciary. Part III discusses the appropriate posture, from the Senate, toward nominees by President Bush.

I. The Constitutional Background[1]

[1] This section borrows heavily, and often verbatim, from David A. Strauss and Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale LJ 1491 (1992). In order to promote readability, I have not included footnotes, which can be found in that essay, attached as an appendix to my testimony.

The Constitution fully contemplates an independent role for the Senate in the selection of Supreme Court Justices. That independent role certainly authorizes the Senate to consider the general approach, and likely pattern of votes, of potential judges.

Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court." A first glance, these words assign two distinct roles to the Senate -- an advisory role before the nomination has occurred and a reviewing function after the fact. The consent requirement, if the Senate takes it seriously, places pressure on the President to give weight to senatorial advice as well. At the same time, the advisory function makes consent more likely. The clause seems to envision a genuinely consultative relationship between the Senate and the President. It seems to create a deliberative process, jointly conducted, concerning the composition of the Court.

In the particular context of judicial appointments, there is an additional and highly compelling concern, one that stems from constitutional structure. It may be granted that the Senate ought generally to be deferential to Presidential nominations involving the operation of the executive branch. For the most part, executive branch nominees must work closely with or under the President. The President is entitled to insist that those nominees are people with whom he is comfortable, both personally and in terms of basic commitments and values. It is for this reason, among others, that the Senate's decisions to confirm Attorney General John Ashcroft and Solicitor General Theodore Olson seem to be entirely correct.

The case is quite different, however, when the President is appointing members of a third branch. The judiciary is supposed to be independent of the President, not allied with him. It hardly needs emphasis that the judiciary is not intended to work under the President. This point is of special importance in light of the fact that many of the Court's decisions resolve conflicts between Congress and the President. A Presidential monopoly on the appointment of Supreme Court Justices thus threatens to unsettle the constitutional plan of checks and balances.

History supports this view of the text and structure. The Convention had four basic options of where to vest the appointment power: it could have placed the power (1) in the President alone, (2) in Congress alone, (3) in the President with congressional advice and consent, or (4) in Congress with Presidential advice and consent. Some version of each of these options received serious consideration.

The ultimate decision to vest the appointment power in the President stemmed from a belief that he was uniquely capable of providing the requisite "responsibility." A single person would be distinctly accountable for his acts. At the same time, however, the Framers greatly feared a Presidential monopoly of the process. They worried that such a monopoly might lead to a lack of qualified and "diffused" appointees, and to patronage and corruption. The Framers also feared insufficient attentiveness to the interests of different groups affected by the Court. The compromise that emerged-the system of advice and consent-was designed to counteract all of these various fears.

A. The Early Agreement on Congressional Appointment

It is important to understand that during almost all of the Convention, the Framers agreed that the Senate alone or the legislature as a whole would appoint the judges. The current institutional arrangement emerged in the last days of the process. On June 5, 1787, the standing provision required "that the national Judiciary be [chosen] by the National Legislature." James Wilson spoke against this provision and in favor of Presidential appointment. He claimed that "intrigue, partiality, and concealment" would result from legislative appointment, and that the President was uniquely "responsible." John Rutledge responded that he "was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy."

James Madison agreed with Wilson's concerns about legislative "intrigue and partiality," but he "was not satisfied with referring the appointment to the Executive." Instead, he proposed to place the power of appointment in the Senate, "as numerous eno' to be confided in-as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberative judgments." Thus, on June 5, by a vote of nine to two, the Convention accepted the vesting of the appointment power in the Senate.

On June 13, Charles Pinckney and Roger Sherman tried to restore the original provision for appointment of the Supreme Court by the entire Congress. Madison renewed his argument and the motion was withdrawn.

The issue reemerged on July 18. Nathaniel Ghorum claimed that even the Senate was "too numerous, and too little personally responsible, to ensure a good choice." He suggested, for the first time, that the President should appoint the Justices, with the advice and consent of the Senate- following the model set by Massachusetts. Wilson responded that the President should be able to make appointments on his own, but that the Ghorum proposals were an acceptable second best. Martin and Sherman endorsed appointments by the Senate, arguing that the Senate would have greater information and- a point of special relevance here-that "the Judges ought to be diffused," something that "would be more likely to be attended to by the 2d. branch, than by the Executive." Edmund Randolph echoed this view.

