



EDUCATION

How Do You Judge A Judge?



FROM THE
ARCHIVES

HISTORY
TODAY

GRADES
8-12



EDUCATION

"An informed patriotism is what we want. And are we doing a good enough job teaching our children what America is and what she represents in the long history of the world?"

Ronald Reagan

Farewell Address to the Nation, January 11, 1989

At the Ronald Reagan Presidential Foundation and Institute, our education programs are dedicated to cultivating the next generation of citizen-leaders. Each year we work with thousands of teachers, and tens of thousands of students from across the country to help foster the engaged and informed citizens that President Reagan knew were so vital to a healthy America.

Being an Informed Patriot requires a healthy knowledge of history and to facilitate this, we have created the 'From the Archives' series to bring primary source documents and exploration into the classroom. These resources, carefully curated by our Education team, are meant to enhance historical discussions around relevant topics of today in history, civics, geography, and economics.

Overview: On 26 June, 1987, Justice Lewis Powell announced his retirement from the Supreme Court of the United States. Justice Powell, was known as a moderate Justice and was considered to be a 'swing vote'. With his retirement, a heated debate over the make-up and 'balance' of the court took up almost the next eight months of political discourse until the confirmation of Justice Anthony Kennedy to the seat on 3 February, 1988. This collection of documents can be used to create a discussion in your classroom of just how a Supreme Court Justice should be judged. Should the primary concern be about the nominees' political ideology or should their past rulings carry more weight? Should the idea of 'balance' come into play? What should the Senate focus on when conducting their 'advise and consent' role? Ultimately, how do you judge a judge?

Suggested Classroom Activities:

Primary Source A: Project on the board or have copies made available for the students. Ask the students what they think is going on here? What do they see in the cartoon? What do they think the cartoonist was trying to say with this piece? How does this relate to the Senate's role in Supreme Court justice nominations?

Primary Sources B & C: Have students either in small groups or individually, consider the arguments made in the White House documents 'No Ideological Tests Should Apply' and "'Balance" on the Supreme Court'. Have students discuss in pairs or small groups, the arguments they just read. Should there be an ideological test for Supreme Court nominees? When confirming Justices to the Supreme Court, should the Senate try to maintain a balance on the Court? If so, which way should it lean? Should they consider changing the number of Justices so that there can always be an even split?

Primary Source D: This Legal Times article contains the arguments laid out by then-Senator Joseph Biden in favor of considering nominees' political ideology versus those laid out by Senator Robert Dole saying that political ideology has no place in the consideration of judicial nominees. Have students read the opinions and weigh in on which they agree with most and explain why.

Primary Sources E & F: Have students consider the excerpted arguments from the Washington Post article and the New York Times article. These articles continue the discussion of whether political ideology has a place in the consideration of judicial nominees. What do these articles tell us about the importance of getting your information from multiple sources before making decisions?

