

Big Government Causes Partisanship in Judicial Nominations

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Thanks for inviting me to this august panel. I'd like to discuss why the confirmation process is broken—as evidenced by the fact that we have five-day hearings for Supreme Court nominees that don't reveal anything.

In 1962, Byron White's hearing lasted fifteen minutes and consisted of three questions. Can you imagine that happening now? Most district court nominees would take that deal. Is it because of TV and the media and the instant sound bite and the new media with the internet and social networking and all the rest of it? Is it because the issues have gotten more ideologically divisive? I think the answer isn't really any of these. It isn't that there's been a corruption of the confirmation process, the nomination process, presidential or senatorial rhetoric, or the use of filibusters. It's a relatively new development but one that's part and parcel of a much larger problem: constitutional corruption.

As government has grown, so have the laws and regulations over which the Court has power. The Court's power has grown commensurate with the power of Congress, because all of a sudden it's declaring what Congress can do with its great powers and what kind of new rights will be recognized. As we have gone down the wrong jurisprudential track since the New Deal, judges all of a sudden have more power behind them and the opportunity to really change the direction of public policy more than they ever had before.

So of course the judicial nomination and confirmation processes are going to be more fraught with ideological and partisan considerations. This didn't used to be a problem—in the sense that partisanship didn't really mean that much other than rewarding your cronies. It's a fairly modern phenomenon for our two political parties to be so ideologically divided and polarized, and therefore for judges nominated by presidents from different parties to have notably different views on constitutional interpretation.

Under the Framers' Constitution, which the country lived under for its first 150 years, the Supreme Court hardly ever had to strike down a law. If you read the Congressional Record of the 18th and 19th centuries, Congress debated whether particular legislation was constitutional much more than whether something was a good idea. Debates focused on whether something was genuinely for the *general welfare* or whether it only served, for example, the state of

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Georgia. “Do we have the power to do this?” was the central issue with any aspect of public policy.

In 1887, Grover Cleveland vetoed an appropriation of \$10,000 for seeds to Texas farmers who were suffering from a terrible drought because he could find no warrant for such appropriation in the Constitution.¹ Then in 1907, in the case of *Kansas vs. Colorado*, the Supreme Court said “the proposition that there are legislative powers affecting the nation as a whole although not expressed in the specific grant of powers is in direct conflict with the doctrine that this is a government of enumerated powers.”²

We also had a stable system of unenumerated rights that went beyond those listed in the Bill of Rights. These rights were retained by the people per the Ninth Amendment—and similarly the Tenth Amendment was redundant of the whole structure of powers, which was based on the idea that we have a government of delegated and enumerated, and therefore limited powers.

By contrast, judges play much larger roles today. The conception of the General Welfare Clause as saying that the government can essentially regulate any issue in any area as long as the legislation fits someone’s conception of what is good—meaning, that you get a majority in Congress—emerged in the Progressive Era and was codified during the New Deal. That is, the New Deal Court is the one that politicized the Constitution, and therefore too the confirmation process and the rest of the judiciary, by laying the foundation for judicial activism of every stripe—be it letting laws sail through that should be struck down or striking down laws that should be upheld.

I don’t like the term activism, by the way, and instead prefer “judicial engagement.”³ That is, so long as we accept that judicial review is constitutional and appropriate in the first place—how a judiciary is supposed to ensure that the government stays within its limited powers without it is beyond me—then we should only be concerned that a court “gets it right,” regardless of whether that correct interpretation leads to the challenged law being upheld or overturned. For that matter, an honest court watcher shouldn’t care whether one party wins or another. To paraphrase Chief Justice Roberts at his confirmation hearings, the “little guy” should win when he’s in the right, and the big corporation should win when it’s in the right.⁴ The dividing line, then, is not between judicial activism (or passivism) and judicial restraint, but between legitimate and vigorous judicial engagement and illegitimate judicial imperialism.⁵

1. 18 CONG. REC. 1,875 (1887).

2. *Kansas v. Colorado*, 206 U.S. 46, 89 (1907).

3. See Clark Neily and Dick M. Carpenter II, *Government Unchecked: The False Problem of “Judicial Activism” and the Need for Judicial Engagement*, INSTITUTE FOR JUSTICE (Sept. 2011), http://www.ij.org/images/pdf_folder/other_pubs/grvnmtunchkd.pdf.

4. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (testimony of John G. Roberts in response to question by Sen. Richard Durbin).

