THE HILL

Why partisan fights over Supreme Court nominees are a good thing

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With Justice Antonin Scalia's untimely death, we are preparing for a new fight over the meaning of the Senate giving "advice and consent" on the president's nominees. It's time that we look at that those words in context of what we will be fighting over—that is, an appointment to the body that increasingly plays a central role in our citizens' lives but over which they have no direct democratic control. In other words, it's time to generally endorse, for both parties, long, bitter, and nakedly partisan fights over Supreme Court nominees.

A little history can help us figure out what the words "advice and consent" might mean. In August, 1789, when the government was only a few months old, President George Washington nominated Benjamin Fishbourn for naval officer for the Port of Savannah, Georgia. For the first time, the Senate **did not confirm** a presidential nominee.

The reasons for the rejection were nakedly political. Fishbourn was not the favorite of James Gunn, a senator from Georgia, who wanted the post to go to a closer political ally. Washington was a little peeved, and he responded to the rejection with a letter to the Senate that teemed with anger—or, at least, an overly stuffy 18th-century form of anger. Washington wrote that if the "propriety of Nominations appear questionable to you" then perhaps the Senate could "communicate that circumstance to me" and then he could have the "pleasure [to] lay before you…the information which led me to make [the nomination]."

In the early days of our republic, there was a glorious improvisational aspect to the first government of the United States under the new Constitution. The Constitution commanded certain things, but other things were quite vague. No traditions existed as to where people should sit, who speaks first, and other matters of governmental decorum. On nominees and treaties, the Constitution instructs the Senate to give "advice and consent," but that could mean anything from rubber-stamping to sitting down with the president to confer about every single nominee and treaty.

And, in fact, Washington did try to confer with the Senate on an Indian treaty only a few weeks after the Fishbourn rejection. He marched into Federal Hall in New York City (Congress met in

New York until 1790, and then in Philadelphia from 1790-1800), and convened the senators to discuss the treaty. He sat in Vice President John Adams's chair while the Senate considered the provisions. Little progress was made, however, and the Senate eventually asked for more time, to which Washington angrily said, "This defeats every purpose of my being here!"

After that, Washington was reticent to engage the Senate so directly, and the Senate more or less adopted the concept of "senatorial courtesy" in approving presidential nominees, including Supreme Court nominees.

"Advice and consent" is vague enough that it could mean many things without violating the Constitution. Had Washington continued the tradition of conferring in person with the Senate, then perhaps today we wouldn't have a tradition of "senatorial courtesy," but something more like a tradition of "substantial Senate input" into nominees.

Now that a crucial Supreme Court seat is open, we should create a new tradition of "substantial Senate input." With a lifetime appointment and few credible threats to their power once seated, a justice can spend 30 plus years steering the course of our country, whether it is to the left or to the right.

This time the Republicans are going to the mat to fight the president tooth and nail, but next time it will be the Democrats. If there's one hard and fast rule in Washington, it's that once one party invents a new type of partisan chicanery, it will eventually be used by both parties.

People lambaste "playing politics," but "playing politics" serves a purpose. We "play politics" for two years before every presidential election, because choosing a person for that powerful office demands a long, drawn-out process wherein the candidates are properly vetted. "Playing politics" is what happens when different ideologies clash and a winner must emerge.

Similar ideological differences exist on the Supreme Court. Both right-wing and left-wing jurists have largely adopted jurisprudential theories that broadly endorse their policy preferences. This is not to say that modern judicial philosophies have been reduced to pure outcome-oriented judging, but there is a strong alignment between policy preferences and jurisprudential philosophies, and presidents know this.

The most important characteristics of Supreme Court nominees are no longer legal brilliance and impartial judging, if they ever were. Rather, prospective justices must be 1) young, so as to influence the bench for as long as possible; and 2) ideologically predictable. Neither party is looking for an impartial justice.

So, should we endorse the idea of a "nonpartisan" nomination process—the tradition of "senatorial courtesy"—as a matter of good governance? This is, after all, a lifetime appointment to a de facto super legislature, and the people—not just those who voted for a given president—should probably have some say in who sits on that super legislature. For vulnerable Republicans,

dogged opposition to the nominee could cost their seat, which seems to be a kind of democratic feedback we should endorse.

President Obama can, and should, exercise his right to submit a nominee, and the Senate can, and should, fully use their prerogative to give "advice and consent," which certainly includes withholding that consent. Republicans should not say that they will not approve any nominee; rather, they should say that they are fully willing to approve a nominee amenable to both sides.

And perhaps Obama should take a cue from President Washington and march down Pennsylvania Avenue to ask for the Senate's advice.

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