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Idaho Common Sense®



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Are they asking the right questions?

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The constitution . . . is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."

Thomas Jefferson

Why is a Supreme Court nominee so important? According to their only constitutional requirement, justices "shall hold their Offices during good Behavior," allowing them to serve for life and affect generations to come. And knowing a nominee to the Supreme Court usually survives the "advise and consent" of the Senate, selecting a nominee to the court is one of the most important things a president does.

Is that all there is to it? Nothing about being a lawyer or a judge? Nothing about being a constitutional scholar or having the "proper" educational pedigree? Nothing about being male, female, black, white, Hispanic or anything else? Why? Maybe the founding fathers just wanted intelligent people with common sense.

Thomas Jefferson voiced concern because justices serve for life, are appointed rather than elected and are not only outside the checks and balances of government, but also "prescribe rules" for the other branches of government. Seeing the potential for the Supreme Court abusing its power, he wrote, "Whatever power in any government is independent, is absolute also."

The president and Congress have recognized this unchecked power since the times of the founding fathers, relegating

Supreme Court justices to political appointees, wanting the justices to "twist and shape" the Constitution like a piece of "wax" – but only if in agreement with the party that selected them.

Senators sanctimoniously question the qualifications of a Supreme Court nominee with less interest in protecting the Constitution and more interest in advancing their own political agenda. More often they offer self-serving speeches to the television cameras than important questions to the nominee. Further, from administration to administration the questions don't change, only the party asking them.

On the recent nomination of Elena Kagan, one Senator suggested she is not qualified because she has never been a judge. Sen. Mitch McConnell suggested she is not qualified because this job "does not lend itself to on-the-job training." Sen. John Cornyn claims, "Most Americans believe that prior judicial experience is necessary." Constitutional concerns or party posturing?

What questions might we, who are not a part of the political aristocracy, ask a Supreme Court nominee? Will the nominee apply the Constitution to every question before them? Will the nominee preserve and protect the Constitution rather than try to "fix" it?

Will the nominee always look to the Constitution first, even if it's in conflict with prior court decisions? In other words, will defending and protecting the Constitution take

priority over defending and protecting prior court decisions?

Does the nominee believe the Constitution is a "living document," needing the Supreme Court to alter it to fit the times, or do they believe, as stated in the Constitution, that only "We the people" can approve changes to the Constitution?

Does the nominee believe if there are issues not addressed in the Constitution it is their right or duty to "fill in the blanks," or do they believe that Article V of the Constitution, which outlines the process for a constitutional amendment, is the only constitutional way to "fill in the blanks?"

Would the nominee have the courage to say, "The Constitution does not clearly address the issue before us; therefore, we cannot render a decision and we will refer this to the Congress to decide if it wishes to propose a constitutional amendment to the people for their approval?"

Thomas Jefferson – "Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure."

"Ordinary rules of common sense." "Men of ordinary understanding." Maybe the founding fathers knew what they were doing. It's worth some thought.