In the end, the Ghorum proposal was rejected by a vote of six to two. At that point, Ghorum suggested, as an alternative, that the President should nominate and appoint judges with the advice and consent of the Senate. On this the vote was evenly divided, four to four.

Madison then proposed Presidential nomination with an opportunity for Senate rejection, by a two-thirds vote, within a specified number of days. Changing his earlier position, Madison urged that the executive would be more likely "to select fit characters," and that "in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it." Pinckney

spoke against this proposal, as did George Mason, who argued: " Appointment by the Executive is a dangerous prerogative. It might even give him an influence over the Judiciary department itself."

The motion was defeated by six to three. By the same vote, the earlier Madison proposal, in which the Senate would appoint the Justices, was accepted.

The issue next arose on August 23. Morris argued against the appointment of officers by the Senate, considering "the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." But it was not until September 4 that the provision appeared in its current form. Morris made the only recorded pronouncements on the new arrangement and seemed to speak for the entire, now unanimous assembly. Morris said, " A s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." The Convention accepted the provision with this understanding.

B. The Meaning of the Shift to Presidential Appointment With Advice and Consent by the Senate

There is no evidence of a general agreement that the President should have plenary power over the appointments process. On the contrary, the ultimate design mandated a strong role for the Senate in the form of the advice and consent function. In this way, it carried forward the major themes of the debates. With respect to the need for a Presidential role, the new system ensured "responsibility" and guarded against the risk of partiality in the Senate. With respect to resistance to absolute Presidential prerogative, the principal concerns included (1) a fear of "monarchy" in the form of exclusive Presidential appointment; (2) a concern for "deliberative judgments"; (3) a belief that "the Judges ought to be diffused," that is, diverse in terms of their basic commitments and alliances; (4) a fear of executive "influence over the Judiciary department itself"; and (5) a desire for the "security" that a senatorial role would provide. It is clear that these concerns reflected a belief that the Senate could consider what we would now call "ideology."

As several of the comments suggest, the Senate's role was to be a major one, allowing the Senate to be as intrusive as it chose. Even Hamilton, perhaps the strongest defender of Presidential power, emphasized that the President "was bound to submit the propriety of his choice to the discussion and determination of a different and independent body." Of course, the President retained the power to continue to offer nominees of his selection, even after an initial rejection. He could continue to name people at his discretion. Crucially, however, the Senate was granted the authority to continue to refuse to confirm. It also received the authority to "advise."

These simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. That system was part and parcel of

general deliberation about Supreme Court membership. The Convention debates afford no basis for the view that the Senate's role was designed to be meager. On the contrary, they suggest a fully shared authority over the composition of the Court. That shared authority was to include all matters that the Senate deemed relevant, including the nominee's point of view.

C. The Early Practice

The practice of the Senate in the early days of the republic and thereafter attests to the same conclusion. George Washington's nomination of John Rutledge, then Chief Justice of South Carolina, as Chief Justice of the United States is a revealing case in point. Rutledge's challenge to the Jay Treaty, negotiated by Washington with Great Britain, played a pivotal role in the confirmation process. The Jay Treaty was challenged by the Republicans as a concession to Britain but approved by the Federalists as a way of keeping the peace. Rutledge attacked the treaty in a prominent speech in Charleston. The Federalists sought to block the Rutledge appointment on straightforwardly political grounds. Hamilton, a leader of the support for the Jay Treaty, led the opposition to Rutledge. The Senate ultimately rejected Rutledge in part for political reasons, by a vote of fourteen to ten.

Nor was the Rutledge rejection unique. In 1811, the Senate rejected Madison's appointment of Alexander Wolcott, partly on the basis of political considerations. In 1826, President Adams' appointment of Robert Trimble was nearly rejected on political grounds. The 1828 nomination of John Crittenden, a Whig, was ultimately prevented through postponement, and squarely on ideological grounds. Similar episodes occurred in the first half of the nineteenth century. In fact, during the nineteenth century, the Senate blocked one of every four nominees for the Court, frequently on political grounds.

The Senate has at times insisted on the "advice" segment of its constitutional mandate. In 1869, President Grant nominated Edwin Stanton after receiving a petition to that effect signed by a majority of the Senate and the House. In 1932, the Chair of the Judiciary Committee, George W. Norris, insisted on the appointment of a liberal Justice to replace Oliver Wendell Holmes. Greatly influenced by a meeting with Senator William Borah, President Hoover eventually appointed Benjamin Cardozo to the Court. The Senator persuaded President Hoover to move Cardozo, then at the bottom of the President's list of preferred nominees, to the top.

