The Constitutional Propriety of Ideological "Litmus Tests" for Judicial Appointments

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I. FRANK PREMISES, FIRST PRINCIPLES

Isn't it obvious?

The Constitution prescribes an explicitly political process for the nomination, confirmation, and appointment of US Supreme Court justices and lower federal court judges. The president has the exclusive power of nomination and may exercise that power on the basis of any criteria he or she sees fit. The Senate has the power to provide its "advice" and—if it wishes—its "consent" to such a nomination.[1] The Senate, too, may exercise its advising and consenting (or nonconsenting) power on the basis of whatever criteria and in whatever manner senators think appropriate.[2] Ultimately, the two sets of political actors must come to an agreement: the president can make a judicial appointment only with the Senate's consent.

The political-constitutional judicial appointment process is inevitably, and necessarily, an occasion of *political* constitutional interpretation. The nomination and consent powers are occasions for the exercise by the president and the Senate of their respective independent prerogatives of constitutional interpretation, and rightfully can be used to advance those political actors' respective

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1 US Const Art II, § 2, cl 2.

2 The appointment process is set forth in Article II, Section 2, Clause 2. For an insightful analysis of the constitutional meaning of "Advice and Consent," see generally Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry,* 29 Harv J L & Pub Pol 103 (2005).

One qualification to the sweeping formulation in the text: Article VI of the Constitution forbids the imposition of a "religious Test" for any federal office. US Const Art VI, cl 3. That prohibition forbids the president from making a person's religion (or lack of one) or specific religious beliefs a criterion for nomination. The Senate is similarly forbidden from using such a criterion in deciding whether to grant or withhold its consent to an appointment. The fact that this constitutional restriction might not be judicially enforceable does not make it any less binding on the president and the Senate. See Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan L Rev 907, 916 (1994).

understandings of the proper constitutional exercise of the judicial power.

This political process is a vital—and deliberate—constitutional "check" on the judiciary. It exists for eminently practical reasons: Supreme Court justices exercise important, often hugely consequential, government power. Whether or not one believes in "judicial supremacy" *over* the Constitution (I do not[3]), the federal judicial power to interpret and apply the Constitution and other governing law to judicially decide cases and controversies within courts' assigned jurisdiction is an enormously influential governmental power within our constitutional system. Once a justice or judge is appointed, the exercise of that power becomes, for the most part, unchecked and virtually uncheckable by the political branches.[4] Once appointed, a federal judge serves for life and exercises judicial power independently and largely immune from political control. In practical terms, therefore, the judicial appointments process is the last clear chance for the other branches to check judicial power. The Framers of the Constitution designed the federal judicial selection process so as to provide such a check, and intended that it so operate.[5]

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[3] See, for example, Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame L Rev 1227, 1298–1301 (2008) (arguing that "the lost lesson of Lincoln . . . is the stunning wrongness of the claim of complete judicial supremacy in constitutional interpretation"); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich L Rev 2706, 2709 (2003) ("The logic of *Marbury* implies not, as it is so widely assumed today, judicial supremacy, but *constitutional* supremacy—the supremacy of the document itself over misapplications of its dictates by any and all subordinate agencies created by it."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 292–320 (1994) (making the textual, structural, theoretical, historical, and practical case for fully coequal, coordinate powers of constitutional interpretation by all three branches of the national government, and against claims of judicial supremacy).

[4] There are several other constitutionally proper means by which the political branches of the national government can check the abuse or misuse of judicial power, which I discuss in other recent work. But each of these other means suffers from practical or political defects, or constitutional limitations, not shared with checks at the appointments stage. See generally Michael Stokes Paulsen, *Checking the Court*, 10 NYU J L & Liberty 18 (2016).

