

CHANGING CRITERIA FOR JUDGING JUDGES

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Professor Nagel and I agree that it is “appropriate”¹ (in his words) that the Senate play a role in the confirmation process. We part company on the desirability of senatorial involvement. This brief essay explains why I am unpersuaded by Professor Nagel’s negative view of the utility of a senatorial role and what benefits I see flowing from the Senate’s scrutiny, over the past few years, of Presidential nominees.

The United States Constitution states that the President shall appoint judges—“by and with the Advice and Consent of the Senate. . . .”² As Charles Black explained some years ago, there are no “textual,” no “structural,” no “prudential,” or no “historical” reasons to object to senators understanding the words of the Constitution—“advice and consent”—to authorize them to take a role beyond rubber stamping Presidential appointments.³

While sharing Professor Black’s view that no constitutional impediments can be found to a senatorial role in the nomination process, Nagel nonetheless raises concerns about that role. Essentially, his claim is that senators ought to be wary of too much involvement in the nomination process. Nagel argues that while senators can (at a constitutional level) screen candidates, senators should not (at a practical level)—because of several problems that he identifies.

At its heart, Nagel’s thesis is reminiscent of what law professors used to call “institutional competency.”⁴ Nagel asserts that the Senate, as an institution, will not be very good at screening and that screening will not be very good for the Senate or the country—for five reasons: because (1) the Senate will lack the energy to screen in a consistent and

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¹ Robert Nagel, *Advice, Consent, and Influence*, 84 *Nw. U.L. Rev.* 858 (1990).

² U.S. CONST. art. II, § 2.

³ Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 664 (1970), quoted in Nagel, *supra* note 1, at 861.

⁴ See Henry Hart and Albert Sachs, *Legal Process Materials* (unpublished materials used in teaching law students) (on file with the author).

even-handed fashion;⁵ (2) the Senate will have varying amounts of information about candidates;⁶ (3) such screening will create incentives to pick individuals that the Senate cannot attack;⁷ (4) screening will enhance the power of law professors;⁸ and (5) screening puts senators in an inappropriate role and deflects their attention from the more important task of considering the work of the Court as a whole.⁹

The first two claims, about energy and information, require more analysis. My sense is that Nagel is correct that the Senate's attention will not be consistently focused upon nominations and that, as public choice theorists have instructed us, agendas will have an impact; some nominees will get more scrutiny than others and some nominees will present a fuller record than others.¹⁰ But the twin problems of energy and information are not only problems for the Senate; these are also problems for the Executive. Some nominations are made quickly, with less information than may be desirable, and some of the nominees are "unknown quantities" in major respects. Given the problems of energy and information, and given my assumption that these problems exist for both the Senate and the Executive, a bit of redundancy—two institutions looking instead of one—may well be desirable.¹¹ Further, the threat of Senate scrutiny may increase the pressure on the Executive to be more thorough in its selection processes.

That brings me to Nagel's third objection, that the basis on which senators reject individuals may lead to the nomination of particular kinds of candidates.¹² Nagel claims that nominees have something that he calls (but does not define) "qualifications," on the one hand and then something else, which he terms "beliefs and probable voting patterns on the Court."¹³ I am puzzled by his distinction between "qualifications" and "beliefs." I am not troubled by either the Senate or the Presidency understanding that a nominee's qualifications entail her or his beliefs and ideology. Nagel suggests that senatorial inquiry into beliefs may prompt presidents to look for nominees whose beliefs are not known.¹⁴ I agree with Nagel that presidents may try to find individuals whose "beliefs" are less well known—less stated, less written, less available to an inquir-

⁵ Nagel, *supra* note 1, at 868-69.

⁶ *Id.* at 869.

⁷ *Id.* at 870.

⁸ *Id.* at 871.

⁹ *Id.* at 874.

¹⁰ *Id.* at 868-69.

¹¹ See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

¹² Nagel, *supra* note 1, at 870.

¹³ *Id.* at 859.