More recently, the "ideology" of judges has played a role in the Senate's consideration of many Supreme Court nominees, including David Souter, Robert Bork, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Anthony Kennedy, and others. Both Republicans and Democrats have considered the general approach and likely pattern of votes of Presidential nominees, including nominees for the lower courts. It would not be excessive to say that in the last twenty years, a bipartisan consensus has emerged on the relevance of "ideology," so much so that no Senator, and no outside observer, has seriously argued that it does not matter.

Constitutional text, history, and structure strongly suggest that the Senate is entitled to assume a substantial role. There are analogies to proposed legislation and treaties, and to the Presidential veto. No one thinks that the Senate must accept whatever bill or treaty the President suggests simply because it is a "competent" proposal; it would be odd indeed to claim that the President must sign every bill before looking closely at the merits. Under the Constitution, the role of the Senate in the confirmation process should be approached similarly.

II. The Contemporary Federal Judiciary

None of the foregoing discussion suggests that in all periods, the Senate should give careful consideration to the "ideology" of prospective judges. If the federal judiciary were appropriately diverse, and if it were showing appropriate respect for the prerogatives of the elected branches of government, there would be great reason to defer to presidential choices. If the Court were left-of-center, and pressing its own will in the guise of constitutional interpretation, the Senate should certainly respect any presidential efforts to redress the balance. But we are in the midst of a different and quite unusual situation. This is a period of conservative judicial activism, in which federal judges appear far from reluctant to reject the judgments of other branches of government. The Supreme Court is leading this unfortunate tendency, but the lower federal courts are entirely willing to strike down acts of Congress as well.

Because this is a period of conservative judicial activism, it is very different from other eras. For example, the period from 1935 to 1950 was generally one of judicial caution, in which the Court tended to uphold whatever the elected branches did. The period from 1958 to 1968 saw a great deal of left-wing judicial activism. We might even say that the Rehnquist Court is the conservative counterpart to the Warren Court, showing an even greater willingness to strike down legislation.

In terms of sheer competence, no one should doubt that the current Supreme Court is unusually distinguished. But there are two disturbing facts about the current Court and indeed the current federal judiciary as a whole. First, it does not defer to democratically elected branches. Second, it shows a distinctive ideological tilt. It is fair to say that it has a heavy right wing, a heavy center, but no left at all. Let me take these points in sequence.

The simplest fact about the Rehnquist Court is that it has struck down more federal laws per year than any other Supreme Court in the last half century. Indeed, the Rehnquist Court has been significantly more aggressive in invalidating federal statutes that the Warren Court itself. Because the Supreme Court struck down only one federal statute between the founding and 1856, there is a good chance that the Rehnquist Court is the all-time national champion, in terms of its sheer willingness to strike down federal statutes.[2] Many of the statutes invalidated by the Court have had strong bipartisan support

[2] Of course the raw numbers do not tell us everything we have to know. Perhaps the Court was correct to invalidate a good deal of federal legislation; perhaps Congress has been, in the relevant period, enacting a number of unconstitutional statutes. To evaluate these claims, we need to go behind the numbers. But I

within Congress, and in many of the relevant cases, there was a powerful argument on behalf of constitutionality.

Consider a few simple illustrations:

- The Rehnquist Court has reinvigorated the commerce clause as a serious limitation on congressional power, for the first time since the New Deal itself.[3] As a result, a number of existing federal statutes have been thrown into constitutional doubt.
- The Rehnquist Court has sharply limited congressional authority under section 5 of the fourteenth amendment, in the process striking down key provisions of the Americans With Disabilities Act, the Religious Freedom Restoration Act,[4] and the Violence Against Women Act,[5] all of which received bipartisan support. In fact section 5 of the fourteenth amendment has a narrower reach than at any time in the nation's history, because of the Rehnquist Court's decisions.
- The Rehnquist Court has imposed serious barriers to campaign finance legislation[6] -- with Justices Scalia and Thomas suggesting that they would be prepared to strike down almost all legislation limiting campaign contributions and expenditures.[7] Many people do not believe that campaign finance legislation is a good idea. But many of those who would question it in principle (as I do) also believe that this is not a subject to be settled by federal judges.
- The Rehnquist Court has thrown affirmative action programs into extremely serious doubt,[8] raising the possibility that public employers, public schools, and public universities will not be able to operate such programs. Many people reasonably doubt the sense, wisdom, and fairness of affirmative action programs. But those who have these doubts usually do not believe that the issue should be resolved by federal judges, as it now threatens to be.
- The Rehnquist Court has given heightened protection to commercial advertising, to the point where advertising does not have much less constitutional protection than political dissent.[9]
- In many cases, the Rehnquist Court has interpreted regulatory statutes extremely narrowly, choosing the interpretation that gives as little as possible to victims of discrimination, pollution, and other misconduct.