[5] Federalist 76 and 77 make this plain. See Charles L. Black Jr, *A Note on Senatorial Consideration of Supreme Court Nominees,* 79 Yale L J 657, 661–62 (1970) (quoting Federalist 76 and 77 to argue for the propriety of the Senate acting as a restraining check on presidential judicial appointments and the propriety of the Senate considering anything that the president might consider in making a nomination). See also Michael Stokes Paulsen, Book Review, *Straightening Out* The Confirmation Mess, 105 Yale L J 549, 562–70 (1995) (arguing that "[t]he appointments process is part of the Framers' independence-plus-mutual-checking arrangement").

Simply put: Supreme Court justices, once nominated, confirmed, and appointed, wield immensely important, independent, and essentially unchecked government power.

Judicial ideology matters greatly to the exercise of that power. Obviously. It matters, for example, whether a judge believes that the Constitution is to be interpreted and applied in accordance with its original meaning or that (quite the reverse) judges possess the power to render decisions based on new meanings they derive from personal beliefs, political principles, pragmatic considerations, or something else. It likewise matters—obviously—what a judge's substantive views are concerning the meanings of specific provisions of the Constitution. The exercise of the federal judicial power involves great and important considerations of constitutional meaning, and the way a judge would exercise such power—and whether such a method or manner is faithful to the Constitution or not—is itself a constitutional question of great importance.

Considerations of judicial ideology (or "philosophy" or "methodology") therefore should be absolutely central to the nomination and consent decisions. The political branches are bound by their oaths to support the Constitution in the exercise of their constitutional powers, including their powers with respect to judicial appointments. The president swears a specific, constitutionally prescribed oath to "preserve, protect and defend the Constitution."[6] Senators swear the oath to support the Constitution mandated by Article VI for all legislative, executive, and judicial officers.[7] It follows, fairly naturally, that in the exercise of their respective powers with respect to nomination, advice and consent, and appointment of Supreme Court justices, the president and the Senate each possess a constitutional duty to act in good faith to support the Constitution by appointing and confirming (or by declining to appoint or confirm) persons they believe will exercise the judicial power faithfully in accordance with the Constitution. And in making this evaluation, both the president and the Senate properly may exercise independent constitutional judgment concerning how the Constitution is properly to be interpreted and applied.

It follows, I submit, that presidents and senators as a matter of constitutional power may—and as a matter of constitutional duty must—take considerations of judicial philosophy into full

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[6] US Const Art II, § 1, cl 8. See also Michael Stokes Paulsen, *The Constitution of Necessity,* 79 Notre Dame L Rev 1257, 1260–63 (2004).

[7] US Const Art VI, cl 3.

and fair account in exercising their constitutional responsibilities with respect to federal judicial appointments.

II. EVALUATING NOMINEES: THE CASE FOR LITMUS TESTS

How is that responsibility best exercised? There is probably a range of reasonable judgment as to the precise method presidents and senators should employ to ascertain whether a prospective judicial appointee is likely to interpret and apply the Constitution and other governing law faithfully, in the president's or senator's judgment. But I submit that one set of positions falls outside that range: complete deference to *any* views or interpretive philosophy a nominee might hold, or complete unwillingness to inquire into such views, on the ground that postconfirmation "judicial independence" renders such inquiries improper.

That view is constitutionally indefensible. The constitutional independence of federal judges consists of life tenure and salary guarantees and autonomy in the actual exercise of the judicial function.[8] But that's it. The (limited) independence of judges, once appointed, does not remotely imply immunity from the up-front check of substantive ideological review at the appointments stage. So to assert would be to deny the explicitly political process for judicial appointments created by the Constitution.

