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July 26, 2005

No Prejudgment, No Pre-Commitment, No Promises

The Proper Scope of Questioning for Judicial Nominees

Executive Summary

- Some Senators are demanding that Supreme Court nominee John Roberts announce his positions on constitutional questions that he may decide as a judge after he is confirmed.
- Making such demands threatens to radically politicize the confirmation process, turning judicial nominees into mere “candidates” who must make political promises in order to be confirmed.
- No judicial nominee should be compelled to answer any question that would force him or her to prejudge or signal future conclusions regarding *any case or issue*.
- Any demand that Judge Roberts prejudge cases or issues threatens the independence of the federal judiciary and jeopardizes Americans’ right to fair and impartial judges.
 - Judges should only reach conclusions after listening to all the evidence and arguments in every case. Judges should keep an open mind in the courtroom.
 - Every judge should remain fair, impartial, and free from political commitments that Senators try to extract during confirmation hearings.
 - No judicial nominee should have to sacrifice ethics and impartiality to be confirmed.
- The effort to require nominees to “prejudge” future cases and issues as a condition of confirmation is contrary to settled standards and longstanding practice.
 - The longstanding canons of judicial ethics prohibit all judicial nominees from prejudging any *case or issue*.
 - All sitting Supreme Court Justices declined to answer some questions on constitutional issues or past cases of the Supreme Court, and have made clear that they are opposed to this change to the confirmation process.
 - Senators of both political parties historically have protected the right of judicial nominees to decline to answer questions that threatened their future independence.
- Senators naturally want to know how cases will be decided, but curiosity must yield to the greater value — the preservation of an independent judiciary and the guarantee of equal justice.

Introduction

Some Senate Democrats are demanding that Supreme Court nominee John G. Roberts announce his positions on constitutional questions that the Supreme Court will be deciding after he is confirmed.¹ Although these Senators are quick to say that they do not seek pre-commitments on particular *cases*, the ethical rules governing judicial confirmations are not limited to preventing prejudgment of particular *cases*. As nominees in the past have recognized, it is inappropriate for any nominee to give any signal as to how he or she might rule on any *issue* that could come before the court, even if the issue is not presented in a currently pending case.

If these novel “prejudgment demands” were tolerated, the judicial confirmation process would be radically transformed. While questions about judicial philosophy *in general* have always been appropriate, any effort to learn how particular constitutional questions will be resolved has always been out of bounds. It was for this reason that all sitting Supreme Court Justices declined to answer some questions on constitutional issues or past cases of the Supreme Court. For example:

- ◇ Justice Sandra Day O’Connor expressly refused to answer questions about past cases that she believed would later come before the Supreme Court.²
- ◇ Justice Ruth Bader Ginsburg testified during her hearing: “I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed.”³
- ◇ Then-Chairman Joseph Biden advised Justice Ginsburg during her hearing: “You not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms ... over your tenure on the Court.”⁴

There is a reason for this longstanding precedent: to demand that a judicial nominee “prejudge” cases and issues threatens the independence of the federal judiciary and jeopardizes Americans’ expectation that the nation’s judges will be fair and impartial. That is why the canons of judicial ethics prohibit any judicial nominee from prejudging *any case or issue*.⁵ Judges should only reach conclusions after listening to all the evidence and arguments in every case. Americans expect judges to keep an open mind when they walk into the courtroom — not to make decisions in the abstract and then commit to one side before the case begins. No judge can be fair and impartial if burdened by political commitments that Senators try to extract during confirmation hearings. Otherwise, judicial nominees will be forced to sacrifice ethics and impartiality to be confirmed.

Senators naturally want to know how future cases will be decided, but curiosity must yield to the greater value — the preservation of an independent judiciary and the guarantee of equal

¹ For example, Senator Charles Schumer has said, “Every question is a legitimate question, period.” *New York Post*, July 6, 2005. Senator Schumer has also said that he will ask how Mr. Roberts will rule on issues that the Supreme Court certainly will consider, including free speech, religious liberty, campaign finance, environmental law, and other political and legal questions. *Foxnews.com*, July 19, 2005. Likewise, Senator Ted Kennedy has demanded to know “whose side” Judge Roberts will favor, and “where he stands” on legal questions before the Supreme Court. *Congressional Record*, July 20, 2005. Just yesterday, Senator Evan Bayh picked up this theme: “You wouldn’t run for the Senate or for Governor or for anything else without answering people’s questions about what you believe. And I think the Supreme Court is no different.” *CNN “Inside Politics,”* July 25, 2005.

² Confirmation Hearing, July 1994, at p. 199.

³ Confirmation Hearing, July 1993, at p. 265.

⁴ Confirmation Hearing, July 1993, at p. 275.

⁵ ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2003).

justice. The following materials provide detailed support for why the traditional norms should be upheld, and why the Senate would tread into very murky waters if it were to upset these settled practices.

The Canon of Judicial Ethics

“[A] judge or a candidate for election or appointment to judicial office shall not ... with respect to cases, controversies, **or issues** that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office....”

— *ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2003) (emphasis added)*.

All Nine Supreme Court Justices Disagree With Requiring Nominees to Prejudge Issues and Cases

Justice Ruth Bader Ginsburg

“A judge sworn to decide impartially can offer ***no forecasts, no hints***, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process. Similarly, because you are considering my capacity for independent judging, my personal views on how I would vote on a publicly debated issue, were I in your shoes, were I a legislator, are not what you will be closely examining.” — *Confirmation Hearing, July 1993, at p. 52 (emphasis added)*.

