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GROUND RULES FOR SENATORS FACING JUDICIAL NOMINEES: The Questions Senators Should Ask, And Decline To Ask, When Evaluating Potential Judges And Justices

By AKHIL REED AMAR AND VIKRAM DAVID AMAR
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This article is Part Two in a two-part series by Professors Akhil and Vikram Amar on the appointments process. Part One (/legal-commentary/the-ground-rules-of-the-appointments-game.html), which is archived on this site along with the authors' other columns, addresses the structure of nominations and confirmations, setting forth a series of ground rules for the different institutional actors in the process. In this part, the authors go on to set out ground rules for Senators who are deciding how deeply, and on what topics, they can question judicial nominees without threatening our independent federal judiciary. - Ed.

Hours after we posted our last column describing how the appointments process was heating up, President Bush added more logs to the fire by invoking his unilateral recess appointment power to place Eugene Scalia and Otto Reich in subcabinet positions until the end of the next congressional session.

But executive branch recess appointments like these, we pointed out, are very different from appointments to the independent judiciary, where the Senate traditionally and properly plays a more significant role ideologically counterbalancing the President. In today's column, we offer some specific guidelines for Senators vetting judicial nominees.

The Need for Nuance: Different Questions and Judgments For Different Judicial Positions

Just as executive branch appointments differ from judicial ones, not all judicial appointments are the same. The qualities that make for a good trial judge, for example, often differ from the qualities needed on the Supreme Court.

The attributes most needed on a given court will also depend in part on who is already sitting on that court at the time a vacancy happens to open up. As Senator Charles Schumer has argued, Senators may properly consider not merely the credentials and ideology of the nominee before them, but also the desirable overall balance on the court in question.

Considerations like these may explain why many Senators who voted against Robert Bork's 1987 nomination to the Supreme Court had voted to support his nomination to the Court of Appeals of the District of Columbia Circuit some five years before. They also explain why-we suspect-these Senators likely would have been happy to confirm Bork again to this lower court had he stepped down and been renominated.

These Senators may have believed that Bork's brand of conservative strict construction would provide a good counterweight to the more freewheeling philosophy of some other D.C. Court of Appeals judges, but would, alongside the recent promotion of William Rehnquist to the position of Chief Justice and the recent appointment of Antonin Scalia, overrepresent one methodological approach on the Supreme Court at the expense of other legitimate judicial philosophies, thereby tilting the Court too far in one direction.

Nor is ideological balance the only kind to consider. Throughout American history, the Supreme Court and many lower courts have benefited from having judges drawn from diverse parts of the legal world - the bench, the private bar, the government and the academy.

How Senators Should Evaluate Sitting Judges

Consider first nominees who are sitting judges. It might initially seem that the Senate's task here is easy: simply read a jurist's past decisions to glean her approach to judging and compare that approach to the Senate's own vision(s). But past decisions may not tell us much, and may indeed be misleading in what they do suggest.

For one thing, stare decisis - the principle that precedent should generally be followed, and that precedent from higher courts is binding on judges lower down in the pyramid - limits all lower courts, federal and state. This principle may force individual judges to reach decisions and embrace reasoning that are deeply in conflict with the judge's own views.

Ironically, the willingness to reach such a decision, or employ such reasoning, based on precedent despite the judge's personal views may in fact illustrate a virtue, even as it is condemned during the confirmation process as a flaw. Simply citing the results judges reached, without a consideration of the precedents that may have constrained them, is irresponsible.

Less obviously, some existing state court judges may not have had occasion to consider many of the kinds of federal questions that regularly confront federal courts. (Because certain federal questions can be easily litigated in federal court, they arise infrequently in state court; indeed, some federal issues, like federal criminal law, are almost never heard in state courts.)

Moreover, even state court judges' decisions as to open questions of state law may not tell us much that is helpful about their general judicial philosophy. State court judges are often elected and/or removable directly by the voters. For this reason, they may feel legitimate in exercising political discretion in deciding state cases in a way they would not if confirmed to the life-tenured federal bench. Put another way, the philosophy they look to may, in part, be that of the voters.

State judges also face distinct political and fundraising pressures that federal judges do not. This type of issue may arise, for instance, in the confirmation process for Texas Supreme Court Justice Priscilla Owen, who has been nominated to the Fifth Circuit Court of Appeals

and will soon be considered by the Senate. Justice Owen has recently come under fire for deciding an opinion involving Enron after accepting campaign contributions from the company; the argument is that she should have recused herself. This particular kind of alleged conflict of interest rarely arises for federal judges, who need not campaign.

Finally, even when we focus on the elevation of sitting federal judges, things are not as simple as one might expect given that these judges have already, in the past, survived one confirmation process. That is because the job of a federal district judge is significantly different from that of a federal appellate judge.

District court judges face tremendous time pressures and far larger dockets than appellate judges do. Often they confront emergency motions, or evidentiary and other legal questions that arise in the course of trials, that must be resolved immediately. As a result, district judges' consideration of complicated questions of law is often not as deliberate and thorough as may be ideal. A huge volume of decisions - sometimes over a hundred per year - inevitably will include a few missteps.

District judges know all this. Accordingly, some district judges view their job as presenting difficult and open legal questions in a clear way for the appellate courts, and taking a good first stab at a right answer, but not much more than that. That should be remembered, and taken account of, in the confirmation process, and Senators should hesitate before tarring a district judge with a single mistaken decision.

