



# Prelude to Armageddon

*Michael J. Gerhardt*

**T**HE NATION FINDS ITSELF in a rare moment of calm before the storm. On July 1, Justice Sandra Day O'Connor surprisingly announced her intention to resign upon the nomination and confirmation of her successor. The announcement caught everyone off guard, including not only her sons but also the White House. The prevailing wisdom at the time was that if anyone were to resign from the Court at the end of the 2004 Term it would be the Chief Justice of the United States, William Rehnquist, who has been ailing with thyroid cancer. Justice O'Connor's announcement signaled the first vacancy on the Court since 1994, the year in which the Senate confirmed Justice Stephen Breyer's nomination to replace Harry Blackmun on the Court. As such, her announcement marks the beginning of the end of the longest period in more than two hundred years without a vacancy arising on the Court. Since Justice O'Connor has been the swing vote in a number of critical cases in recent years, the fight over her

replacement is likely to be as intense as any Supreme Court appointment in our history. Her resignation gives President Bush the opportunity to shift the Court's center further to the right, particularly in criminal procedure, establishment clause, and gender discrimination cases. Given the expectation that the Chief Justice will resign sooner rather than later (and maybe in a matter of days or weeks), President Bush seems well positioned and prepared to transform the Court, a possibility that is not good news to most Democrats.

Though the stakes in replacing Justice O'Connor are not lost on anyone, not everyone in the Senate can claim the same familiarity with the Supreme Court confirmation process. A majority of senators – 56 – have never participated in a Supreme Court confirmation; fewer than half the members of the Judiciary Committee have any experience in dealing with the confirmation of a Supreme Court nominee.<sup>1</sup> Senate staffers are using the brief period of calm between

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1 See Sheryl Gay Stolberg, *Out of Practice, Senate Crams for Battle Over Court Nominee*, N.Y. Times, July 8, 2005, A1, 20.

the announcement of O'Connor's resignation and hearings on the President's choice to replace her to educate themselves (and their bosses) about the confirmation process, including its history.

I suspect that, but for the *Green Bag*, it would have been highly unlikely any but a few people would have known about, much less had the opportunity to read the transcript of, a special hearing of the Senate Subcommittee on Separation of Powers held in 1976. The hearing, whose transcript follows, focused on the often-ignored role of the Senate to provide "Advice" on Supreme Court appointments.<sup>2</sup>

The hearing is particularly interesting when one contrasts it with another Senate subcommittee hearing held 25 years later. Both hearings were led by Senate Democrats – James Abourezk of South Dakota in 1976, and Charles Schumer of New York in 2001. Senator Abourezk held his hearings in the brief interlude between Justice Douglas's announced resignation from the Court and President Ford's nomination of then-Seventh Circuit Judge John Paul Stevens as an Associate Justice, while Senator Schumer conducted his hearings without the *raison d'être* of a Supreme Court vacancy.

The most striking difference between the hearings, at least in my judgment, has little to do with their timing. I am most struck by the difference in their focus. In 1976, the experts primarily focused on qualifications. In the 2001 subcommittee hearing, the focus was principally on "ideology." In 1976, the experts acknowledged that judicial philosophy was something presidents, and senators, might consider. But they did not consider it their role to either validate or attack particular judicial philosophies, and the term "ideol-

ogy" appears nowhere in the hearing. Instead, the experts and the senators questioning them all looked for higher ground, a higher ground on which politics of the highest order would play a recognized part. In 1976, the witnesses discussed the characteristics essential to someone meriting appointment to the Court. Judicial philosophy received scant mention, and no particular ideology was labeled as either obligatory or disqualifying for the candidate who would replace Justice Douglas. In 2001, the experts recognized it as inevitable, if not necessary, for confirmation proceedings to focus on judicial nominees' likely ideologies.

Yet another interesting difference between the 1976 and 2001 hearings is that the Separation of Powers subcommittee – and the experts – tended to focus on different parts of the Appointments Clause, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court ... ." In 1976, the express purpose of the subcommittee hearing was to explicate the term "Advice," while in 2001 the subcommittee's focus was on the extent to which the "Advice and Consent" power empowered the Senate to evaluate nominees' judicial philosophies.

What accounts for the quite different focuses in 1976 and 2001? No doubt, some conservatives, or Republicans, will be quick to blame the Democrats for the change in focus in judicial confirmation hearings. On the one hand, many blame Jimmy Carter, who would not become president until January of the next year, for trying to stack the lower courts with liberal activists under the guise of diversifying the federal judiciary. On the other hand, many point to the Senate's

2 Article II, section 2, clause 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for."

rejection of Robert Bork's nomination to the Court as a watershed event in the Supreme Court appointments process. They argue that it was the Democrats who in 1987 changed the rules (indeed, some argue the Democrats did this again in 2002 when they started to filibuster some of President Bush's judicial nominations). As many Republican commentators see it, ideology was never, or almost never, an important factor in Supreme Court confirmation hearings until Senate Democrats made it so. I am sure many commentators will thus greet the 1976 hearings, conducted by Democrats, as proof positive of the absence of ideology as a focus of Supreme Court confirmation hearings if not the Democrats' apparent culpability in shifting the focus toward ideology.

