A Crash Course in Constitutional Law for Harriet Miers – and Everybody Else

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Over the weekend, Senate Judiciary Committee Chairman Arlen Specter said that, with no prior judicial experience and a background primarily in business law, Supreme Court nominee Harriet Miers "needs a crash course in constitutional law."

Well, I am prepared to offer just such a course--for Miers and any would-be nominees among my readers. Pay attention, because there will be a test.

"To secure the blessings of liberty," as its preamble states, the Constitution divides power. In particular, it apportions authority along three main dimensions: between the state and federal governments; among the branches of the federal government; and between, on the one hand, all levels of government and, on the other hand, individuals. The vast majority of live constitutional questions concern a conflict along one or more of these axes. Collectively, they comprise our crash course syllabus.

States' Rights Versus National Power

The principal impetus for the 1787 Constitutional Convention in Philadelphia was the widespread perception that the Articles of Confederation gave inadequate powers to the national government. Accordingly, the Constitution that emerged from the Convention and that was ultimately ratified in 1789 created a stronger central government, but it did not obliterate the state governments, as the most ardent nationalists wished.

Instead, it contained a number of mechanisms that wove state power into the very fabric of the federal government: Constitutional amendments could only be ratified by votes of three-fourths of the states; the President was to be chosen through a state-by-state Electoral College; and Senators would be apportioned to states equally, regardless of their population, and selected by state legislatures (although the Seventeenth Amendment substituted direct election of Senators in 1913).

In extraordinary cases like *Bush v. Gore*, the Supreme Court may construe one of the foregoing structural provisions. But for the most part, constitutional disputes between state and national authorities concern the question of whether some Act of Congress is within the scope of powers delegated to that body by Article I, Section 8 or one of a small number of other provisions. As the Tenth Amendment makes clear, states generally have inherent power to regulate wherever valid federal legislation has not displaced (or in constitutional jargon, "preempted") state authority. But for an Act of Congress to be valid, the Act must carry out some power delegated by the Constitution to Congress.

James Madison wrote in Federalist No. 45 that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite," and so one might think that the courts must invalidate an Act of Congress that does not implement one of the constitutionally enumerated powers.

That is technically true. Congress, the Court has said, has no inherent powers, only those delegated to it. But the Court has also said that the delegated powers carry with them implied powers. Most famously, although the Constitution nowhere expressly enumerates any Congressional power to charter a national bank, the Court ruled in the 1819 case of *McCulloch v. Maryland*, that such a power could reasonably be inferred from the express powers to tax, to spend, to borrow, and to regulate interstate commerce.

In conventional constitutional law courses, *McCulloch* is taught as though any other result would have been unthinkable. But, in fact, the issue was hotly debated within the administration of President George Washington, with Secretary of the Treasury Alexander Hamilton arguing for, and Secretary of State Thomas Jefferson arguing against, the bank's constitutionality.

Hamilton's argument is well known, because Chief Justice John Marshall basically plagiarized from it in his *McCulloch* opinion. But Jefferson's argument (which you can read here for extra credit), is worth considering. The concept of implied powers, Jefferson explained, has no logical stopping point. "It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please."

And in truth, both Hamilton and Jefferson were right. Hamilton was right that Congress could not possibly do anything effectively without implied powers. (For example, Article I, Section 8 gives Congress the power to establish post offices but says nothing about issuing stamps. Obviously, in order for the post offices to function effectively, Congress must be able to authorize them further.) Likewise, even though the Constitution only empowers Congress to create an Army and a Navy, no sensible person therefore thinks the Air Force is unconstitutional.

But Jefferson was also right that there is no clear stopping point on the slippery slope from implied powers to absolute powers. And history has proved him right. From the late 1930s until 1995, the Supreme Court rejected every claim that an Act of Congress exceeded the scope of the enumerated powers.

Recent cases involving federalism--like the 1995 decision invalidating the Gun Free School Zones Act, and the 2005 decision upholding the federal marijuana prohibition against a challenge by a Californian using medical marijuana pursuant to state law--are a pale shadow of the Hamilton/Jefferson debate. The only real question today is whether the federal government is omnipotent or merely almost-omnipotent.