How Senators Should Evaluate Nominees From Private Practice

How about nominees who are drawn from private practice? Positions a lawyer has taken in court representing clients may not always tell us everything about the lawyer's own views of the law, because a lawyer ordinarily has an ethical duty to make all plausible legal arguments (whether he personally embraces them or not) on behalf of a client. But a nominee's conduct as a private lawyer can tell us what kinds of legal positions she thinks are plausible under the law as it now exists or is likely to exist.

Also, a lawyer's decision to take a case that she knows will involve the making of certain kinds of arguments may be quite informative. There is no requirement that a private lawyer accept every client, and in many situations an attorney could, if she so chose, agree to represent a client only on the condition that certain kinds of arguments not be made.

Some courts may be unwilling to enforce some limitations on representation that an attorney imposes (seeing these limitations as in conflict with, for instance, the attorney's duty to represent her client zealously). Moreover, Senators should tread carefully here, since asking, for example, what arguments a client requested that the attorney make might reveal attorney-client communications. But there is at least some room for questioning here - particularly about the decision to take a particular case.

For example, consider the case of a nominee who is a private lawyer who has represented the tobacco industry and, in the course of that representation, makes First Amendment arguments against tobacco advertising restrictions. It is fair to ask whether the voluntary decision to accept the case says something about the nominee's vision of free speech, and about his ethical vision more generally.

Of course, even here, Senators must be aware of nuances in roles. A young associate at a law firm may not have much say at all about the cases to which he is assigned, and no say at all with respect to the ones his firm accepts.

Just as a lower court judge can sometimes point to clear Supreme Court guidance as an explanation for an otherwise troubling opinion, so too a junior lawyer may be able to point to a senior partner who is calling the shots. But this is not always true. A young associate who joins a firm known for its tobacco defense work should be able to be held accountable for it by those Senators who disapprove of such work. Similarly, an associate who joins a firm that does some tobacco defense work, but has the choice to opt out, even at a cost to his own career, should be held accountable for doing the work.

The important point is that these decisions must be judged in the context in which they are made, and the junior attorney's limited power to control his or her work is inevitably part of that context.

Nuanced distinctions like these also apply when we look at nominees who have been government attorneys. Unlike private lawyers, government attorneys do not choose their clients, but they do often have discretion to define their client's interests, and are also ethically bound to do justice.

The discretion enjoyed by government attorneys, though, may vary because different departments within government play different roles. An attorney prosecuting crimes for the Criminal Division of Department of Justice, for instance, has less leeway to stake out his own views of the law than does an attorney in the Office of Legal Counsel, whose job is not so much to win cases but rather to figure out what the law is or should be.

And even within a department, some lawyers will have much more power to dictate positions and set agendas - and thus be required to explain those positions and agendas - than others. For example, arguments a Solicitor General advances before the Supreme Court are rarely dictated by anything other than the SG's sense of what makes the most legal sense for the United States, whereas deputy SGs have much less decisionmaking authority and assistant SGs less still.

Again, in each case, Senators may question a nominee about a past position, but sometimes the sincere answer will be "it was my job to make that argument." Even then, though, a Senator can follow up by asking whether the nominee now believes the past argument he made was correct or not.

This question is not too hypothetical or abstract to yield a helpful answer. Nor will a candid response - so long as it does not take the form of a guarantee - create an impression of prejudice should the issue recur in a case down the road.

How Senators Should Evaluate Nominees from the Academy

In contrast, legal academics can rarely defend their past positions by pointing to someone else like a client or a superior. Academic freedom means that scholars are able, and encouraged, to say what they really believe.

Still, even here, Senators should be sensitive to the nuanced roles academics play. Professors are taught to be, and rewarded for being, provocative. Thus, an academic will sometimes float an argument to generate discussion and dialogue even when he is not yet convinced that he is right. (Some of the Robert Bork's controversial scholarship may belong in this category.)

Moreover, and relatedly, good academics, like good judges, are open-minded and sometimes abandon even deeply-held views when new arguments and evidence emerge. Again, this is an instance where what may really be a virtue - an ability to be persuaded and not to be rigid in one's thinking - can wrongly be painted as a vice during the confirmation process: a hypocrisy or a weakness of the mind.

In a similar vein, consider Judge and former Yale Law Professor Robert Bork's inability, during his 1987 Supreme Court confirmation hearings, to identify a plausible theory other than stare decisis to defend the 1954 Supreme Court decision in *Bolling v. Sharpe* (https://laws.findlaw.com/us/347/497.html), which banned racial segregation in the DC school system. That inability tells us something about how broad and creative a constitutional thinker Bork might be.

The Costs of Senate Error

Although we believe that the Senate capable of a meaningful and productive dialogue with nominees, we admit that there is always a chance the Senate will misplay the game, with unfortunate consequences.

We focus less on the injustice to nominees whose past may be mischaracterized, because the constitutional process is not about fairness to individual nominees so much as it is about safeguarding the federal judiciary. No one has a vested property right to a federal judgeship, so very little "due process" to nominees is required.

But above and beyond possible unfairness to individual nominees are larger systemic concerns. First, those who want to be judges may avoid taking positions that may be distorted later, with the result that much good speech and lawyering will be chilled and lost.

Second, and relatedly, the only people who make it through the Senatorial gauntlet will be "stealth" candidates who have scrupulously avoided talking (and perhaps thinking) about the great issues of the day.

In our next and final column on appointments, we will try to illustrate and apply our proposed guidelines by discussing in detail our reasons for supporting President Bush's Tenth Circuit nominee, Professor Michael McConnell.

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