Thurgood marshall: supreme court nomination and confirmation

Thurgood Marshall began his career fighting for voting rights and equal housing for African Americans and fighting against racial and gender discrimination. As head of the Legal Defense and Education fund of the NAACP, he garnered an impressive success rate arguing cases before the Supreme Court, (Gibson 110), which likely earned him the appointed to the Second Circuit of the United States Court of Appeals by President Kennedy. In 1965 he was appointed Solicitor General by President Lyndon Johnson, and just two years later, on June 13, 1967, President Johnson nominated Marshall as an Associate Justice of the Supreme Court of the United States.

Marshall's nomination led to heated debates in the Senate; opposition was primarily from southern senators who hailed from states where Jim Crow laws were still in force, despite the passage of the Civil Rights Act three years earlier. Senate hearing transcripts cited one senator's grievance that Marshall's past record as jurist and attorney led him to believe the appointment would cause a dangerous imbalance in the Court, as he would replace Justice Clark, who was viewed as a conservative. Ultimately, Marshall's nomination was confirmed with a 69 to 11 vote, and 20 non-voters. (U. S. Senate 24656). Sworn in by Chief Justice Earl Warren, Thurgood Marshall became the first African American Justice in the history of the United States. The 96 th Justice served from 1967 until his retirement in 1991. (Thurgood Marshall).

Marshall was nominated to fill an anticipated vacancy in the Court due to the impending retirement of Justice Tom Campbell Clark. Clark was stepping down to avoid a conflict of interest caused by the appointment of his son, William Ramsey Clark, to the U. S. Attorney General position by President

Johnson. Tom Clark had been the U. S. Attorney General from 1945 to 1949 before his own nomination to the Court by President Truman. Tom Clark had no prior judicial experience and Truman later expressed regret over his choice. (Dutton). Clark was viewed as a conservative, but turned out to be a swing voter. It is evident Johnson created the vacancy by design. In his remarks to the press, Johnson said of Marshall, " I believe he earned that appointment; he deserves the appointment. He is best qualified by training and by very valuable service to the country. I believe it is the right thing to do, the right time to do it, the right man and the right place." (Peters and Woolley). It is noteworthy also, that both Marshall and Clark were nominated by Democratic Presidents in a Democratic controlled congress. (Lou Frey Institute). A liberal ideological shift took place in the Warren Court, most significantly when Justice Goldberg replaced Frankfurter and Marshall replaced Clark. (Grofman and Brazill 63-64).

The amount of time between Supreme Court nominations and the final committee vote has varied significantly, from three days or less to 117 days, in the case of the 1916 nomination of Louis D. Brandeis. Between 1967 and 2009, from Marshall to Sotomayor, the Judiciary Committee has consistently taken more time; the average is around 50 days, but some took more than 80 days. (Bearden and Rutkus 13). The table below shows how the trend changed between the confirmation of Marshall and his predecessor, Tom Clark.

Table 1

Nomine	Pres	Date	Public	Final	Fina	Date	Final	First	Committ	Final

e		rec’d in Senate	Hearing Dates	Vote Date	l Vote	Action	Public Hearing Date	ee Final Vote Date	Action Senator President
Tom Clark	Truman	08/02/49 08/09/49 08/10/49 08/11/49		8/12/49 In Favor 9-2	08/18/49 Confirmed 73-8		7	10	16
Thurgood Marshall	L Johnson	6/13/67 07/13/14 07/14/14 07/18/14		8/3/67 In Favor 11-5	08/30/67 Confirmed 69-11		30	51	78

07/1

9/14

07/2

4/14

Source: Bearden, Maureen and Steven Rutkus. *Supreme Court Nominations, present-1789* . Analysis. Washington: Congressional Research Service, 2009. Print. 23 Mar 2014, 34-35.

In his book, *Pathways to the U. S. Supreme Court: From the Arena to the Monastery* , Garrison Nelson says, “ 44 of the first 88 Supreme Court nominations were previously governors, senators, members of the House or cabinet members.” The Nelson theory claims there are four paths to the Supreme Court. Of those four paths, however, the most common is vertically, as former judges in other courts. Justices elevate from this route 47. 3% of the time. Marshall ascended by a less common path, by serving as Solicitor General. Nelson calls this the diagonal route; only 11. 6% of Justices elevate by this route. (Reidel).

So then, what is the appropriate role of the Senate in Supreme Court nominations? Should the voting public have a more active role in the nominations? Or should it be just left to the President? If left to the President without Senate consent, the nominees would be ideologically suited to the President his party. Since Justices have lifetime appointment and Presidents have term limits, this may cause conflict between the Court and future administrations. The Senate consent feature acts as a check and balance of

the Executive as intended by the framers. Similarly, if the nomination is left to the voting population, individuals may not fully comprehend the impact of a decision based solely on popularity or publicity. Individuals may not balance their own personal views against the needs of society in making a decision. Furthermore, the average individual may not be qualified to determine the potential future legal effect a lifetime appointment on the laws of the country. The American Bar Association reports that in 2012, a mere . 26% of the U. S. population consists of a combination of lawyers, law students and law professors. (American Bar Association). Using census data from the Bureau of Labor and Statistics and including a more generous pool of the population to include lawyers, law students, law professors, clerks, judges, paralegals and other legal support positions, while narrowing the scope to include only the employed portion of the population, the number is still a meager 0. 36% of persons who have some knowledge of the law and courts. (Bureau of Labor and Statistics).

Over 100 years ago, Finley Peter Dunne’s infamous Mr. Dooley uttered the proclamation, “ No matter whether th’ Constitution follows th’ flag or not, th’ Supreme Court follows th’ illiction returns.” (Dunne 26). One study linked constituent opinion to Senate voting patterns and researched how the visibility of the roll-call during Senate confirmation hearings influenced outcomes. Senators tend to vote against nominees with controversial policies. Stakes are high in the competition for re-election and senators must be responsive to the views of their constituents. (Kastellec, Lax and Phillips 676, 782, 783). Despite these results, the intent of the Senate’s role in the process is still sound. Senators are elected officials, representing their

constituents. Although Senators tend to vote based on their own views and their interpretation of the nominee’s views, they also factor in the views of their constituents and the balance of the Court. And finally, Senate consent fulfils the Legislative check and balance requirement on the Executive branch of government as required under the Constitution.

Since Marshall supported similar positions on civil rights issues as his predecessor Clark, the argument that Marshall would create a dangerous imbalance in the Court was moot. Although Justice Clark was viewed as a conservative, he was often the swing vote, supporting landmark cases such as Mapp v. Ohio, which applied the Fourth Amendment exclusionary rule to the states, and Abington School District v. Schempp, nullifying daily Bible readings in public schools. Clark also supported the end of racial segregation and joined the unanimous decisions in Brown v. Board of Education. (Reger). Marshall was an influential figure in the civil rights movement, always pursuing the goal of racial equality. His liberal opinions challenged race and gender discrimination, opposed the death penalty, supported the rights of criminal defendants, and defended affirmative action and abortion rights. “ As a Supreme Court Justice, Thurgood Marshall believed the Constitution was a living document that should be interpreted based on the current political, cultural, and moral climate.” (Maki 4).

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