Nonetheless, despite its relatively low stakes, the modern federalism debate is highly contentious. Accordingly, prospective Supreme Court Justices would be well advised, in answer

to Senate Judiciary Committee grilling, to remind the Senators that the issue could come before the Court, but to add that they accept *McCulloch* as settled law.

Separation of Powers, or "I'm Just a Bill, Sitting on Capitol Hill"

Any high school student who received a C- or better in civics can tell you that there are three distinct branches of the federal government: legislative, executive and judiciary. Respectively, they make, execute and interpret the law. The Constitution's very structure reinforces this fact. Article I begins by vesting legislative power in Congress; Article II places the executive power in the hands of the President; and Article III sets out the scope of judicial power.

What are sometimes called "separation of powers" problems nonetheless arise because the actual constitutional architecture is more complicated. For example, the President plays a role in making law, by either signing or vetoing bills. Likewise, the Senate has a hand in executive administration, as it must approve Cabinet-level and other high-ranking officials (what the Constitution calls "principal officers"). Thus, when the branches of government attempt newfangled arrangements, one cannot argue that they are necessarily unconstitutional because they scramble the three powers; the Constitution does that, too.

Nonetheless, the Supreme Court has sometimes approached this problem in a somewhat formalistic way. Thus, when Congress attempted to give the President a "Line-Item Veto"--that is, the power to cross out particular items in spending bills--the Justices ruled that this procedure violated Article I, Section 7, which says that the President must either sign or veto bills in toto; he cannot, in effect, sign part of a bill.

At the same time, however, the Court has acquiesced in the creation of what many have called a fourth branch of government: administrative agencies. These agencies are (in most instances) under at least the nominal supervision of the President, so that one would think they are part of the executive, but not so fast: They also have the seemingly legislative power to issue regulations that have the force of law, and the seemingly judicial power to adjudicate disputes between individual parties.

Would-be Justices can avoid--or, if they succeed in getting confirmed, merely forestall--the difficult task of justifying the Court's apparently contradictory separation-of-powers decisions by resorting to platitudes. Remind the Senators that you believe fervently in an independent Judiciary and a modest judicial role. A sufficiently somber facial expression will go a long way towards disguising the contradiction.

Individual Rights

The Constitution's federalism and separation-of-powers provisions govern which government actors decide various policy questions: the states or the federal government; Congress, the President, or the courts. By contrast, individual rights provisions govern whether any government actor may decide some question. Your right to free speech means that you simply can't be penalized by any government actor for criticizing the President--not by the President,

Congress, the federal courts, your state's Governor, legislature, or courts, or even by your local sheriff.

It didn't always work that way. The original Constitution contained a small number of protections for individual rights, such as a right to jury trial in criminal cases in federal court, but Anti-Federalists who feared national power extracted a promise from the Constitution's supporters that following ratification, a Bill of Rights would be added.

The promise was kept just two years later. But even then, the Bill of Rights was deemed only to restrict federal power. In the 1833 decision in *Barron v. Mayor and City of Baltimore*, the Justices held the Bill of Rights inapplicable to the exercise of power by the states. States were, of course, bound by their own state constitutions, but state bills of rights could be, and frequently were, construed to provide less protection than the federal Bill of Rights.

By the mid-1960s, however, the Supreme Court had ruled that most of the provisions of the federal Bill of Rights did restrict the states after all, for the Fourteenth Amendment, adopted in 1868 in the wake of the Civil War, "incorporated" the Bill of Rights. Although incorporation was controversial in its day, it too has become settled law, and so Supreme Court hopefuls can win valuable points with liberal Senators at no cost with conservatives, by endorsing incorporation.

You'll win extra credit if you say that in retrospect, it would have been better if incorporation had been accomplished under the Privileges or Immunities Clause than under the Due Process Clause, and some of the Senators (or at least their staff) will even know what you're talking about.

As noted above, federalism cases typically pose the question of what implied powers can be inferred from the powers specifically enumerated in Article I, Section 8. Similarly, individual rights cases often pose the question of what implied rights can be inferred from the rights specifically enumerated in the Bill of Rights.

