FEDERALISM & SEPARATION OF POWERS

THE JUDICIAL CONFIRMATION PROCESS: PERSPECTIVES FROM THE THREE BRANCHES*

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HON. SILBERMAN: Now remember, I'm speaking as a federal judge. I have, therefore, no view as to what it is legitimate for Senators to ask and no view as to the fight as between the two parties concerning suitable nominees. I do observe, however, in a neutral fashion, it seems to me, that under the existing regime, as I understand it, in the Senate Judiciary Committee in my time, it has always been true that nominees who were perceived on the extreme wing, either conservative activists on the conservative side or on the liberal side, were always in some trouble.

As I see it now, using the standard that the Senate Judiciary Committee and its supporters would use means that no nominee presently on our circuit court could get through—perhaps, maybe one or two—no nominee on either the Democratic or Republican side. As I understand the standard, no one with a strong judicial self-restraint philosophy nominated by a Republican who is well educated, smart and intelligent and a good lawyer can get through, and the same thing is true for his or her counterpart on the Democratic side. So, I think this present regimen means absolute stalemate if the Republicans were to apply the same standard. But you note, it's focused on intelligence and deep thinking. The ones who seem to get through are those who don't manifest any intellectual ability…or not a very strong intellectual ability. Now, this is really an extraordinary change. But, you know, I have no view as to what is appropriate for Senators to look for.

I do have a strong view, however, of what is appropriate for judicial nominees to do or say. And I think the model in that respect was Antonin Scalia. I confess that I acted as his counselor. He said nothing when he was nominated and went through the confirmation process rejecting any probing into his judicial philosophy that could be even thought to bear upon cases that came before the Court. And he recognized that there was no stopping point.

I will never forget when he was asked the question whether he would still stand by *Marbury v. Madison*, and there was a recess. He called me on the phone because a very skilled lobbyist from the White House, or being designated by the White House, Tom Korologos, was telling him that he had to answer that question, and that the senators were really terribly upset about his stonewalling.

He called me on the phone and I said, you know, as a matter of principle, if you answer *Marbury v. Madison*, there's no stopping point between there and *Roe v. Wade* or anywhere else, so that's a matter of principle. Secondly, pragmatically, the only way you could ever be defeated is if you start answering these questions. So, he did not answer the questions. That was frankly the right position.

We have gone downhill since that time, when my colleague and friend Bob Bork went up. He thought he could turn that nomination process into a Yale Law School classroom, which was a profound mistake, since they only recorded Senator Kennedy's questions and not any follow-up. So that didn't work and it became a disaster, and it has become increasingly a problem for Supreme Court nominees.

What is new now is the suggestion that this is going to be practiced with respect to Circuit Court nominees. That's sort of astonishing. I think it was Senator Biden, that major legal thinker, who took the floor of the Senate to say that if a nominee did not answer his questions, which would go into how the nominee might rule on cases that came before him—certainly at a philosophical level, if not on a case-specific level—he would filibuster. That's going to put a lot of pressure on nominees.

But, the answer, it seems to me, for any nominee who goes up before the Senate is that it is unethical and it is dishonorable to answer any questions that bear on how you would approach a case coming before you. That includes questions that are cast in philosophic terms because they can easily project onto cases that come before you. And if you have committed yourself in public, that can't help but have an impact on your decisionmaking process as a judge. Either you're going to be a liar, as I think certain nominees have been, or you're going to be committed unethically as to how to rule when a case comes before you.

Now having said all that, I will go on to say, with respect to the confirmation process, that in my view a nominee to the federal bench, who is not independently wealthy and therefore, indifferent to the judicial salary the first prize is not to get a hearing. It's only a third prize to get confirmed because it is now apparent that, in light of what the Justice Department did under Attorney General Ashcroft and the position they took in the Supreme Court, and the Supreme Court's refusal to decide the case, with three Justices dissenting, on the constitutionality of keeping judges from getting the cost-of-living increases that they were guaranteed in legislation.

For most federal judges who are not independently wealthy, you face an inevitable decline in your real income, for reasons which I can go into in question-and-answer. It is unwise, in my judgment, for any man or woman who relies upon the federal salary to take a federal judicial appointment. It's just a mistake.

* Judge Silberman's remarks were part of a panel sponsored by the Federalist Society's Federalism and Separation of Powers Practice Group's Project for Judicial Independence. It was held on April 15, 2002 at the Capitol Hill Club.