

Deference to the President? I don't think so.

The president's nomination of one to the Supreme Court inevitably is accompanied by claims that deference should be given his choice, an argument usually espoused by members of the president's party. That argument takes on more legitimacy when a source as prominent as the *Washington Post* editorializes "if the presidential election means anything . . . it [is] that the president's choice has a heavy presumption of confirmation. That is the way the system works. Why else would Justices Sandra Day O'Connor, Antonin Scalia, Stephen G. Breyer and Ruth Bader Ginsburg have received only a handful of no-votes among them?"

But that is not the way the system works. The notion of an electoral mandate for a president regarding specific policies or appointments to the Supreme Court is a myth. The closest we come to electoral mandates in this nation is in initiative and referendum voting. Supreme Court nominations are not Cabinet appointments, not even just another judicial appointment. The justices head the essential third branch of our government. It is they who give life to equal protection for all and who define the powers and limitations on those powers granted by our Constitution. The framers, stymied by the best way to appoint the federal judiciary, compromised by saying only that the president, by and with the consent of the Senate, shall appoint. George Washington immediately saw the appropriate execution of this terse dictate. He would appoint whomever he wished and the Senate could make its own independent assessment regarding whether to consent. Neither had to give reasons for their judgments, although the need for persuasion would recommend doing so.

Whether or not there actually is a presumption in favor of the president's nominee depends entirely on the potential for controversy inherent in the vacancy setting and on how the president addresses that potential. The four appointments mentioned above received a handful of "No" votes, not because of a "heavy presumption" in favor of the president's choice, but for other reasons. In the case of O'Connor, Reagan nominated a relative unknown who was viewed as better than the Democrats' worst fears, and they could hardly oppose the first female nominee to the Court. In the case of Scalia, the simultaneous nomination of Rehnquist to be Chief Justice resulted in a strategic decision of Democrats to focus opposition on Rehnquist, not Scalia. Indeed, had Reagan nominated Robert Bork rather than Scalia, there is little doubt that Bork would now be on the Court. Breyer and Ginsburg are both instances of President Clinton appointing someone distinctly less liberal and more palatable to the Republicans than might otherwise have been the case. These nominations also occurred in settings in which the potential for controversy was relatively low.

Controversy in Supreme Court nominations has everything to do with the context in which nominations occur. When Reagan appointed Bork, the potential for controversy was considerable. The Democrats had regained control of the Senate, Reagan's approval ratings had dropped to around 50%, 15 points lower than when Scalia had been nominated, and the vacancy was that of Lewis Powell, the quintessential swing vote in numerous 5-4 Court decisions. Reagan responded to this potential for controversy by

nominating Bork, the equivalent of tossing gasoline on a smoldering fire. Today the vacancy is O'Connor, not only the key swing vote in crucial 5-4 decisions but one of only two women on the Court. Bush's approval rating is 5 to 10% points lower than that Reagan faced. And while the Republicans control the Senate by a comfortable 10 vote margin, the potential for controversy here is considerable.

Presidents have choices. Gerald Ford chose to avoid controversy by nominating Stevens in 1976 and Reagan finally did so by nominating Anthony Kennedy for the Powell vacancy. Should a president choose to fly in the face of a controversial setting and nominate someone who will ignite that controversy, as with Bork or Clarence Thomas, that is the president's decision and he cannot expect to wrap himself in some flag of deference to the president regarding that choice. Advocacy groups, as representatives of particular interests have an obligation to scrutinize nominees in light of their groups' interests and to inform the public of their assessments. The press has an obligation to inform the public about what is at stake, how different interests seek to define the nomination and the nominee, separate fact from fiction in those attempts, and provide channels for citizens to become more informed and more involved in the process. The Senate has an obligation not to defer to the president but to make an independent and informed judgment regarding the suitability of the nominee relative to the vacancy.

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