

On Justice Appointments, A Largely Silent Constitution

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Events surrounding the nomination of Judge Brett Kavanaugh to fill the vacancy on the U.S. Supreme Court illustrates how, on matters of Supreme Court nomination and confirmation, the U.S. Constitution is largely missing in action.

To begin with, the Framers provided no minimal qualifications for who could serve as a Justice. As school kids learn, there are minimum ages and citizenship/residency requirements for those who become presidents, Senators, or members of the House of Representatives. But the Constitution provides no qualifications whatsoever for judicial appointees; the Framers did not even require that federal judges and justices be lawyers.

Of course, in choosing nominees presidents act under a host of *practical political* constraints: There is strong pressure to appoint highly accomplished graduates of elite law schools. And lots of other practical dynamics outside of the Constitution influence the partisan, age and previous-employment profiles of nominees to the Court. Most recent nominees have come from the federal courts of appeal because they have written “track records” of judgments on relevant federal-law matters; how these nominees will act once on the high Court can be more accurately (although not conclusively!) predicted.

The Constitution is also silent on the myriad processes by which modern presidents develop a “short list” of Justice nominees, check in with relevant political officials and interest groups, and vet the backgrounds of potential nominees. These important procedural facets -- some of which are common to all presidents, and some of which vary -- have developed over time and outside the Constitution’s rubric.

The same pattern of constitutional silence supplemented by extra-constitutional practicalities and procedures applies to how presidential nominees are considered by the U.S. Senate. The Constitution merely provides that a nominee shall be appointed “by and with the Advice and Consent of the Senate.” As the failed Merrick Garland nomination shows, it is not even clear that the Senate must hold hearings or a vote on a presidential nominee. Although I believe that the Senate had a clear *civic duty* to consider the Garland nomination, it is less clear that it was *constitutionally* obligated. One question is what to make of the fact that the Constitution says that the president “shall” nominate and appoint justices but omits similarly mandatory “shall” language when discussing Senate advice and consent.

And, of course, the procedures by which the Senate Judiciary Committee gives nominees extensive pre-hearing questionnaires, holds hearings, reports a recommendation – and the processes the full Senate uses to individually meet with

nominees and move to a vote on nominations – are the product of Senate rules and traditions ungoverned by constitutional commands.

Ultimately, the lack of constitutional guidance for Supreme Court nominations and confirmations fits into a broader pattern of constitutional silence on many key matters relating to the federal judiciary. For federal court judges below the Supreme Court, the Constitution similarly fails to specify minimum qualifications, confirmation rules and procedures, and the like. And the Constitution's Framers did not address a host of other highly important questions: How many justices should be on the Court? To what extent was the Court intended to exercise independent "judicial review" over acts of Congress or the president? Is the Court the ultimate interpreter of the Constitution or just one of three independent Constitution-applying branches?

Heck, the Constitution doesn't even provide a clear rule for how justices should interpret it. Thus, we still have pitched battles among devotees of the "Original intent," "Evolving Constitution," and other interpretive approaches.

Thus, with judicial appointments and confirmations, as with so many other issues, our largely silent Constitution offers successive generations opportunities for independent action undermining or advancing its core principles!