¹⁴ *Id.* at 870.

ing Senate.¹⁵ But I am not sure that such people are, as a category, less desirable candidates for federal judgeships. Who are the individuals who are the most visibly committed on legal issues? In addition to politicians, it is we, law professors, who make our living by writing articles about what we think law is and should be. It is not obvious to me that some of us, law professors who have spent our lives trying to develop theories of judging, are necessarily the best suited to be judges.

Much of judging, even at the Supreme Court level, is trying hard not to make global theoretical statements about the meaning and nature of what law is and should be, but rather, trying to decide cases in context—cases generated from human beings, in dispute, in discord, in pain. Those who are experienced theorists, (*i.e.*, law professors) about the meaning of the law are not necessarily or presumptively those who are good at responding to human beings in dispute. Hence, a selection process that selects fewer people who have written grand theory is not intrinsically objectionable.¹⁶

Of course, this comment has relevance to Nagel's next concern: that senatorial screening unduly enhances the power of law professors.¹⁷ As an empirical matter, I think Nagel is wrong—about law professor power and law professor interests. First, the power point. Law professors' distress about the nomination of Robert Bork to the United States Supreme Court was not pivotal but useful. While concerns about the Bork nomination were cast in terms of legal doctrine, the reason for the political struggle was the perception that Bork in a series of articles and opinions spanning two decades, was unsympathetic to the problems faced by blacks, women, the poor, and civil rights plaintiffs. The nomination of Robert Bork was rejected, in my view, because his statements came to represent a vision of the Constitution that the Senate (sensitive to the political goals and political power of those groups) rejected.

Second, the issue of law professors' interests. As a group, it is far easier for we who are law professors to support the legal elite than to oppose it—especially when those nominated are our former colleagues,

¹⁵ *Id.* at 870 ('nominees have a natural advantage if their views on these subjects are difficult to ascertain').

¹⁶ One caveat may be in order. Another category of people whose views may be relatively more available than others are judges on lower federal or on state courts—who have, by the nature of the work, written opinions justifying their judgments. Assuming one wants judicial experience for some members of the Supreme Court and other federal courts, then one would want to include lower federal court and state court judges in the pool of individuals who might be nominated. If one believed further that senatorial screening will eliminate these individuals, there would be more cause for concern. However, I do not think that the recent nomination debates demonstrate that opinion writing will be a frequent source of disqualification. Critics of the nomination of then-Judge Bork were inspired not only by his written opinions, but also by the wealth of articles and speeches he made as a law professor and social commentator. Further, the subsequent nomination and confirmation of then-Judge Kennedy indicates that writing opinions is not as much of a problem as presenting oneself as the expositor of a set of views that one hopes to put into place as a judge.

¹⁷ Nagel, *supra* note 1, at 871.

friends, or acquaintances. There is no joy in disagreeing, loudly and in public, with those with whom one has worked. Moreover, the shared work makes it difficult to disagree. Third, I think the pressure on presidents to look outside the legal academy for judges reduces the actual influence of law professors. Law professors may testify, may brief senators, but if not actually being the judges then law professors have no power to decide cases and to transform lives in the direct and immediate way that belongs to the office of the judge.

Nagel's next claim is that when senators screen, they and their language are transformed; they move from being political actors, engaged in political discourse, to assume the role of judge and to engage in "legalized discourse."¹⁸ Here again, I am unclear about the distinction drawn—between "legal" discourse and "political" discourse.¹⁹ Neither phrase is defined nor explained.²⁰ Nagel claims that there is something problematic about senators talking about and asking questions about constitutional interpretation and the law.²¹ I do not know why senatorial efforts to talk about law is any different than senatorial efforts to understand missile systems, foreign policy, or the needs of the homeless. To legislate, senators need information, which in turn requires reliance on staff and witnesses. Given the range of topics about which senators must make decisions, we can expect that they will almost always be at a disadvantage as compared to the witnesses who testify before them and who are, by definition, expert in an area. Most senators will not be as able to engage in as nuanced a conversation as will the witnesses examined, but that does not disqualify the Senate from making decisions in a variety of areas.

