Primer on Selecting Federal Judges

The Judiciary – Where Judges Work

The Constitution created the Supreme Court and authorizes Congress to create lower courts. Today, the federal judicial system has three levels:

- **U.S. District Court**
  Trials and lawsuits begin in the U.S. District Court; its judicial districts cover up to one entire state (or a territory or the District of Columbia).

- **U.S. Court of Appeals**
  Cases may be appealed to the U.S. Court of Appeals; its judicial circuits each cover several states (or D.C.).

- **U.S. Supreme Court**
  Congress also determines the number of seats on the Supreme Court; the Court has had nine seats since 1869.

The Constitution provides that federal judges do not have limited terms of office, like the President or members of Congress. Judges may serve until they leave voluntarily, by retirement or resignation, or involuntarily, by impeachment or death.

Judicial Selection – How Judges Get Their Job

Article II, Section 2, of the Constitution states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" various public officials, including federal judges. This text clearly indicates that the Senate's role of "advice and consent" exists **after** the President has made a nomination. The President may follow any procedure he feels will help him fulfill his constitutional responsibility of nomination. This may include consulting with Senators or others, but this is not required by the Constitution.

The best way to understand the Senate's "advice and consent" role is that it gives advice about whether the President should appoint the nominated person by giving or withholding its consent. Traditionally, the Senate does so by an up or down vote. America's founders believed that the President would be the "principal agent" and that the Senate would make sure that his nominees were not crooks, cronies, or incompetent. The Senate's role, however, is not co-equal with the President's power. This suggests the Senate should give the President significant deference. The House plays no role in the appointment process.

On the Supreme Court, the Chief Justice and the eight Associate Justices are appointed by the same process. If the Chief Justice retires, the President may "elevate" one of the Associate Justices or appoint someone from outside the Court. Only five of our nation's 16 Chief Justices have been appointed through elevation; they include the current Chief Justice, William Rehnquist, who had been appointed Associate Justice in 1971 and was appointed Chief Justice in 1986. President Reagan appointed Antonin Scalia to replace Rehnquist as Associate Justice. Most Chief Justices are appointed from outside the Court; these include Rehnquist's predecessors Warren Burger in 1969 and Earl Warren in 1953.

If two members of the Court retire together, the process remains the same. In 1971, for example, Justices Hugo Black and John Marshall Harlan announced their retirement. President Nixon nominated Lewis Powell and William Rehnquist, respectively, on the same day to replace them. The Senate confirmed them within a few days of each other.

Once a nomination is made, it takes approximately four to six weeks for the FBI to conduct a background investigation, the American Bar Association to complete its evaluation, and the Judiciary Committee to prepare for a hearing. A hearing for a Supreme Court nominee will likely take at least a week, with the nominee testifying for a few days and witnesses for and against the nominee testifying for another day or two. The Judiciary Committee meets a few days after the hearing concludes to vote whether to send the nomination to the full Senate with a positive, negative, or no recommendation. Then the full Senate debates and, unless the minority tries to filibuster, votes on confirmation.

The Supreme Court's term extends from the first Monday in October (October 3, 2005) to approximately the end of June. The Court has almost complete authority to decide which cases it will consider; four votes are required to accept a case for review. A federal law requires at least six of the nine Supreme Court Justices for a "quorum," or the minimum number of members for the Court to meet. A majority is required to decide a case, especially when that decision is to reverse or overturn the decision of a lower court. This is a very strong reason for having an odd number of Justices, because if the Court splits 4-4, the lower court decision is automatically upheld. There is no legal deadline for filling a vacancy and in recent years, retiring Justices have said that their retirement would take effect when their replacement is confirmed; this is a safeguard against having such split decisions.

Judicial Power – What Judges Do

This is a thumbnail sketch of the judiciary itself and the process for appointing judges. The most important thing, however, is the result of that appointment process, that is, the **kind of judge** that is appointed.

General Principles. First, **we have a system of limited government**. The power of government and individual liberty are inversely related; the more powerful government gets, the less liberty we have. Keeping government limited is necessary for liberty.

