

Judicial Decision-Making: You Decide

The presidential election is still several months away from being decided. Currently the big issues range from the economy to family values to the war in Iraq. But another issue which should gain further attention as Americans narrow down the candidates is the prospect for future nominations to the Supreme Court. This is often a difficult topic to digest as it is hard to anticipate retirements from the Court as well as potential nominations. But it brings up an important question, what should the executive look at when deciding who to nominate? There are a myriad of issues (that rarely fall neatly into conservative/liberal camps) which a potential justice may face and can be difficult to prejudge. It is important, therefore, that the executive look to how a potential justice makes his or her decisions.



There are two main schools of thought on how justices make legal decisions. The first approach, sometimes labeled the “rule of law” approach, says that justices make their decisions based on a criterion they apply to each individual case. There are several possible criteria. Perhaps the most recognized is the originalist approach which looks at what the framers of the constitution meant when they wrote the constitution. With this approach a justice sees the Constitution as a static document and delves into the historical record surrounding the constitutional conventions and framers’ speeches and/or writings. The Federalist Papers, for instance, is often mentioned when looking at framers’ intent. Proponents of this approach point out that it offers consistency in decision-making and that it promotes an objective approach rather than a value-laden judgment. On the other side, opponents argue that it results in rigid decision-making that does not allow for consideration of historical changes and the current state of the world.

Another “rule of law” approach uses textualism to make decisions. In this category of interpretation justices rely on either what the words meant to the common person at the time of the documents writing or what the words mean currently. Textualism, does not, however consider what the framers’ intended those words to mean at the time. These two approaches may also offer the claimed advantage of objectivity and consistency. Critics argue that it is too difficult to decide what a particular word meant at the time of the founding.

A third approach is that justices use logical reasoning. That is, they look at a major premise and a minor premise and make a decision. The question then becomes, how do they evaluate the premises and how do we know they are correct?

There are a few other variations within the rule of law approach but framers intent and textualism are two of the main factions. The other school of thought is that all judicial decision-making is political.

This approach acknowledges that all justices are real people. They do not join the bench and become blank slates. Most have had distinguished careers which included a political leaning one way or the other. Under the political approach it is claimed that since all justices have a particular ideology, it is impossible for them to completely divorce themselves from preconceived understandings of the role of government and the promotion of policies.

Another aspect of this approach is that justices live in the current world of politics. Indeed the Supreme Court is housed just blocks from the Capital. Justices know what is going on in the political world and also have a sense of political opinion. Thus, it is argued, the justices have this interplay at least in the back of their minds.

At the end of the day, perhaps it all boils down to a philosophical question. Which comes first, ideology or approach? For most, it is probably a combination whose origin is difficult to discern. But either way it is important for those who are part of the selection process to ask those questions and peruse previous opinions, if possible, to find out how and why particular decisions have been made.

The importance of this discussion for voters is to recognize the complexity of the process as well as its importance. As the presidential race heats up, judicial selection should be an important consideration for voters. While even the executive him or herself does not always know what he or she is getting with a nominee, voters should ask what the potential executive considers important when making nominations, remembering it does not always fall neatly along political party lines. And an important aspect of that consideration is how the justices make decisions.

Sarah McIntosh is Vice President of Programs for the Kansas-based Flint Hills Center for Public Policy. A complete bio on Ms. McIntosh can be found at <http://www.flinthills.org/content/view/24/39/>, and she can be reached at sarah.mcintosh@flinthills.org. To learn more about the Flint Hills Center, please visit www.flinthills.org.