At the heart of Professor Nagel's conceptualization is a claim that "the legal culture is properly concerned with ideas"²² and in politics, ideas and justifications matter less and "consequences . . . the everyday effects of abstractions" are what is relevant.²³ Nagel may be right that the "legal culture" of *law schools* is concerned about ideas, but he is wrong (in my judgment) about the "legal culture" of judges. Cases are not only about ideas; cases are also about people. People in disputes. Cases are about ideas *and* about "the everyday effects of abstractions," the "consequences." I want judges to be keenly aware that their job is practical, is (in Nagel's terms) "political," is about everyday effects and everyday consequences. Hence, the very objection Nagel raises to senatorial screening is for me one of its great advantages. Moreover, to the extent Nagel seems surprised that so much energy is focused upon partic-

¹⁸ *Id.* at 870.

¹⁹ *Id.*

²⁰ Nagel's phrase is the "legalization of political discourse." *Id.* at 871.

²¹ *Id.*

²² *Id.* at 874.

²³ *Id.*

ular nominations and not on the institution of the Court as a whole, I think his surprise is unfair. For me, the lessons of the last two decades—of Watergate, the Iran Contra dispute, and the Supreme Court—are that individuals matter a good deal. The constraints one might have thought existed by virtue of legal documents such as the Constitution and statutes and by virtue of institutional arrangements do not seem, in fact, always to constrain. At bottom, it is the people that count enormously. Hence the pressure to look hard and the emotional involvement in who will be our spokespersons and our judges.

Rather than be distressed about senatorial screening, I believe there are reasons to be cautiously optimistic about its impact on judicial nominees, on the institution of the Senate, and on the country as a whole. I know the sample size is small, the history recent, and that generalizations must be carefully bracketed with caveats, but let me conclude by suggesting that the debate that surrounded Robert Bork and to a lesser extent, Anthony Kennedy, demonstrates that senatorial screening has had a positive effect on the stated aspirations for our judges.

Two new qualifications seem to be emerging: that the nominee express identification of and compassion and concern for the difficulties faced by those who appear before him or her, and that the nominee take women seriously as political and social beings. I was one of many who testified against the nomination of Robert Bork. One of my objections to his nomination was that, upon reading many of his opinions in the field of my expertise and when listening to him testify, I found that he seemed uninterested (in published decisions and in his testimony) in the plight of the litigants before him. While I, and others, criticized Judge Bork for a lack of expressed sensitivity, we had few learned legal opinions to cite for the propositions that judges, and specifically Supreme Court Justices, are supposed to speak about the plight of those who come before them, to acknowledge the connection between the painful problems faced by the litigants and the claims of legal right, to discuss judges' obligations of compassion.

I am pleased to report that, today, there is support, in cases and commentary, for the proposition that judges should be compassionate. Justice Brennan has published a lecture in which he speaks of that requirement.²⁴ During the course of the debate on his qualifications, Anthony Kennedy described a "good judge" as a person who had "compassion, warmth, sensitivity and an unyielding insistence on justice."²⁵ In 1989, Justice Blackmun wrote, in dissent, about the requirement that judges render "'sympathetic' reading[s] . . . that comport[] with dictates of fundamental justice and recognize[] that compassion need not be ex-

²⁴ William J. Brennan, Jr., *Reason, Passion and the "Progress of Law,"* 42D REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 948, 950 (Dec. 1987).

²⁵ See *Nominee to Court Says Judges Should Avoid Making Policy*, N.Y. Times, Dec. 2, 1987, at A26, col. 1.

iled from the province of judging."²⁶ I think that the nomination debates of 1987 helped to make plain that compassion is a "qualification," a "belief," a part of the "ideology" to be required of those selected to don the robes of judge.