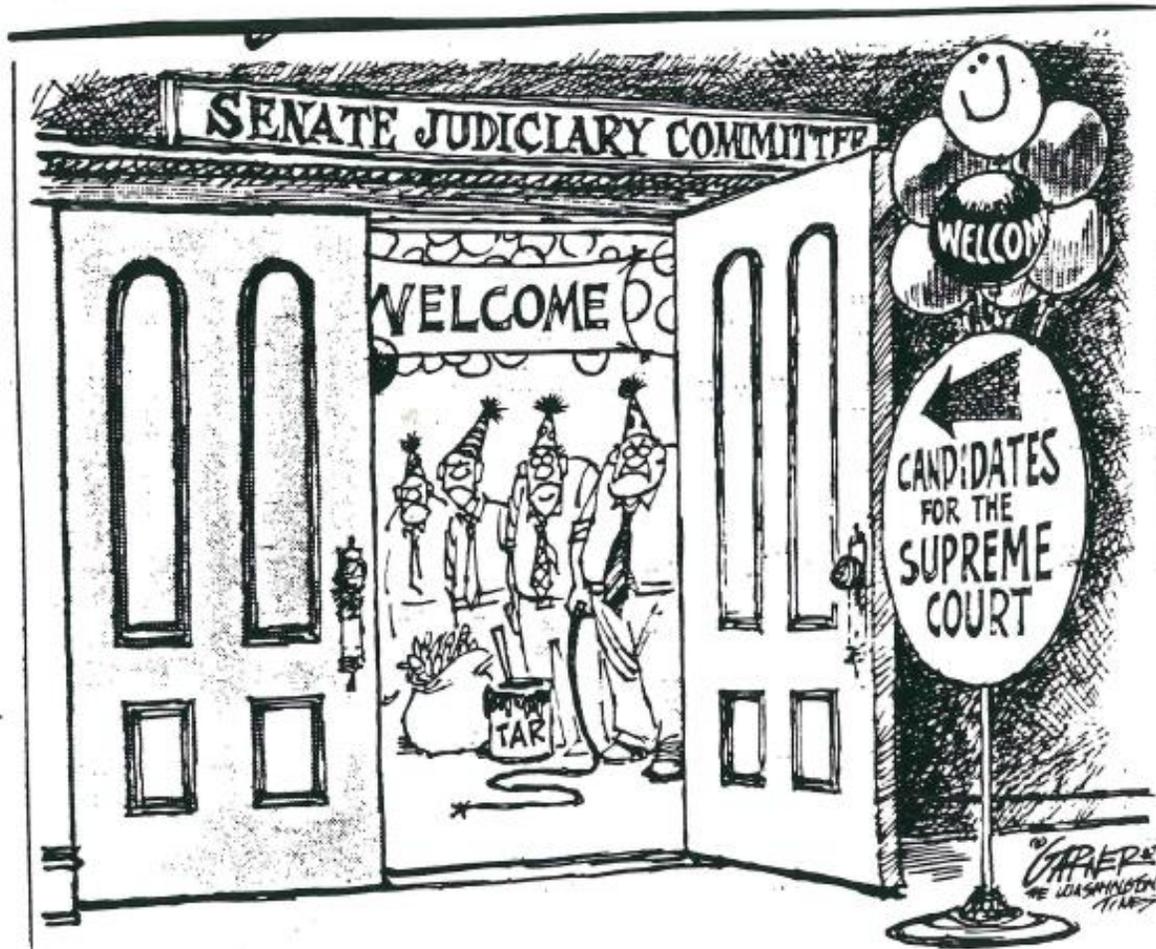
Previous Page: Judge Robert Bork making remarks to the press during a briefing in the Press Room. 9 October 1987

Note: All excerpted pieces were retrieved by the Ronald Reagan Foundation and Institute team from the archives at the Ronald Reagan Presidential Library and are intended for educational use only.

Developed by
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The Washington Times

DATE: 6/30/87
PAGE: A9



Garner, B. (1987, June 30). The Washington Times, p. A9.

Retrieved From: Folder "Bork: Clips (2)" box 7, David McIntosh Files, Ronald Reagan Library

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NO IDEOLOGICAL TESTS SHOULD APPLY

- o Ideology should have no role in the Senate's decision on whether to confirm Judge Bork. The application of ideological tests would end the independence of the judiciary.
- o The Senate would have to interrogate any prospective nominee on his position on dozens of issues. Attempts to preserve all these competing balances would subject the Senate to paralyzing competing demands. The judicial selection process would become completely politicized.

"...[H]istory should be enough caution to those of us on the floor who are willing, for our own political needs and/or because we think we know, to stop predicting what she is going to be and to underscore the need for us to have more objective criteria to determine whether or not someone should or should not be on the Supreme Court of the United States -- that is, their intellectual capacity, their background and training, their normal character, and their judicial temperament. We cannot be asked to effectively do much beyond that; for, if it were our task to apply a philosophic litmus test beyond that -- which is not the constitutional responsibility of this body, in my opinion -- it would be a task at which we would consistently fail, because there is no good way in which we can know."

--- Sen. Joseph Biden
Congressional Record, 9/21/81
(Sandra Day O'Connor nomination)

"...[T]he Senate must not apply litmus tests of its own. No party to the process of naming federal judges has any business attempting to foreclose upon the future decisions of the nominee."

--- Sen. Joseph Biden
Congressional Record, 6/6/86

"...[T]his hearing is not to be a referendum on any single issue or the significant opposition that comes from a specific quarter.... [A]s long as I am chairing this hearing, that will not be the relevant issue. The real issue is your competence as a judge and not whether you voted right or wrongly on a particular issue.... If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench."

--- Sen. Joseph Biden, Hearing on
Nomination of Abner Mikva to D.C.
Circuit at 394, 396

"Single-issue politics has no place in the solemn responsibility to advise and consent to appointments to the Supreme Court or any other Federal Court."

--- Sen. Edward M. Kennedy
Congressional Record, 9/21/81

"I believe there is something basically un-American about saying that a person should or should not be confirmed for the Supreme Court...based on somebody's view that they are wrong on one issue."