“Because I am and hope to continue to be a judge, ***it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide***. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.” — *Confirmation Hearing, July 1993, at p. 52 (emphasis added)*. *Justice Ginsburg was a judge on the D.C. Circuit when nominated to the Supreme Court.*

“I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust v. Sullivan* (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. ... ***If I address the question here, if I tell this legislative chamber what my vote will be, then my position as a judge could be compromised***. And that is the extreme discomfort I am feeling at the moment.” — *Confirmation Hearing, July 1993, at p. 188 (emphasis added)*.

“When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest.” — *Republican Party of Minnesota v. White*, 536 U.S. 765, 816 (2002) (*Ginsburg, J., dissenting*).

“[H]ow a prospective nominee for the bench would resolve particular contentious issues would certainly be ‘of interest’ to the President and the Senate in the exercise of their respective nomination and confirmation powers But in accord with a longstanding norm, *every member of this Court declined to furnish such information to the Senate*, and presumably to the President as well.” — *Republican Party of Minnesota v. White*, 536 U.S. 765, 807 n.1 (2002) (Ginsburg, J., dissenting) (emphasis added).

“This judicial obligation to avoid prejudgment corresponds to the litigants’ right, protected by the Due Process Clause of the Fourteenth Amendment, to an ‘impartial and disinterested tribunal in all civil and criminal cases.’” — *Republican Party of Minnesota v. White*, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) (internal citation omitted).

Justice Sandra Day O’Connor

“I feel that is improper for me to endorse or criticize a decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts. I do not think we have seen the end of that issue or that holding and that is the concern I have about expressing an endorsement or criticism of that holding.” — *Confirmation Hearing, September 1981, at p. 199.*

Justice Stephen Breyer

“I do not want to predict or to commit myself on an open issue that I feel is going to come up in the Court. . . . There are two real reasons. The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . . The other reason, which is equally important, is . . . *it is so important that the clients and the lawyers understand the judges are really open-minded.*” — *Confirmation Hearing, July 1994, at p. 114 (emphasis added).*

“The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.”
Confirmation Hearing, July 1994, at p. 138 (regarding the right to an abortion).

“Until [an issue] comes up, I don’t really think it through with the depth that it would require. . . . *So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different* after you’ve become informed and think it through for real than what you would have said at a cocktail party answering a question.” — *Remarks at Harvard Law School, December 10, 1999, quoted in Arthur D. Hellman, Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals, 34 U.C. Davis L. Rev. 425, 462 (2000) (emphasis added).*

Justice John Paul Stevens

“A candidate for judicial offices who goes beyond the expression of ‘general observations about the law ... in order to obtain favorable consideration’ of his candidacy demonstrates either a ***lack of impartiality or a lack of understanding of the importance of maintaining public confidence in the impartiality of the judiciary.***” — *Republican Party of Minnesota v. White*, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting) (internal citation omitted) (emphasis added).

Justice David Souter

“[C]an you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?” — *Confirmation Hearing, September 1990, at p. 194.*

Justice Anthony Kennedy

“[The] reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues [is that] the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, ***and not because he has taken particular positions on the issues.***” — *Confirmation Hearing, January 1987, at p. 287.*

Chief Justice Rehnquist

“For [a judicial nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.” — *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (*Mem. on Motion for Recusal*).

Justice Clarence Thomas

“I think it’s inappropriate for any judge who is worth his or her salt to prejudge any issue or to sit on a case in which he or she has such strong views that he or she cannot be impartial. And to think that as a judge that you are infallible I think totally undermines the process. You have to sit, you have to listen, you have to hear the arguments, you have to allow the adversarial process to work. You have to be open and you have to be willing to work through the problem. I don’t sit on any issues, on any cases that I have prejudged. I think that it would totally undermine and compromise my capacity as a judge.” — *Confirmation Hearing, September 1991, at p. 173.*

Justice Antonin Scalia

“I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.” — *Confirmation Hearing, August 1986, at p. 37.*

Additional Opposition to Prejudgment of Issues

Justice Thurgood Marshall

“I do not think you want me to be in a position of giving you a statement on the Fifth Amendment and then, if I am confirmed and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself.” — *Confirmation Hearing, August 1967.*

Senator Joseph Biden

In 1989, then-Chairman Joseph Biden crafted the question that is now asked of all nominees to the federal bench:

“Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.”

“I believe my duty obliges me to learn how nominees will decide, not what they will decide, but how they will decide.” — *Confirmation Hearing for Ruth Bader Ginsberg, July 1993, at p. 114 (emphasis added).*

“You not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms ... over your tenure on the Court.”
— *Confirmation Hearing for Ruth Bader Ginsberg, July 1993, at p. 275-276.*

Democrat-controlled Senate Judiciary Committee Report on Abe Fortas Nomination

“Although recognizing the constitutional dilemma which appears to exist when the Senate is asked to advise and consent on a judicial nominee without examining him on legal questions, the Committee is of the view that Justice Fortas wisely and correctly declined to answer questions in this area. To require a Justice to state his views on legal questions or to discuss his past decisions before the Committee would threaten the independence of the judiciary and the integrity of the judicial system itself. It would also impinge on the constitutional doctrine of separation of powers among the three branches of Government as required by the Constitution.” — *Committee Report on Nomination of Abe Fortas to be Chief Justice of the United States, September 20, 1968.*

Conclusion

Every sitting Supreme Court Justice disagrees with the approach urged by some Senate Democrats — for good reason. Nothing less than judicial independence and the preservation of a proper separation of powers is at stake. The Senate should not allow short-term curiosity about particular issues to override the settled procedures that have governed this process for so long.