



Written by on May 15, 2009

Gender of Justices of Little Concern, Notes Gallup

Frank Newport, editor in chief of the Gallup Poll, said concerning the poll's inability to detect widespread strong preference for a female justice: "It is unclear how much the average American knows about the current demographic composition of the Supreme Court," Newport added. "Still, as was the case four years ago, the current results suggest that — for whatever reason — there is simply no large groundswell of demand from the American public for the appointment of a new justice" who is a woman.



The consensus was even stronger when those polled were asked about Obama naming a Hispanic or Black justice to the high court. Sixty-eight percent replied that it doesn't matter whether Obama names a Hispanic justice, and 74 percent answered that it doesn't matter whether the president appoints a black justice.

Though the polls are encouraging — in that they indicate an overwhelming majority of Americans apparently believes that members to the highest court in our land should be selected on the basis of qualifications rather than membership in any particular demographic group — some politicians and members of the news media may not be of a similar mindset. For example, a May 14 Reuters news article headlined "Obama weighs wide range of candidates for court" observed that Obama had "pondered a broad group of candidates for a Supreme Court opening ranging from judges to a member of his Cabinet" and that "under consideration are several women."

And a May 1 AP story headlined "Obama's high court choice could be Hispanic, woman" began, "President Barack Obama pledged Friday to name a Supreme Court justice who combines 'empathy and understanding' with an impeccable legal background to succeed liberal David Souter, whose abrupt retirement announcement set off speculation the next justice could be a woman, a Hispanic or both." The article also quoted the new addition to the Democratic side of the Senate, Arlen Specter of Pennsylvania, who said the court "could use some diversity along a number of lines," including African-Americans and Hispanics.

However, Senate Republican Leader Mitch McConnell, called for merit to matter in the process when he noted in a written statement: "I trust the president will choose a nominee for the upcoming vacancy based on their experience and evenhanded reading of the law, and not their partisan leanings or ability to pass litmus tests."

Perhaps lost in all of this dialogue and speculation is a clear understanding of what the Supreme Court's function is in our republican form of government as defined by the Constitution. The Constitution entrusts the Supreme Court with judicial power, which extends to all cases in law and equity that arise under the Constitution, the laws of the United States (federal law) and treaties. Special categories are also noted, as cases affecting ambassadors and public ministers, cases between two states, etc. The primary function of the court, however, is to decide, in each case, whether the law



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applicable to the case was written or was applied in accordance with the Constitution. The justices are not supposed to judge the plaintiff or the defendant in the case so much as the law itself.

It is not the court's function to write law since the Constitution vests all legislative power in Congress. Contrary to popular understanding, decisions of the high court are not "the law of the land" (which can be made only by Congress), but the law of the case. The Constitution states that it (and the laws and treaties made in pursuance thereof) shall be the supreme law of the land.

Consequently, it is not the function of the Supreme Court to remedy social ills or injustices or to reinterpret the law to make current conditions fairer for one segment of Americans or another. If such adjustments to the law of the land need to be made, they must be made by Congress and carried out by the executive branch if, of course, they fall under the prerogatives of the federal government, not state governments. The sole function of the Supreme Court is to decide, in each case brought before it, whether the Constitution has been adhered to.

From this, it should be clear that the most important prerequisite to be a highly qualified Supreme Court justice is knowledge of the Constitution. A candidate having completed a heavy body of course work in constitutional law seems essential. Furthermore, to understand the mindset and original intent of the Founders who wrote the Constitution, the candidate ideally should have read the minutes of the constitutional convention of 1787 and basic works such as the *Federalist* papers. Beyond that, solid experience on the federal bench would also be a plus.

And yet, President Obama pledged on May 1 to name a Supreme Court justice who combines "empathy and understanding" with an impeccable legal background. Now the impeccable legal background would be ideal, so long as it included plenty of casework or research involving constitutional law. However, the qualities of "empathy and understanding" — however commendable those traits may be in a human being — have absolutely nothing at all to do with one's ability to evaluate the constitutionality of a given piece of legislation.

For a judge in a family court, making decisions regarding the custody of children or child support, empathy and understanding might very well help to make wise decisions. But the only empathy and understanding relevant to the position of Supreme Court justice would be empathy for the authors of the Constitution and an understanding of what they intended.

If empathy and understanding are irrelevant qualifications, then certainly the justice's gender, ethnic background, or skin color are as well. To imply otherwise would be construed as sexist or racist if it were implied that White Anglo Saxon Protestant males understand the Constitution better than others.

As it is, the Court's sole current black member, Clarence Thomas, would likely score very high points as a strict interpreter and defender of the Constitution. But his qualifications should be attributed not to his race, but to his intellect and his finely honed set of principles.

Photo: Justice David Souter



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