To be sure, it might compromise the postappointment decisional independence of judges for presidents or senators to leverage the appointment power forward to exact *commitments* as to future decisions by a judge. That would be improper. But in exactly the same way, it would compromise the preappointment constitutional prerogatives of the political branches to leverage judicial independence "backwards" (as it were) so as to forbid *inquiry* into substantive views. Presidents and senators properly

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[8] See US Const Art III, § 1. This of course does not mean that Congress and the president are forbidden from using their legislative and executive powers to urge courts to adopt positions or general interpretive approaches that the political branches of government think correct. If it did, that would forbid the executive from advancing positions in litigation in which it is involved. It would also forbid Congress from enacting statutes specifying rules of governing federal law. Both results would be absurd. Nor does autonomy of judicial decision mean that judicial decisions bind the political branches in the independent exercise of *their* constitutional powers. See Paulsen, 83 Georgetown L J at 274–75, 283–84 (cited in note 3). Nor, finally, does it preclude the use of the impeachment power if Congress judges the actions of judges to constitute a high crime or misdemeanor. See Paulsen, 101 Mich L Rev at 2729–30 (cited in note 3). It merely means that the exercise of the judicial power by the judicial branch ultimately must remain within the control of the judicial branch, even if such an exercise of judicial power remains subject to the external checking powers of the other branches.

may ask whatever they want. Judicial candidates may answer—and can do so constitutionally and ethically without compromising judicial independence—so long as they do not literally bind themselves in their (possible) future exercise of judicial power.[9]

Subject to this one essentially formal limitation, presidents and senators can and should put direct substantive "litmus test" questions to judicial candidates and demand answers. Indeed, as I first wrote more than twenty years ago,[10] the *perfect* such question—the one that yields the maximum possible information about judicial philosophy, sense of judicial role, constitutional interpretive methodology, and public moral courage—is to ask about a nominee's views of *Roe v Wade*.[11] What is the meaning of "person" under the Fourteenth Amendment (that is, does it include the unborn?) and what methodology would one use to determine the answer? May courts properly create new constitutional rights (whether in the name of "substantive due process" or under some other provision) with only the most tenuous or abstract basis in supposedly "open-ended" constitutional texts? What is the role of courts versus legislatures in this regard? May courts engage in the making of social policy in the name of the Constitution? What is the legal morality of the *Roe* decision? If a prior case has discovered (or invented) non–textually justified rights, does the idea of judicial stare decisis entrench such understandings, "whether or not mistaken"?[12] Answers to this packet of questions reveal *much*—nearly everything one would need to know—about a Supreme Court nominee's judicial ideology, and how he or she would exercise judicial power. A president or a senator could, with entire propriety, support or

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9 I have drawn this line in other writing. See Paulsen, 105 Yale L J at 570–75 (cited in note 5). Even this before-and-after line may be subject to a qualification: a senator may certainly take the position that he or she will consider a judge's departure from a stated correct standard in the exercise of judicial power as a violation of the judge's oath, providing grounds for a senator's vote in favor of conviction in an impeachment trial. See Paulsen, 10 NYU J L & Liberty at 82–83 (discussing the propriety of impeachment for believed abuse of judicial power) (cited in note 4). See also Federalist 81 (Hamilton), in *The Federalist* 541 (Wesleyan 1961) (Jacob E. Cooke, ed) (contemplating impeachment as a check on abuse of judicial power).

10 Paulsen, 105 Yale L J at 568 (cited in note 5).

11 410 US 113 (1973).

12 The "whether or not mistaken" formulation comes from the Court's decision in *Planned Parenthood v Casey*, 505 US 833, 857 (1992).

oppose a potential candidate on the basis of his or her answers to this line of questions—or refusal to answer them.[13]

III. THE 2016 ELECTION

It is obvious to the point of being a cliché: elections matter to the composition and direction of the Supreme Court. The 2016 election is certainly no exception. The sudden death of the supremely great Justice Antonin Scalia in February 2016 frames the question of judicial philosophy and the future direction of the Court as an election issue, in an unusually direct, immediate, and dramatic fashion. Election year vacancies and appointments are not unprecedented, but they are rare. Even rarer is the case in which an election year vacancy arises when one party holds the presidency (as a lame duck) and the other possesses the majority in the Senate.[14]