One might have thought that seeking compassionate or sympathetic judges would be uncontroversial, but it is not. Yet, more difficult is figuring out what impact such "compassion" or "sympathy" should have, as more than a decade of jurisprudence on the eighth amendment (*inter alia*) demonstrates.²⁷ But bringing in those emotional and moral states as relevant is an important step in considering what their impact should be. Flippancy about sympathy or about the categories of individuals or activities to whom courts have or have not extended protection belies a fear of the emotive²⁸ and suggests that legal rules operate unaffected by human emotive responses. Fear of the connected and obligatory aspects of judging does not prevent emotion from operating in the course of judgment but inhibits conversations about what scope to give that emotion in the context of adjudication.²⁹

The second qualification that is emerging is about nominees' attitudes about women. Not very long ago, it was permissible discourse—both "legal" and "political," in Nagel's terms—to trivialize women and the problems that face us. We heard such trivialization during the Bork hearings. For example, one of the controversial decisions of then-Judge Bork (as a member of a panel of judges on the Court of Appeals for the

²⁶ *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1012 (1989).

²⁷ In the 1970s, the Supreme Court "recognized that 'sympathy' is an important ingredient in the eighth amendment's requirement of an individualized sentencing determination." *Saffle v. Parks*, 110 S. Ct. 1257, 1273 (1990) (Brennan, J., dissenting). Some members of the Court have attempted to distinguish "a moral inquiry into the culpability of the defendant" from "an emotional response to the mitigating evidence." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The latter, according to a recent Supreme Court majority in *Saffle*, "is more likely to depend on that juror's own emotions than on the actual evidence regarding crime and the defendant" and thus to compromise reliability and nonarbitrariness. *Saffle*, 110 S. Ct. at 1262. In *Saffle*, the trial judge had instructed the jury to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." *Id.* at 1259. On appeal, the Court of Appeals for the Tenth Circuit stated that the 1987 *California v. Brown* case had "implicitly suggested that sympathy that is based on the evidence is a valid consideration in sentencing that cannot constitutionally be precluded." *Parks v. Brown*, 860 F.2d 1545, 1553 (10th Cir. 1988) *rev'd sub nom.*, *Saffle v. Parks*, 110 S. Ct. 1257 (1990). The Supreme Court denied habeas corpus relief on retroactivity. While the majority did not address the question of sympathy instructions on the merits, the majority registered concern about the use of "sympathy."

²⁸ I do not share Nagel's view of the ramifications for politicians of supporting judicial protection of gay and lesbian rights on the one hand and of "obscene" materials on the other. While fighting "obscenity" may still look politically popular (see UPI, *Governor Takes Credit for Rapper's Arrests*, L.A. Times, June 11, 1990, at 8, col. 3.), many politicians are seeking to affiliate with the concerns of lesbians and gays. See, e.g., Victor F. Zonana, *The Gay Vote is Hotly Pursued in Governor's Race*, L.A. Times, May 20, 1990, at A3, col. 1.

²⁹ See generally Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations of our Judges*, 61 So. CAL. L. REV. 1877 (1988).

District of Columbia) involved jobs at a factory that exposed workers to chemicals that might harm reproduction.³⁰ The company had a policy that, to continue working at such jobs, women of childbearing age would have to be sterilized. Judge Bork wrote an opinion for a unanimous three-judge court that concluded that the policy did not violate federal law.³¹ The issue at the hearings on the Bork nomination was not whether the opinion was correct as a matter of law, but whether the opinion acknowledged the outrageous nature of the problem faced by women workers: be fired or demoted or be sterilized. Judge Bork's opinion noted that the company's plan was an attempt to deal with a "distressing" problem, and that rather than fire the women, the company had given them a "unhappy choice" of sterilization.³² At the nomination hearing there was controversy over Judge Bork's characterization of the company's practice as a "choice" for women and about his comment that "some of the [women] I guess didn't want to have children."³³

Discussion was also focused upon *Griswold v. Connecticut*,³⁴ in which the issue was whether a Connecticut statute, making it a crime to proscribe contraceptives, was constitutional.³⁵ Robert Bork described *Griswold* as a "law professor's dream" and the statute as a "nutty" law.³⁶ Again, one had a sense that the nominee was, if not cavalier, surely not somber about the realities of poor families' lives. While the rich could find doctors to provide contraceptives or could go out of state, the poor could not, and a clinic for poor women could not provide birth control. (Indeed, Bob Nagel also claims that this case is "routinely demolished in first-year law school classrooms."³⁷ I know that at least some law professors do not read *Griswold* as an opinion to be trivialized.) Finally, in an opinion about sexual harassment, Judge Bork wrote of sexual "dalliance[s]"³⁸ and "sexual escapades"³⁹—appearing to make light of accusations of an atmosphere in which sexual compliance is required.