Here, too, we have made little analytical progress since the Eighteenth Century. The unenumerated rights question was hotly debated in the 1798 case of *Calder v. Bull*. There, Justice Samuel Chase contended that it was in the nature of a Constitution meant to limit government power that it includes rights beyond those specifically spelled out in its text. Justice James Iredell, however, disagreed. In his view, so-called "natural justice" was subjective, and accordingly provided an insufficient basis for unelected, life-tenured judges to invalidate decisions taken by elected officials.

The names have changed somewhat. Instead of invoking natural law, today's heirs to the Chase position speak of the doctrine of "substantive due process," or they invoke the Ninth Amendment (which by its terms acknowledges, without specifying the content of, unenumerated rights). And instead of Justices Chase and Iredell, we can substitute Justices Kennedy and Scalia.

But as with the federalism debate, the rights debate is essentially a case of plus ça change, plus c'est la même chose. (Note to Supreme Court nominees: It's best not to speak French during your

confirmation hearings, even if you conspicuously ate the Freedom Fries in the House cafeteria before trudging over to the Senate.)

Got Constitutional Philosophy?

You should now know enough to parry Senatorial thrusts designed to elicit your actual views on any substantive issues you might be called upon to decide as a Justice. But you still need a "constitutional philosophy," a general approach you will take that helps you move from abstract constitutional language to concrete results in particular cases.

Two polar possibilities are originalism and living Constitutionalism. As the name suggests, adherents to originalism believe that provisions of the Constitution should be given the same meaning today as they had when they were originally adopted. There is a certain commonsensical appeal to originalism: The Constitution is law because it was adopted by actual people, and so why not interpret it to mean what they thought they were adopting?

One reason is that it's almost impossible to be an originalist because so many of today's issues are new. The framers and ratifiers of the Bill of Rights never thought about internet filtering of adult content or thermal imaging scans of homes. Sophisticated originalists say that we should accordingly "translate" the original understanding, but it's hardly clear how this translation process differs from simply asking what we think the Constitution's words mean today.

Even if you get over the changed circumstances hurdle, you can't possibly tell the Senate that you're an originalist, because, as Robert Bork learned eighteen years ago, you will end up tying yourself into knots explaining why you're not therefore a racist and a sexist. The original understanding of the Fourteenth Amendment, after all, pretty clearly permitted state-imposed racial segregation and numerous restrictions on the economic, political and social opportunities of women.

Living constitutionalism means that the Constitution's meaning evolves over time. Few people deny that fact, but embracing living constitutionalism won't get you very far with the Senators. How does constitutional meaning evolve over time, they will want to know. To what sources should a Justice look for evidence of evolution? What role, if any, do the Justice's own values play in charting the course of the Constitution's evolution? Living constitutionalism makes clear the need for answers to such questions but it hardly supplies them.

Besides originalism and living constitutionalism there are other, more esoteric philosophies available. "Representation-reinforcement," the brainchild of the late law professor (and Stanford Law School dean) John Hart Ely, posits that the Court should generally defer to the outputs of elected officials, except where the political process itself seems to be broken--because, for example, it discounts the voices of racial minorities or squelches dissent.

Representation reinforcement is an attractive view in many ways, but it is likely to get you in hot water because Ely was a famous critic of *Roe v. Wade*. You could point out that in his later years, Ely came to accept *Roe*, or you could point out that you're not Ely, you're you. But either answer will simply lead the Senators to shift ground and start questioning you intensely on your views

about the proper role of precedent--a question that representation-reinforcement itself does not address.

Accordingly, the most cunning response to the constitutional philosophy question may be to act as a Zen master and "unask" it. Chief Justice John Roberts used this method to good effect. The judge, he said, begins with the facts and the issues, which in turn lead him or her to an approach for the particular case; different facts and issues may call for a different approach. In this view, there is no need for an overarching judicial philosophy.

Or better yet, say you're a "pragmatist," a common name for this sort of bottom-up, context-specific way of thinking. You will thereby earn points with moderates who think that pragmatism is better than rigid ideology. And you will connect yourself to the most distinctive contribution of American philosophy: the pragmatism of William James, John Dewey, and the greatest judicial figure in our history, Oliver Wendell Holmes, Jr.

Oh yes, about that test. Turn in your answers to Senator Specter.

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