Such circumstances do not alter the existence of the political branches' respective constitutional powers. But they may well affect the conditions and dynamics of their exercise. President Barack Obama certainly possesses the constitutional power to nominate a successor to Scalia, and he has done so.[15] The Senate certainly possesses the constitutional power to decline to consent to such an appointment, and may do so by declining to even consider a nomination. Each branch has its prerogative; each properly may press its views as to the proper understanding of the Constitution and of the judicial role with the powers at its disposal. Obama might wish to appoint a liberal jurist committed to a "living constitutionalism" activist view of the judicial role, and to do so before his presidency ends. The Senate might strongly prefer to honor Scalia's legacy by refusing to confirm anyone other than a principled constitutional "originalist" in the Scalia mode. Both sides are plainly within their rights.[16]

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[13] The Court's decision in *Obergefell v Hodges*, 135 S Ct 2584 (2015), creating a right to same-sex marriage, presents many similar issues and might similarly function as a useful litmus test of judicial philosophy and constitutional ideology.

[14] Jonathan H. Adler, *On Election Year Supreme Court Vacancies* (Wash Post, Feb 13, 2016), archived at http://perma.cc/55WZ-JEQZ.

[15] *Remarks by the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court* (White House, Mar 16, 2016), archived at http://perma.cc/D8LE-V6S5.

[16] There is no constitutional obligation of the Senate to act affirmatively on a proposed appointment and there is no constitutional necessity that the Court operate with nine justices. The Constitution does not prescribe the number of justices; the statutory number has varied considerably over the years and included even-numbered arrangements (including originally six, under the first Judiciary Act of 1789, 1 Stat 73); and the Court has frequently functioned with less than the full statutory complement of judges. Indeed, a plausible case can be made that an eight-member Court serves important

It is neither improper nor surprising that national elections should decide, in whole or in part, large and small questions of constitutional power or meaning. Arguably, elections did so in enormously consequential ways in 1800 (repudiating the position of the Adams administration and the federal judiciary on the question of the constitutionality of the Alien and Sedition acts),[17] in 1832 (vindicating the constitutional position of President Andrew Jackson, against that of the Supreme Court, on the constitutionality of a national bank),[18] and in 1860 (repudiating the position of the Supreme Court and the South on *Dred Scott v Sandford*[19] and the supposed constitutional right to extend slavery into national territories, and electing a president whose public position was opposed to the validity, extension, or binding political force of the Court's decision).[20] Many other elections have presented less enormous constitutional questions but influenced, directly or indirectly, the ultimate resolution of certain constitutional issues. Voters, as individuals, possess less constitutional interpretive power than presidents or senators, but in the aggregate possess more such power than any branch of national government. Voters certainly have the right to exercise the constitutional interpretive power they have by virtue of their votes. Elections are often acts of constitutional interpretation, and properly so.

The 2016 election presents substantial questions of constitutional meaning—including how the appointment and confirmation power should be exercised, the broader issue of the future composition of the Supreme Court, and (indirectly) the question of the propriety or impropriety of the Court's exercise of its powers of constitutional interpretation in highly controversial recent cases. If it is obvious (as I have argued above it is) that political actors properly may consider constitutional ideology in the exercise of their own constitutional powers with respect to judicial appointments, it should be equally obvious that voters

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functions of judicial restraint (requiring a larger pro rata majority consensus, of 5–3, for decisions in closely contested matters). See Michael Stokes Paulsen, *Eight Is Enough (Justices That Is): Let the Court Unpack Itself* (National Review Online, June 23, 2015), archived at http://perma.cc/6K9Z-GSUC.

17 See Michael Stokes Paulsen and Luke Paulsen, *The Constitution: An Introduction* 133–137 (Basic Books 2015).

18 See id at 127.

19 60 US (19 How) 393 (1857).

20 See Paulsen and Paulsen, *The Constitution: An Introduction* at 162–69 (cited in note 17). See also generally Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U Chi L Rev 691 (2004) (discussing the significance of the election of Lincoln and the Civil War as events of constitutional interpretation).

may consider constitutional ideology in *their* exercise of the constitutional power of election of such political actors.