³⁰ *Oil, Chem. and Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).

³¹ *Id.* at 445.

³² *Id.* at 450.

³³ Linda Greenhouse, *Bork Sets Forth Spirited Defense of his Integrity*, N.Y. Times, Sept. 19, 1987, at 1, col. 2.

³⁴ 381 U.S. 479 (1965).

³⁵ CONN. GEN. STAT. 53-32, 54-196 (1958), quoted in, *Griswold*, 381 U.S. at 480.

³⁶ See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); Stuart Taylor, Jr., *Bork Tells Panel He is Not Liberal, Not Conservative*, N.Y. Times, Sept. 16, 1987, at A1, col. 6. See generally *Griswold v. Connecticut: Landmark Case Recalled*, N.Y. Times, May 28, 1989, at A6, col. 5.

³⁷ Nagel, *supra* note 1, at 872.

³⁸ *Vinson v. Taylor*, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting from the suggestion for rehearing en banc); panel opinion affirmed in part and remanded in part *sub nom.* *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

³⁹ *Vinson*, 760 F.2d at 1332.

As Martin Shapiro has noted,⁴⁰ feminists' voices were heard repeatedly during the Bork hearings. Many witnesses objected to the nominee's trivializing responses and to his interpretations of constitutional doctrine that would exclude women from the protection of the fourteenth amendment. Months later, when Anthony Kennedy was nominated, questions were asked about his involvement in clubs that excluded women. The underlying issues were: what is this person's attitude toward women? Does this nominee understand that women are and should be full participants in the political, economic, business, and social life of the community and that problems of women are not occasions for jokes or innuendoes? This concern about attitudes about women is reflected in the more recent debate about John Tower's nomination to be Secretary of Defense. A *New York Times* headline is illustrative. John Tower's daughter proclaimed that her father "always treated women as equals."⁴¹ For me, that treatment of women is relevant to the qualifications of nominees—for judgeships and for other offices of the federal government—is to be celebrated.

Senatorial involvement helped raise questions about equal treatment and about the stance of judges toward the litigants before them. With senatorial involvement and political debate, the criteria for choosing judges have begun to shift. Under these newly developed criteria, Bruce Ackerman's praise (echoed by Professor Nagel) of Robert Bork—one of the "best qualified candidates for the Supreme Court of this or any other era"⁴²—seems problematic. If the qualifications have in fact changed over time, then it is unlikely that one is among the "best qualified . . . of this and any other era." Our era has (happily in my view) redefined what counts as "best qualified." If I am correct that these last nominations have helped to create, reflect, and state new aspirations for judges, then, for the institution of the Senate, for the nominees, and for the country, senatorial screening is a step forward, to be greeted warmly, to be encouraged and supported.⁴³

⁴⁰ Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U.L. REV. 935 (1990).

⁴¹ Maureen Dowd, *Tower, With Family Near, Begins a Counterattack at the 11th Hour*, N.Y. Times, Mar. 6, 1989, at A1, col. 4, B11, col. 2.

⁴² Nagel, *supra* note 1, at 859 (quoting Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988)). Compare Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 Yale L.J. 1419 (1990) (Book Review of Robert H. Bork's *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*).

⁴³ Senatorial debates of nominee qualifications and beliefs will not always entail the development of criteria that I personally endorse. The furor about the nomination of Louis D. Brandeis to the Supreme Court is an example of a fight in which the "opposition couched its attack in terms of questionable character and lack of judicial temperament, and occasionally anti-Semitism became overt, but essentially the campaign against the nominee rested on the repugnance of his social and economic views." Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1151 (1988). That such debates sometimes occur in the context of nominations to the Supreme Court or to lower federal courts is neither troubling nor surprising, for these are the issues

with which the country is struggling and the federal courts participate in both shaping and reflecting those battles. *See* Ackerman, *supra* note 43.