J. Harvie Wilkinson III

Congress & the court: judicial confirmation

The congressional-judicial relationship is frayed but not broken.[1] Positive aspects of the relationship don't grab headlines: Congress has frequently been responsive to the judiciary's budget requests and courthouse security needs, and open to discussion on bills affecting the judicial function, for example. But even the best relationships have their ups and downs.

One of the recurrent trouble spots in congressional-judicial relations is the process of Senate confirmation of judicial nominees. The judiciary respects the fact that the Senate has a special constitutional duty to perform in judicial confirmations. Its role requires both care and inquiry before approving what are, after all, significant lifetime appointments. However, two special dangers to the judiciary arise from the present state of affairs. Both dangers, if not attended to, will have serious adverse impacts on judicial function.

First, over the past decade nominees of real distinction have had an increasingly difficult time with the Senate confirmation process. I have often spoken about the dangers that growth in judgeships poses to the functioning of the federal appellate courts. Regardless of one's views on the issue of increasing the number of judges on the circuit courts, no one can reasonably dispute that we absolutely must maintain the quality of judges nominated for the bench. According to some, stagnant judicial salaries pose the greatest threat to the quality of the bench. But at least as grave a danger is a newly emergent skepticism on both sides of the aisle toward professional distinction of all sorts.

The more distinguished the nominee, seemingly the less likely he or she is to receive a hearing or actually be confirmed. These distinguished nominees have commanded great respect in one or another aspect of the legal profession. Some have achieved prominence in private practice, others in academia, still

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others in public service. Some have become premier oral advocates, held high elective office, or served with distinction in state government or within the federal executive branch. Indeed the quality of their professional records is not in dispute.

By all rights, this kind of career record would appear to enhance one's credentials and prospects for service on the federal bench. Yet it too often appears to have become an almost insurmountable obstacle – which is neither proper nor fair. Any career of distinction will involve its share of risks and controversies; that comes with having been in the arena. Honorable positions taken in the course of honorable professional service, though, are regularly becoming an impediment in the confirmation path, blocking the real leaders of our profession from service, even on the lower federal bench.

What are the consequences of this behavior? Just as a legislature would be a poorer place without its more dynamic members, so, too, will a court suffer without members of intellectual breadth and high-level professional experience. Surely our judicial heritage would be all the poorer if the Learned Hands and Henry Friendlys had not made it to the bench due to this or that rough edge in their previous careers. The same could perhaps be said of many of my present colleagues.

So what are we to make of nominees whose professional credentials are nowhere in dispute but who face a prolonged confirmation or, even worse, unsuccessful confirmation? Have we reached the point in the confirmation process where both sides of the aisle consider intellectual distinction a threatening characteristic in a judicial nominee? There could not be a more unfortunate long-term development from the standpoint of the judicial branch.

Many able persons have been nominated to the appellate courts by presidents of both parties. Also, emphasizing distinction is not intended to be elitist. The sole mission of the courts is one of public service. The range of cases that reaches judges is staggering, in fields of law as diverse as criminal, securities and antitrust, labor and civil rights, tax and admiralty, administrative and constitutional. The cases involve questions of both state and federal law, complex statutes, and byzantine regulations, and they require an appreciation of the dynamics of government and the workings of sometimes inscrutable federal agencies. Furthermore, rapidly changing technologies often underlie the most challenging disputes. In a period when many cases are just plain demanding, the public deserves the best intellectual resources and professional experience that this country can provide. This is a bad time to disqualify the most distinguished nominees from judicial service.

The second danger pertains to the role accorded ideology as a criterion for confirmation. While presidents have traditionally consulted judicial philosophy in the broadest sense in making appointments, ideology has often taken a back seat to integrity, experience, and temperament in the confirmation of lower-court judges. To the extent that extreme views should raise red flags, ideology should be taken into account in appointments to the federal bench. There are two problems, however, when ideology becomes an express criterion for confirmation.