--- Sen. Howard Metzenbaum
Congressional Record, 9/21/81

"I am familiar with your [Bork's] views with respect to antitrust legislation, antitrust enforcement, and you and I are totally in disagreement on that subject. However, as I said at the time Justice [Sandra Day] O'Connor was up for confirmation, the fact that my views might differ from hers on any one of a number of different issues would not in any way affect my judgment as it pertains to confirmation or failure to confirm a member of the judiciary."

--- Sen. Howard Metzenbaum
Congressional Record, 1/27/82

"Balance" on the Supreme Court

In raising concerns about the nomination of Judge Robert Bork to be Associate Justice of the United States Supreme Court, some have suggested that, whatever the nominee's other qualifications, it might be appropriate for a Senator to oppose Judge Bork's nomination on the ground that it would affect the "balance" on the Supreme Court. This is a theme developed by Professor Laurence H. Tribe of the Harvard Law School. This novel argument is at odds with the history of Supreme Court appointments since the beginning of the Republic.

- The United States Constitution nowhere specifies that any particular "balance" is to be permanently maintained on the Supreme Court. Opposing a particular nominee because the nominee would alter the "balance" on the Court is merely a veiled way of saying that one disagrees with the philosophical direction in which a nominee would move the Court. Whatever the propriety of opposing a nominee because of philosophical differences, this should not be confused with an objection of "imbalancing" the Court.
- The constitutional reason for rejecting this so-called "balance" test is clear: If the Senate tried to preserve the narrow balances of the present Court on, e.g., criminal procedure or administrative law, it would undermine the constitutionally-guaranteed independence of the Supreme Court. The Senate would have to interrogate any prospective nominee on his position regarding such issues. To preserve each of these competing balances would subject the Senate to sharply conflicting demands. This politicization would plague the confirmation process far into the future.
- Nor does the historical practice surrounding Senate confirmation of Supreme Court nominees suggest that the present "balance" between liberals and conservatives must be maintained when a new nominee is proposed for a vacancy. The Senate historically has not adhered to a "balance standard" in assessing Presidents' judicial appointments. Certainly no such standard was employed in evaluating Franklin Delano Roosevelt's eight nominations to the Court, or Lyndon Johnson's nominations to the Warren Court, even though, as Professor Laurence Tribe has written, Justice Black's appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to FDR's initiatives. So too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

- A variant of the "balance" argument is the argument that the Supreme Court should not undergo rapid changes in direction. Because the Supreme Court is a collegial body consisting of nine individuals, however, it is unlikely that there will be major changes in the direction of the Court except in those areas in which there are fairly recent 5-4 votes. In any event, any change in the direction of the Court would be tempered substantially by adherence to the principle of stare decisis.
- If the argument were accepted that existing "balances" on the Court should be respected, it is difficult to see how such High Court decisions as Plessy v. Ferguson ("separate but equal") could ever be reversed by such subsequent decisions as Brown v. Board of Education.
- In the 1960s, when Justices Goldberg, Fortas, and Marshall were being placed on the Supreme Court -- resulting in a body that consisted of (at best) two judicial conservatives -- the "balance" theory was never raised. Presumably, the "balance" theory has nothing to say when a judicial philosophy is so predominant on the Court that an additional appointment, rather than shifting the "balance," will merely solidify the dominance of an existing "balance."
- The "balance" theory is delinquent also in its pure result-orientation, assuming that judges are always predictable in their opinions on the basis of their personal, philosophical perspectives. If Judges--both "liberal" and "conservative" ones--were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections, there would be no need to worry about "balance on the Court."
- In reality, there is always going to be a "balance" on the Court and there is always going to be a Justice who best approximates the center of that balance. If Justice Powell does not represent the balance, then it will be represented by someone else who falls in the middle on a particular issue or class of issues. To opine that a nominee will be opposed because he will upset the "balance" on the Court is merely another, not-very-subtle way of saying that one simply opposes any movement by the Court in the direction of the new Justice nominee.
- Judge Bork's appointment would not change the balance of the Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. This is manifested by the fact that Judge Bork has voted with

the majority on the Court of Appeals 94% of the time. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- It is ironic that Judge Bork is accused simultaneously of being "outside the mainstream" and capable of moving the Court in a variety of unsatisfactory directions. Judge Bork, if elevated to the Court, would need the concurrence of at least four of his colleagues in order to achieve a Court majority on any issue. If Judge Bork is "outside the mainstream," then so are at least four other members of a Court comprised of six Justices confirmed by near-unanimous margins and two other Justices (Marshall and Rehnquist) confirmed by sizeable margins.