Second, **the judicial branch is part of government** and, therefore, must remain limited. In fact, it is even more important to keep the judicial branch limited both because of the kind of power judges have and because we do not elect federal judges. So it is very

important to clearly define what judges are supposed to do and to ensure that they do not do anything else. Third, the most important way to limit government is to **keep the branches of government separate**.

The handy formula we learned in civics class is that the legislative branch **makes** the law, the executive branch **enforces** the law, and the judicial branch **interprets** the law. Even before completely understanding what each of these categories – making, enforcing, and interpreting – is, we know that each of these categories is separate and different. That is, we know that **interpreting and making the law are fundamentally different**. Judges may interpret, but they may not make, the law.

Judges settle legal disputes by interpreting law and applying it to the facts cases.

The most important part of this job description is that judges **interpret** law. The law they must apply might be a regulation, or a statute, or the Constitution, but in every case that comes before a federal judges, the law is **written**. Interpreting any written document requires determining what it means.

Where is the line between interpreting and making law? The key is that every written document – a shopping list, a speed limit sign, the Bible, or the Constitution – has **words** and those words have **meaning**. In fact, we use words precisely because they do have meaning. We write things down to communicate a specific idea.

Obviously, judges do not choose the words of a regulation, a statute, or the Constitution. The legislative branch does that. But **changing the meaning is the same as changing the words**.

When judges interpret law, therefore, they are **discovering the meaning the words already have**. When a wife gives a shopping list to her husband, it already means something; if it says "milk and bread" and he brings home motor oil and a newspaper, he has not interpreted the law, he has changed it. When Congress passes a statute, its words already mean something.

Most importantly, **the words of the Constitution already mean something**. When a judge interprets the Constitution, he discovers what it already means.

Judges making law by changing what it means is called **judicial activism** and is dangerous.

- First, judges do not have authority to make law. Government acting without lawful authority is tyranny and undermines liberty.

- Second, the first three words of the Constitution are "we the people." The Constitution belongs to the people, not to judges, and only the people (and their elected representatives) may determine what their Constitution means.

- Third, if judges make law, the people do not. If the people cannot make law, they do not govern themselves. If they do not govern themselves, they have no liberty.

- Fourth, whoever makes law will determine public policy and define the culture.

- Fifth, if judges can make the Constitution mean anything they want, judges and not the Constitution become the "supreme law of the land."

Judicial activism, or judges making law, is the real problem. The Supreme Court's *Roe v. Wade* decision was bad not because it invented a right to abortion, but because it invented any right at all. Any time judges make law, any time the Supreme Court effectively amends the Constitution by changing what it means, is equally serious.

When we properly understand what judges are supposed to do, we can better identify when they have not done their job. And we can better ensure that the right kind of judge is appointed in the first place. The solution to judicial activism is appointing judges who will not be judicial activists, it is that simple.

The only real solution to judicial activism is appointing judges who will not be activists. That is, we must always appoint judges who understand the difference between interpreting and making law and who will stick to the job description.

Defining Terms

Any discussion or debate involving lawyers, legal cases, and judges will likely include terms that many Americans find unfamiliar. Terms such as "strict constructionism" or "faithfully interpreting the Constitution" will likely be used in the same way as this outline discusses what judges are supposed to do.

In our section on **Judicial Power—What Judges Do**, we defined what it means to have a strict constructionist or a judge who will faithfully interpret the Constitution on the Supreme Court. He is someone who does not legislate from the bench or impose his own political philosophy upon a case.

Another term that will be used in discussions of Supreme Court nominees is the Latin term *stare decisis* (which means "the decision stands"). This term refers to a court's past decisions, or precedents, on a particular issue.

Liberals will insist that judges never overturn a previous court decision. However, this is an incorrect view of the law.

A judge should be more faithful to the law than to a court's past decisions; therefore, a judge should be willing to overturn a precedent, or past decision, that conflicts with the law or incorrectly interpreted the Constitution. Overturning a past decision is not necessarily a mark of judicial activism; the real question is why the past decision was overturned. Correcting a past mistake by, for example, overturning an incorrect interpretation of the Constitution is the opposite of judicial activism.