---

believe a careful inspection of the cases shows that too much of the time, this Court is far from respectful of democratic prerogatives.

[3] US v. Lopez, 514 US 549 (1995); US v. Morrison, 120 S Ct 1740 (2000).

[4] City of Boerne v. Flores, 521 US 507 (1997).

[5] US v. Morrison, 120 S Ct 1740 (2000).

[6] FEC v. National Conservative PAC, 470 US 480 (1985).

[7] See Nixon v. Shrink Missouri Government PAC, 120 S Ct 897 (2000) (Thomas, J., joined by Scalia, J., dissenting).

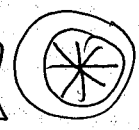
[8] Adarand Constructors v. Pena, 515 US 200 (1995); Metro Broadcasting v. FCC, 497 US 547 (1990).

[9] See, eg, 44 Liquormart, Inc. v. Rhode Island, 517 US 484 (1996).

On the basis of all this, there can be no doubt that this is a quite activist Court--activist in the sense that it does not have a modest conception of its role in the constitutional design.[10]

Now to the issue of "tilt." It is notable that the Supreme Court has moderates but no liberals – no one who stands as a jurisprudential successor to Justices William Brennan and Thurgood Marshall. The so-called "liberal wing" actually consists of two moderate, precedent-respecting Republicans (John Paul Stevens and David Souter) and two moderate Democrats who are respectful of precedent and represent centrist thinking (Ruth Bader Ginsburg and Stephen Breyer). The Court has no liberals in the sense that none of its members would follow in the path set by Brennan and Marshall.[11]

If we put the Court's activist inclinations together with its tilt, we reach a simple conclusion: The Court is all too willing to federal statutes, and the statutes that it is willing to strike down are usually those that diverge from a conservative orthodoxy. It is unsettling but true to find a considerable overlap between the general directions charted by the current Court and the general directions charted by Republican Party platforms over the last two decades. There can be no doubt that the transformation in the federal judiciary, produced over the last twenty years, has been a product of political forces, and in particular of a self-conscious effort, by Republicans in the White House and the Senate, to ensure a judiciary of a certain stripe. This effort to transform the federal judiciary has been quite successful – in part because President Clinton, to his credit, generally made centrist appointments, on the Supreme Court and on the lower courts. In fact it is hard to think of any non-centrist appointment by President Clinton within his eight years in the White House. By contrast, President Bush and particularly President Reagan made a sustained effort to appoint young, conservative judges, many of whom continue to have a dominant influence on the lower courts, charting its basic directions.



III. The Senate's Current Role

[10] The idea of "judicial activism" is an unusually vexed one, above all because any claim that the judges are "activist" seems to depend on accepting a certain theory of legitimate interpretation. If originalism is the right approach to constitutional law, then Justice Scalia is no activist. If democracy-reinforcement is the right approach to interpretation, then Earl Warren was hardly an activist. Here is the problem: If we need to agree on a theory of interpretation in order to know whether judges are activist, discussion of the topic of "activism" will become extremely difficult and in a way pointless. A disagreement about whether judges are activist will really be a disagreement about how judges should be approaching the Constitution; and the notions of activism and restraint will have added nothing. Following Judge Richard Posner, I am using a neutral definition here. A court is activist when and to the extent that it is willing to strike down legislation or other acts and decisions by other branches of government. On this view, to call a court activist is not necessarily to condemn it. It is on this view that the Rehnquist Court counts as the most activist in the nation's history, simply because and to the extent that it has struck down more federal laws, on an annual basis, than of its predecessor courts. To be sure, this statistic does not tell us everything we need to know. But it is highly suggestive about current tendencies and trends.