July 30, 1987

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LegalTimes

Excerpts from: Biden, Dole Debate Senate Consent Role. (1987, July 27). Legal Times, p. 14.

Retrieved From: Folder "Bork: Clips (8)," box 7, David McIntosh Files, Ronald Reagan Library

Senator Joseph Biden (D-Delaware)

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Most of all, the Founders were determined to protect the integrity of the Courts. In Federalist 78, Hamilton expressed a common concern: "The complete independence of the courts of justice," he said, "is peculiarly essential in a limited Constitution... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."

So, to preserve an independent judiciary, the framers devised three important checks: life tenure, prohibition on reduction in salary and, most important, a self-correcting method of selection. As they relied on the Court to check legislative encroachments, so they relied on the legislature to check executive encroachments. In dividing responsibility for the appointment of judges, the framers were entrusting the Senate with a solemn task: preventing the president from undermining judicial independence and from remaking the Court in his own image. That in the end is why the framers intended a broad role for the Senate.

The debates and the *Federalist Papers* are our only keys to the minds of the founders. Confining your investigation to "original intent," you would have to stop there. But there is much more. Two centuries of Senate precedent, always evolving and always changing with the challenges of the moment, point to the same conclusion: the Senate has historically taken seriously its responsibility to restrain the president. Over and over, it has scrutinized the political views and the constitutional philosophy of nominees, in addition to their judicial competence. In many cases, the Senate rejected technically competent candidates whose views it perceived to clash with the national interest. (Of the) 26 nominations rejected or withdrawn since 1789, in only one case, George Williams--a Grant nominee whose nomination was withdrawn in 1874---does it appear that substantive questions played no role whatsoever. The rest were, in whole or in part, rejected on political or philosophical grounds.

Senator Robert Dole (R-Kansas)

The real issue... is whether our duty to advise and consent to the nomination should include our consideration of a nominee's views on specific political and social issues, as opposed to his fitness and merit.

Such an approach, I suggest, would offend common sense, would be contrary to the intent of the framers, and would, in the end, be horribly shortsighted.

It is universally acknowledged that judicial nominees should not be asked to commit themselves on particular points of law in order to satisfy a senator as to how he or she will decide an issue that might come before the Court. Yet there is little discernible difference between a senator demanding such an explicit quid pro quo during the confirmation process and one who decide, beforehand that he will only support nominees that satisfy a "check list" concerning specific issues or case.

As Professor Richard Friedman has put it, "extended debates, both within and without the Senate, concerning the political philosophy of a nominee cannot help but diminish the Court's reputation as an independent institution and impress upon the public--and, indeed, the Court itself--a political perception of its role." In short, the independent judiciary should not be caught up in "campaign promises" designed to curry favor with politicians and their constituent groups.

...

In my view, our inquiry should focus on the nominee's ability and integrity, and upon whether the nominee would faithfully and neutrally apply the Constitution in a manner that upholds the prerogatives of the three coordinate branches. If we go beyond this and require that judicial candidates pledge allegiance to the political and ideological views of particular senators or interest groups, we will do grave and irreparable violence to basic separation of powers principles that act as the ultimate safeguard against the tyranny of the majority. We would threaten all three branches of government. We would undermine the president's constitutionally mandated power of appointment by paralyzing the Senate in a gridlock of competing interest groups, each hawking its own agenda--and I'm afraid that the extremely long, almost unprecedented delay in hearings on this nomination is only a foretaste of what we can expect if we politicize this process. And, more important, we will deny the Court that insulation from the political process, which the Constitution so wisely attempted to insure.

For these reasons, I urge my colleagues to join me in considering the appropriate role of the Senate in reviewing judicial nominees and the confirmation process.

The Washington Post

Excerpt From: Berns, W. (1987, August 24). A Judge Who Respects Limits. The Washington Post.

Retrieved From: Folder "Bork: Materials on Judge Robert H. Bork (2)" box 9, David McIntosh Files, Ronald Reagan Library

Complete article can be found at: https://www.washingtonpost.com/archive/opinions/1987/08/24/a-judge-who-respects-limits/8e976f58-2baa-445d-af61-480aedd0dfa0/?utm_term=.0a6fbedd82a0

Almost everybody who has addressed the subject has recognized at some point that it is improper to assess the qualifications of a Supreme Court nominee solely in terms of his politics or ideology. Most commentators acknowledge that federal judges are not politicians and ought not to be judged like politicians.

