What America Deserves in a Supreme Court Justice

Any Supreme Court nominee must have a *demonstrated* commitment to impartially applying the law, not legislating from the bench. The Supreme Court plays a tremendously powerful, but limited, role in our constitutional system. It is vital that any nominee understands that the proper role of a Justice is to apply the law as written, not to misuse the powers granted to the Court to impose his or her own values. Lip service to the principles of judicial restraint is not enough; all nominees must be able to demonstrate, on the basis of their record, that they understand and have lived by these principles.

A Justice must make decisions based on the law – not emotions, personal experience, or opinion. President Obama famously said that he wants judges who would rely on empathy to resolve cases. He said that for the cases that "really count … what you've got to look at is: What is in the justice's heart. What's their broader vision of what America should be."[1] More recently, after this view had been widely rejected, he repeated that he sought a nominee who had "a keen understanding about how the law affects the daily lives of the American people."[2] Statements like these suggest the President misunderstands the role of a judge, which is not to rely on empathy or pick winners and losers; it is to apply the law as written. Giving unelected judges, who have lifetime tenure, the power to look into their own hearts in order to divine laws that will best affect the American people would dramatically undermine our democracy.

A Justice must never be a rubber stamp. A judge at any level must use the bench neither to impose his or her will nor to rubber stamp the decisions of his or her preferred political party. This Administration, enabled by the Democratic Congress, has pushed to aggressively expand the scope and reach of government. Some of its legislation has raised serious constitutional concerns, and observers have suggested the President may seek a nominee who would uphold these laws.[3]

The President has said recently that he favors "judicial restraint," which he characterized as the view "that generally speaking we should presume that the democratic processes and the laws that are produced by the House and the Senate … and the administrative process that goes with it, is afforded some deference as long as core constitutional values are observed."[4] But the President only seems to favor "restraint" now that he is President, and he only seems to favor it when talking about particular laws and policies that he personally supports (as will be discussed later).

Anyone appointed to the Supreme Court must be willing to evaluate laws as they are written under the plain meaning of the Constitution; appointing someone simply because he or she agrees with the "constitutional values" of a particular politician is not sufficient. Legislation is either constitutional, or not, regardless of whether a politician—even the President—agrees personally with it, or how

many votes the laws received in Congress. It is judicial *abdication*, not judicial restraint, to excuse lawless behavior by the political branches.

A Justice must not be selected in order to achieve preconceived results in cases. The President has made statements suggesting a troubling focus on his desired results in particular cases, a politicization of the Court that must be resisted. In a reference to restrictive campaign speech laws supported by the President but held unconstitutional by the Supreme Court, President Obama stated that his nominee "will be someone who … knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens."[5] In addition, while claiming not to have a "litmus test" on abortion, the President said, "I will say that I want somebody who is going to be interpreting our Constitution in a way that takes into account individual rights and that includes women's rights, and that is going to be very important to me." [6] These statements strongly suggest that he would only nominate someone who will support restricting political speech with which he disagrees and who will read abortion rights into the Constitution.

The Senate owes the American people a thorough consideration of any nominee's suitability to serve on the Supreme Court, not distracting side arguments. Democrats cannot defend their radical view of the role of the courts and the type of Justice they would like to see on the Court. Instead, they have tried to change the conversation by attacking the rulings of sitting justices in a handful of recent decisions with which they disagree.[7] Many criticisms of these cases have misrepresented what the Court actually ruled.[8] Senator Leahy has argued that the decisions he does not like fail to "reflect the American people."[9] It is the job of the President and the Congress to reflect the American people. It is the job of the Court to follow the Constitution and apply the law. America deserves a Supreme Court Justice who understands this distinction.

Senate Republicans will not let Democrats change the subject from the matter at hand—the fitness of the next nominee for a lifetime position on the Supreme Court—to individual cases where Democrats did not like the outcomes.

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[1] "Obama Makes Empathy a Requirement for the Court," *Washington Post*, May 13, 2009.

[2] "Remarks by the President on the Retirement of Justice Stevens," The White House, April 9, 2010.

[3] "Obama Says Liberal Courts May have Overreached, *New York Times*, April 29, 2010 (comments of Clinton Administration Official Walter Dellinger: "He may be more concerned about avoiding a Court that would strike down progressive legislation…").

[4] "President Obama Speaks to the Press on Air Force One," http://www.youtube.com/watch?v=Yn591USAs-Q.

[5] "Remarks by the President on the Retirement of Justice Stevens," The White House, April 9, 2010.

[6] "Obama Promises No 'Litmus Test' for Supreme Court Nominee," *The Caucus: The Politics and Government Blog of the (New York) Times*, New York Times,April 21.

[7] See, e.g., "Dems Take Aim at Court Conservatives," *Politico*, April 13, 2010 ("Democrats hope to turn the upcoming Supreme Court confirmation hearings into a referendum on controversial recent decisions by the Roberts court.")

[8] For instance, in the case of *Ledbetter v. Goodyear*, 550 U.S. 618 (2007), Senator Leahy has said that the Court "said that women could be paid less than men." Meet the Press, NBC, April 11, 2010, http://www.msnbc.msn.com/id/36362669/ns/meet_the_press/). The Court ruled no such thing.

[9] "Obama Begins Court Vetting," *Roll Call*, April 22, 2010.