[11] This is lamentable not because I believe that this is the correct path (in fact I strongly disagree with the path marked out by Justices Brennan and Marshall), but because a Court that lacks anyone committed to it is missing something important – just as a Court lacking the views of Scalia and Thomas would be missing something important.

If President Bush follows the path set by his predecessors, and if the Senate remains passive, what might the future look like? We could easily imagine a situation in which federal judges

- strike down affirmative action programs, perhaps eliminating such programs entirely;
- strike down campaign finance reform;
- invalidate portions of the Endangered Species Act and the Clean Water Act;
- reinvigorate a controversial understanding of the Second Amendment, so as to disable Congress and the states from enacting gun control legislation;
- elevate commercial advertising to the same basic status as political speech, thus preventing controls on commercials by tobacco companies (among others);
- further reduce congressional power under the commerce clause;
- generally limit democratic efforts to prevent disabled people, women and the elderly from various forms of discrimination;
- significantly extend the reach of the "takings" clause, thus limiting environmental and other regulatory legislation;
- ban Congress from allowing citizens to sue to ensure enforcement of the law;
- and much more.

From the constitutional point of view, what would be most troublesome about such a future would not be the results. It would be the large transfer of power from democratic branches to the federal judiciary. For people of varying political commitments, this transfer of power should be quite troublesome. The conservative attack on "liberal judicial activism" is now out of date, but it had a great deal of merit. Conservative judicial activism is not better.

Should anything be done about the situation? In an ideal world, neither Democrats and Republicans would have to think, most of the time, about the political convictions of judicial nominees. In such a world, both Republicans and Democrats would insist on high-quality judges who would decide cases based on legal grounds that could be accepted by people with diverse views. As I have suggested, rule by left-wing judges is as bad as rule by right-wing judges. In the 1970's, I believe that Republicans were right to attack undemocratic, overly ambitious rulings of the Warren Court. Yet by focusing so carefully on judicial appointments, recent officials have also produced undemocratic judiciary, one with far too little respect for the prerogatives of the elected branches.

If President Bush seeks judges with political missions, there is only one remedy. As a minimal step, the Senate should be prepared to block any effort by Mr. Bush to fill the courts with people of a particular ideological stripe. Of course the Senate has the power to refuse to consent to a presidential appointment; and the Senate should deny its consent to nominees who cannot demonstrate that they have a healthy respect for democratic prerogatives, and will refuse to participate in any general effort to engraft new constitutional limitations on congressional power. Justices Scalia and Thomas have been distinguished members of the Court, and their voices deserve to be heard. But a federal

judiciary that follows their lead would make unacceptable inroads on democratic self-government. The Senate should not permit this to happen.

Under the Constitution, the Senate also has power to provide "advice" to the president. As we have seen, the Constitution's framers intended the Senate's "advice and consent" role to provide security against what they greatly feared: an overreaching president willing to dominate the judiciary. The Senate should reclaim its advisory role, collaborating to ensure the creation of a modest, and properly balanced, federal judiciary. The Senate would be well within its rights to insist on a role in "advising" the President about the appropriate mix of federal judges, on the lower courts as well as the Supreme Court. It would be most surprising if mutual agreeable accommodations could not be worked out.

A clarification: If the Court lacked anyone with Justice Scalia's views, and if it was tilted to the left, it would be appropriate to confirm someone like Justice Scalia, and perhaps even appropriate to insist on someone like Justice Scalia. A successful effort by Democrats, to create a left-wing judiciary with similar hubris, would properly meet with an aggressive Republican response.

Conclusion

In the context of the judiciary, the idea of "ideology" is a complicated one. Some people seem to think that they really know how to interpret the Constitution, and speak and write as if everyone who disagrees has an "ideology." But it is better to think that there are several reasonable approaches to interpreting the Constitution, and that in a democratic society, it is desirable to ensure a reasonable mix.

No one really doubts that "ideology," in terms of general approach, or patterns of likely votes, is relevant to the nomination and confirmation of federal judges. Everyone would consider certain views out of bounds. In the present circumstances, it is appropriate for the Senate to impose a high burden of proof on presidential nominees, in order to ensure that the federal judiciary has an appropriate mix of views, and does not accelerate the current trend toward an unacceptably aggressive role for federal judges in the constitutional order.