...

All of which is to say they are not politicians, and, because they are not, the Senate should not allow political considerations to govern or control its decision in a confirmation vote. Of course, the same rule must constrain a president when he makes a judicial nomination, especially one for the Supreme Court. As the Framers of the Constitution reiterated time and again, judges occupy a separate branch of government -- detached from the people by the manner of their selection and from the political branches by their life tenure -- precisely because their work is not political in the ordinary sense. A good judge is not the same as a good politician; he is neither a conservative nor a liberal.

...

How, then, to judge a judge? At a minimum, by his refusal to be political. A fair measure of that self-discipline is his capacity to recognize and his willingness to respect the difference between what is politically desirable (or at least desired) and what is constitutionally permissible. Bork's record is filled with examples of this.

...

As Bork said recently, in a constitutional democracy the moral content of the law must be given by the morality of the Framers or, in the case of a statute, that of the legislators, never by the morality of the judge. "The sole task of the latter -- and it is a task quite large enough for anyone's wisdom, skill, and virtue -- is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances."

That, I submit, can serve as the standard by which we judge a judge, especially a judge on a court with the power to overrule the judgments of a democratic people.

The New York Times

Excerpts from: How To Judge Bork. (1987, July 7). The New York Times.

Retrieved from: Folder "Bork: Materials on Judge Robert H. Bork (2)" box 9, David McIntosh Files, Ronald Reagan Library

Complete article can be found at: <http://www.nytimes.com/1987/07/07/opinion/how-to-judge-judge-bork.html>

Americans hold the Supreme Court in such reverence that they are sometimes persuaded, haplessly, to try taking the politics out of politics. As President Reagan's nomination of Judge Robert Bork to the Court reverberates, it becomes clear that this is such a time.

The white marble and black robes radiate a virtue that transcends partisanship. That's exactly as it should be; Federal judges receive lifetime appointments in order to be free of any partisan debt or duty. Their unencumbered freedom to decide cases is, however, distinctly different from how the Senate should decide which nominees to approve for the Court.

As the history of Reagan nominations illustrates, that is a political question, properly and always. To claim that it is improper to examine a nominee's philosophical positions misses the point. The wholly proper test is to discover and weigh what those positions are.

...

Now, the politics have changed dramatically. The Senate is controlled by the Democrats. The President's popularity has plummeted. And Judge Bork's extensive record as a lawyer, teacher, government official and member of the Court of Appeals strongly suggests that he would change the Court's delicate balance.

Is that a legitimate focus of concern? Yes; philosophy is every bit as relevant for the Senate as for the President who nominated him. For people who think of themselves as progressive on social issues, that record is not reassuring.

...

Are executive officials thus free to ignore commitments of law and honor? These and other questions warrant full Senate attention. Questions that might have been answered one way in 1973 or even 1986 may be answered differently this year. The Court's balance is different; the Senate is different; the politics are different.

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EDUCATION

Student Programs

Ventura County Scholars Program



The Ronald Reagan Presidential Foundation Scholars Program awards Ventura County, Calif., high school seniors who exemplify outstanding leadership skills and personal character with a total of \$50,000 in scholarships annually.

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The GE-Reagan Foundation Scholarship Program honors the legacy and character of our nation's 40th President by rewarding college-bound students who demonstrate exemplary leadership, drive, integrity, and citizenship with financial assistance to pursue higher education. Through the generous support of General Electric, this national program awards \$40,000 in scholarships to numerous high school students each year.



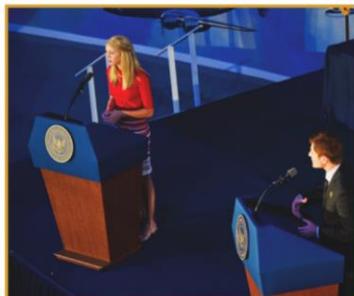
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The Leadership and the American Presidency is a program designed to facilitate leadership development among undergraduate students through the unique lens of the American presidency. This accredited course is grounded in real history as students critically examine the leadership journeys of presidents in relation to their own lives. Students hear from real leaders in the fields of business, government, and the nonprofit sectors learning lessons on leadership, while simultaneously applying all of these skills in the real world in an internship setting and in an authentic culminating course assessment.

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