Let the Grilling Begin — Separating Myth from Reality in the Confirmation Process

By Erwin Chemerinsky

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Only 12 days have passed since Justice Sandra Day O'Connor announced that she was stepping down from the Supreme Court, but already a great deal of misinformation about the judicial selection and confirmation process has been spread. Let's try to separate the myths from the reality.

Myth: Selecting federal judges, including Supreme Court justices, is the prerogative of the president, and the Senate owes deference to his choice.

Reality: The framers of the Constitution deliberately created a process in which two branches of government have to be involved in almost every major action — from declaring war to enacting a law to putting a person in prison. The same is true of judicial selection, where the Constitution requires Senate approval of presidential nominations.

During the 19th century, about 20% of all presidential picks for the Supreme Court were rejected by the Senate, and during the 20th century, 10% of presidential nominees were turned away.

Myth: It is inappropriate for the Senate to consider the views and ideology of a nominee.

Reality: Every president has looked to ideology in picking federal judges. Likewise, the Senate has considered the views of the nominee in deciding whether to confirm them. For example, George Washington's candidate to be the second chief justice, after John Jay resigned, was John Rutledge. But the Senate rejected him because they disliked his views about U.S. neutrality in the war between England and France.

In the 20th century, the Senate rejected John Parker in 1931 because of his anti-labor views, Clement Haynsworth and G. Harold Carswell in 1969 because of their conservative ideology, and Robert Bork in 1987 because of his narrow view of constitutional rights, including privacy and abortion rights.

The reality is that justices have great discretion in interpreting broadly written constitutional phrases, and ideology matters greatly in how a justice will rule.

Myth: Nominees should not express their views on issues that are likely to come before the court.

Reality: Since a person's views are likely to matter so much, the Senate must know those views in deciding whether to confirm the person. The Senate can refuse to confirm nominees who do not answer questions in a complete and honest manner.

That doesn't mean that a nominee should say specifically how he or she would vote on a particular issue or case, because obviously that will be a product of the specific circumstances and the arguments presented. But it is absurd to pretend that nominees do not have broad views on the crucial constitutional issues of the day, such as abortion rights, affirmative action, gay rights and separation of church and state.

Nominees should also be asked in detail about their philosophy of how the Constitution should be interpreted. Is its meaning fixed and unchanging, or is it a living Constitution? Should the court protect rights not specifically enumerated, such as privacy, or not?

In no way does it compromise judicial independence or impartiality to require nominees to answer such questions. Indeed, just a few years ago, Justice Antonin Scalia, writing for the court, expressly held that it does not threaten judicial neutrality for candidates for elective judgeships to announce their views on legal or political issues. Same with the Supreme Court. Nominees have views, and there is nothing gained by pretending otherwise.

Myth: It is impossible to predict how a person will vote on the court, and therefore it is unnecessary and wrong to look at ideology.

Reality: Rarely do individuals in their 50s or 60s experience major changes in their belief systems. There are occasional examples of justices who shifted over time, including Felix Frankfurter, who became more conservative, and Harry Blackmun, who became more liberal. But they are the exceptions. Most justices — including, by the way, William Rehnquist, Scalia, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer — behave on the court exactly as the presidents who nominated them would have predicted.

The intense interest in who President Bush will nominate to replace O'Connor reflects the reality that many of the nation's most divisive issues — abortion rights, separation of church and state, affirmative action, gay rights — are ones in which the Supreme Court has the last word. So we must be sure to question the nominees closely.

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