



February 13, 2008

Judicial Decision-Making: You Decide

By Sarah McIntosh

The presidential election still is several months away from being decided. The big issues range from the economy to family values to the war in Iraq. But another issue that should gain attention as Americans narrow down the candidates is the prospect for future nominations to the Supreme Court. It is important 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 justices make their decisions based on criteria they apply to each case. 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. 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 document’s writing or what the words mean now. Textualism does not, however, consider what the framers intended those words to mean at the time. These two approaches may 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.

There are a few other variations within the rule of law approach, but the 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 that include a political leaning one way or the other. Under the political approach it is claimed that because all justices have a particular ideology, it is impossible for them to 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. 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.

The importance of this discussion for voters is to recognize the complexity of the process as well as its importance.

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.

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Circulation: 6,134
Olathe News

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Opinion