Democrats have a few interesting responses. Many will no doubt argue that it was President Reagan and the Presidents Bush who began to emphasize ideology in their nominations to both the lower federal courts and the Supreme Court and thus forced the Senate to consider its propriety in judicial selection. Bork was not a watershed so much as the culmination of a systematic effort by the Republicans to stack the courts against *Roe v. Wade*<sup>3</sup> and other decisions of both the Warren and Burger Courts. Once Democrats regained control of the Senate in 1986, they had the opportunity to keep President Reagan from replacing a swing justice – Lewis Powell – with someone clearly disposed to undo or alter Powell's legacy. The 1976 hearing helped to make their point: Held three years after *Roe*, it is noteworthy that in the hearing that *Roe* is mentioned only once, and even then only obliquely and not by name. (Try to imagine a Supreme Court confirmation hearing in 2005 in which *Roe* is mentioned a single time!) In 1976, the experts all anticipated that presidents would

make "political" appointments to the Court – that they would make Supreme Court appointments to further their social or political agendas. But the experts did not offer commentary on those agendas and the Senators questioning them sought none. Rather, the experts all saw their task as trying to provide counsel to the Senate on how it may provide "Advice" to the President to appoint the "best" possible person to the Court. Accordingly, they went to great lengths to set forth what they each considered to be the indicia of a meritorious appointment to the Court.

So, who is to blame for an apparent change in the focus of Supreme Court confirmation hearings? Who is right? I will let you, the good reader, decide. I will not try to sway you one way or other (even if that were possible). Instead, I will make just three observations for further consideration. The first is to consider the significance of the 1976 subcommittee's attempt to construe the powers of the Senate over Supreme Court nominations. In particular, the senators and experts agreed that the term "Advice" in the Appointments Clause empowers the Senate to make non-binding recommendations to the President on the criteria he ought to employ in selecting Supreme Court nominees. For anyone who claims to be a textualist (and that ought to be all of us!), each word of the constitutional text is supposed to have meaning, and so the word "Advice" in the Appointments Clause ought to have a distinct meaning, one that is separate from the term "Consent" in the same clause. The question, of course, is what is that special meaning. Regardless of one's politics, one ought to recognize that the term "Advice" raises the possibility of some pre-nomination role that the Senate may perform in Supreme Court selection and more generally in the federal appointments process. It is hardly silly for senators to look for

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<sup>3</sup> 410 U.S. 113 (1973).

this meaning, though it is not uncommon in our history for senators from the President's party to construe the term "Advice" narrowly to allow the chief executive more discretion in choosing nominees and senators from the opposing party to construe the term broadly to oblige the President to consider more seriously their recommendations for important nominations.

A second, important observation is that, in trying to determine the possible differences between the 1976 and 2001 hearings, we have the advantage of knowing how things turned out. By this, I do not mean Bork's rejection. I mean Stevens' nomination, and particularly how President Ford employed what many commentators, then and later, consider as a model for appointing a Supreme Court justice. After setting forth some basic criteria (including judicial philosophy), President Ford delegated the primary responsibility for assembling a short-list to his very able Attorney General, Edward Levi. Attorney General Levi did a first-rate job. In keeping with his efforts then to restore confidence in the Justice Department in the aftermath of Watergate and President Nixon's resignation, Levi worked hard to find the best possible nominee. That the nominee he found was someone whom he knew and who came from the very same city in which he had spent most of his professional life may have been a coincidence. The Senate greeted the nomination of John Paul Stevens with great relief and acclamation. He was easily confirmed; and while some may argue he has drifted (disturbingly) to the left (or that the President should have stressed judicial philosophy more heavily in his choice of a nominee), John Paul Stevens has been, I believe, a model justice. He is by all accounts a person of enormous integrity, high intellect, principle (albeit nuanced), civility, grace, and independence. Ask yourself how willing you would be, operat-

ing behind the infamous Rawlesian veil of ignorance without any idea of what cases might come before the Court including your own, to accept a Justice Stevens. I for one have no trouble accepting him as the judge of my case without even knowing what the issues would be, for I am confident that, as his record shows, he will listen carefully to the arguments of both sides, and that he will not pre-judge the cases coming before him but instead will fairly and even-handedly decide them on their facts and the law as he has found it. He has been as considerate as possible of all legitimate sources of decision. Not bad, for a justice, I think. He might not have been the "public" person the experts in 1976 urged the President to select, but he has, I think by almost any measure, served his country (and its Constitution) well.

Third, of course, we also know how much ideology has become the preoccupation with those responsible both for choosing and for confirming justices. I believe this has been a bipartisan preoccupation, for better or worse. And, while I am not confident it is a good thing, it has been a preoccupation with most presidents and most senators. It is no accident that at the times of their respective appointments to the Court all eleven of President Washington's Supreme Court appointees were well-known Federalists, that all five of President Lincoln's Supreme Court appointees had been ardent supporters of the Union, and that all nine of President Roosevelt's appointees had long track records of supporting the constitutionality of the New Deal.

The contemporary challenge is to determine whether it is possible to define merit in non-ideological terms. The 1976 hearing is remarkable, because the experts did just that. I do not know how many experts could do that now. The 1976 hearing thus provides a significant marker for us. We can measure

*Prelude to Armageddon*

how far we have come or perhaps how much we have deviated from its underlying assumptions and expressed understandings. Instead of blaming any decline in the appointments process on others, perhaps we can ask how much President Bush and the Senate is each capable of rising to the occasion as I believe the President and Senate did in 1976 to join in making a genuinely meritorious appointment.

It would be folly to predict what the future

holds. It is, however, not too late to learn from an interesting moment in our history, though I leave it to each reader to decide what lesson our past, including the hearing, teaches us about the Supreme Court, the President's nominating authority, the Senate's authority to provide "Advice," and of course the Republicans', Democrats', and countless interest groups' agendas. If things do not work out as we like, I agree with Shakespeare that the fault does not lie in the stars.