One, the role of ideology in lower-court decision-making is frequently exaggerated, and the role of simple professional craftsmanship is too frequently

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overlooked or ignored. Whatever strong feelings may be generated by Supreme Court appointments, courts such as the courts of appeals should not become ideological battlegrounds. Certainly a court of appeals sees a wide variety of views in its judges. But what one comes to appreciate in a colleague is not so much ideology but dedication, preparation, intelligence, humanity, and, above all, legal mastery and competence.

With proper discussion and reflection, good appellate judges will reach agreement on cases in the lower federal courts 80 to 85 percent of the time. Even disagreements cannot always be attributed to philosophical or ideological differences. When they can – and sometimes they can – there are often two reasonable and debatable views on the law. Emphasizing ideology overlooks professional habits of mind that will serve the public best, day in and day out.

A second problem with making ideology a confirmation criterion concerns judicial impartiality and independence. If judges are appointed and confirmed for their professional distinction, they will be perceived as performing a public trust. If, however, ideology becomes a paramount consideration in the confirmation process, it will only be a matter of time before the public perceives courts to be ideological bastions rather than the repositories of impartial judgment. We will all lose if the rule of law and the role of courts come to be perceived as mere extensions of politics.

Some argue that ideological considerations have been forced upon Congress by ideological decisions from the courts. Critics point to Supreme Court invalidations of congressional legislation not only under the Commerce Clause but also under Section 5 of the Fourteenth Amendment, in which Congress has been held to have the authority to enforce but not to redefine basic Fourteenth Amendment rights. (Many of the most controversial decisions have been 5 – 4 votes.) Then, too, the argument goes, with capital punishment, affirmative action, abortion, and church-state relations on the judicial docket, Congress can hardly afford not to take ideological considerations into account, especially if the executive branch itself is hardly blind to them.

This does raise legitimate concerns. The judicial guidepost that Congress can regulate only subjects with "substantial effects" upon interstate commerce is not altogether clear. The same goes for some of the Section 5 and Eleventh Amendment tests as well; this lack of clarity must be a source of frustration within the legislative branch. Also, some in Congress rightly argue that self-restraint should be the hallmark of the judicial function, and that activism of the right or left poses the grave and unacceptable danger of displacing the judgments of the democratic branches of our government with the policy preferences of unelected jurists. Competing brands of activism are in no one's interest, least of all that of the judiciary.

Congress should, though, accord the Supreme Court's work a commensurate level of respect. The judiciary is not at liberty to walk away from its duty to interpret. Whether it be the Bill of Rights or the structural dictates of our founding document, the courts have been charged, since *Marbury v. Madison*, with the obligation to state what is the law. The bifurcation between structure and rights that has pervaded much of modern constitutional law is not always wholly understandable. Indeed, the structure of our government makes possible many of the rights we now enjoy, so courts must be attentive to both structure and rights. The same document that confers our

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rights also establishes our governmental structure, and the maintenance of structure and the protection of rights are the shared responsibilities of Congress and the courts (and the executive branch, too, for that matter). Questions of structure are not off bounds for the courts any more than questions of rights are off bounds for Congress.

That the Supreme Court, then, should undergo so much criticism for taking structural questions seriously is unfortunate. The basic fact remains that our federal government is one of enumerated and thus limited powers, and that the framers set in place a system of dual sovereignties. The courts cannot ignore those structural dictates without rejecting the sum and substance of the Constitution itself.

In the aftermath of September 11, the political branches of our government stepped forward to address the national crisis, and the judiciary seemed for a time to have receded from the national consciousness; this is as it should be. It is with the political process that America has placed its faith. Congress has the essential functions of taxation, appropriation, oversight, confirmation, ratification, and prescriptive legislation and rule-making, and these functions remain vigorously intact.

Those of us in the judicial system profoundly respect the primacy of the political process and understand that politics is often a messy, rough-and-tumble, half-a-loaf business. We hope in turn that Congress will continue to respect the important role the courts play in a constitutional democracy. The courts are guarantors of many important national values – the liberty, equality, opportunity, security, stability, and order that flow from faithful adherence to the rule of law.

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