5. Clark Neily, WALL ST. J., *The Myth of Judicial Activism*, Sept 28, 2011, at A13, available at <http://online.wsj.com/article/SB10001424052970204422404576596902280394100.html>; Ilya Shapiro,

Getting back to the historical development, we can trace the perversion of the law institutionally to the New Deal era. In 1935, for example, President Roosevelt wrote to the chairman of the House Ways and Means Committee, “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.”⁶ And decades later, Rexford Tugwell, one of the architects of the New Deal, wrote that “to the extent that these [New Deal policies] developed they were tortured interpretations of a document intended to prevent them.”⁷

During the 1930s and -40s, we thus had the perverse expansion of the Commerce Clause with cases like *NLRB v. Jones & Laughlin* and *Wickard v. Filburn*—the stuff that’s now being covered on the front page of the *New York Times* in conjunction with the Obamacare arguments.⁸ We also had the flip side of the expansion of powers: the warping of rights. In 1938, for example, the infamous Footnote Four in the *Carolene Products* case bifurcated our rights such that certain rights are more equal than others in a kind of *Animal Farm* approach to the Constitution.⁹ In that light, the recent confirmation battles—whether you look at Robert Bork, Clarence Thomas, the filibustering of George W. Bush’s lower-court nominees, or the scrutiny of Sonia Sotomayor’s “wise Latina” comment—is all part of, and a logical response to, politicians’ incentives given judges’ novel expansive role. When judges act as super-legislators, senators, the media, and the public want to scrutinize their ideology and treat them as if they’re confirming lifetime super-politicians—and rightfully so.

To quote my boss, Roger Pilon, writing presciently ten years ago,

Because constitutional principles limiting federal power to enumerated ends have been ignored, the scope of federal power and the subjects open to federal concern are determined now by politics alone. Because the rights that would

Objection, Your Honor: What Does It Mean to Be an ‘Activist’ Judge, THE WEEKLY STANDARD, (Nov. 12, 2007), <http://www.weeklystandard.com/Content/Protected/Articles/000/000/014/300xjwgv.asp>.

6. Letter from Franklin D. Roosevelt to Rep. Samuel B. Hill (July 6, 1935) in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 91–92 (Samuel I. Rosenman ed., 1938).

7. Rexford G. Tugwell, *A Center Report: Rewriting the Constitution*, CENTER MAGAZINE, March 1968, at 20.

8. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

9. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) (citations and internal quotation marks omitted).

limit the exercise of that power are grounded increasingly not in the Constitution's first principles but in the subjective understandings of judges about evolving social values they too increasingly reflect the politics of the day. Thus the rule of law is now largely the rule of politics.¹⁰

Sure we can tinker around the edges of the judicial appointment process with bipartisan commissions, or have a set term or fixed retirement age—or we could have scheduling requirements for when hearings and votes have to occur after a nomination—but all that is re-arranging the deck chairs on the Titanic. And the Titanic is not the judicial appointment procedure, but rather the ship of government. The fundamental problem is the politicization not of the *process* but of the *product*, of the role of government, which began with the Progressive Era politically and began to be institutionalized during the New Deal.

Justice Scalia, who isn't necessarily my favorite justice but is obviously the best writer on the Court, described this phenomenon in his dissent in *Planned Parenthood v. Casey*:

[T]he American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading texts and discerning our society's traditional understanding of that text—the public pretty much left us alone. Text and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text... then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.¹¹

Ultimately judicial power is not a means to an end, be that liberal, conservative or anything else, but instead an enforcement mechanism for the strictures of the founding document. We have a republic here, with a founding document intended just as much to curtail the excesses of democracy as it was to empower its exercise. In a country ruled by law and not men, the proper response to an unpopular legal decision is not to call out the justices at a State of the Union but to change the law or amend the Constitution.

Any other method leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process—which by definition is counter-majoritarian. Or it could lead to government by black-robed philosopher kings. Even if that's what you want—a

10. Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, CATO POL'Y ANALYSIS No. 446, (Aug. 6, 2002), at 11.

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

black-robed philosopher-king government—why would you hire nine lawyers for the job?!

So if we want to have the rule of law, we need judges to interpret the Constitution faithfully and strike down laws when government is exceeding its authority or infringing on our vast panoply of natural rights (some enumerated, others not). Depoliticizing the judiciary is a laudable goal, but that'll happen only when judges go back to judging rather than merely ratifying the excesses of the other branches while allowing infinite intrusions into economic liberties and property rights. Until that time, it's absolutely appropriate to question judicial philosophies and theories of constitutional interpretation—and to vote accordingly.