

The Role of the Courts

THE ISSUE:

The Founders envisioned the judiciary to be the “least dangerous branch,” but activist judges have transformed the courts into policymaking bodies that wield wide-ranging power over virtually all aspects of American life. Rather than fulfilling their duty to interpret the Constitution and laws as they are written, judges increasingly seek to impose their own policy preferences on the nation. Recent examples include a federal judge relying on administrative fiat rather than federal law to strike down an Arizona law that simply enforced immigration laws that are already on the books and a federal judge in California creating a previously unknown constitutional right to homosexual marriage. In order to restore the rule of law in America, elected officials, legal experts, and concerned citizens must oppose judicial activism and encourage the President to select constitutionalist judges.

THE FACTS:

- **The Current Supreme Court’s Delicate Balance.** Only four of the nine current justices on the bench have demonstrated that they are usually faithful and consistent constitutionalists. The others are either hard-core liberal activists or inconsistent in their approach. President Barack Obama will likely have at least one more Supreme Court nominee and fill around 50–60 more federal circuit court seats.
- **Closely Decided Landmark Decisions.** Roughly one-fifth of the Supreme Court’s cases this term were decided by a 5–4 vote, including *McDonald v. Chicago*, which properly confirmed that the Second Amendment protects citizens’ gun rights in the states, and *Christian Legal Society v. Martinez*, which incorrectly held that a law school may enforce policies infringing on a religious

group’s First Amendment rights to free speech and association.

- **Importing Foreign Law.** Unable to justify their desired outcomes with United States law, several justices have resorted to citing foreign law in interpreting our Constitution and laws. At least three of the current justices have publicly promoted this practice, and newly confirmed Justice Elena Kagan has also endorsed looking to foreign law.
- **The “Empathy Standard.”** President Obama has stated that an essential criterion for his judicial nominees is whether they have personal empathy for certain parties: “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”
- **Americans Want Constitutionalist Judges.** In a national survey of 800 actual voters conducted by the Polling Company for the Federalist Society, 70 percent of voters surveyed prefer Supreme Court justices and other federal judges “who will interpret and apply the law as it is written and not take into account their own viewpoints and experiences.”

THE SOLUTIONS:

- **Promote a Robust Dialogue About the Importance of Putting Constitutionalist Judges on the Bench.** Members of Congress should seek to educate the American people about the threat of judicial activism and pledge to promote the appointment—or in states, where applicable, the election—of constitutionalist judges.
- **Senators Should Vigorously Question a Judicial Nominee Regarding His or Her Philosophy of**

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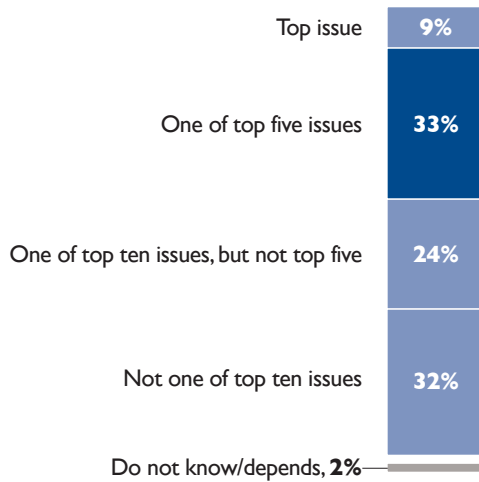
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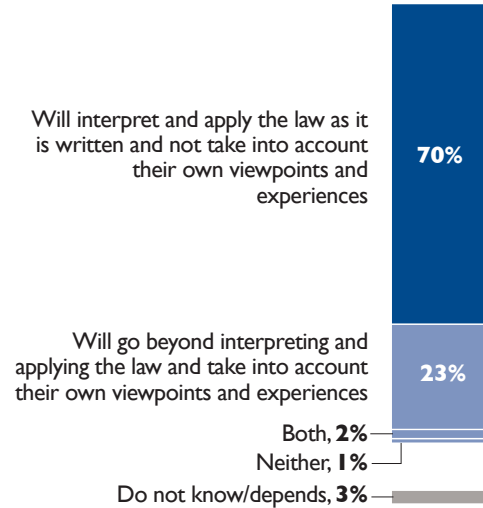
Survey Responses on Judicial Nominations

FROM A NATIONWIDE SURVEY OF 800 ACTUAL VOTERS CONDUCTED DURING AND AFTER THE 2008 ELECTION

Q: When you decided for whom you would vote for President of the United States, how important was it to you whom that person might nominate to serve as Justice on the United States Supreme Court and other federal courts relative to other issues?



Q: Regardless of whom you voted for, would you prefer a President nominate Justices to the United States Supreme Court and judges to federal courts who ... ?



Source: Poll of 800 actual voters, conducted November 4–5, 2008, by the polling company, inc. for The Federalist Society; margin of error is plus or minus 3.5 percentage points; figures may not sum to 100 due to rounding.

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Judging. Senators have the duty to gauge whether a nominee will be faithful to the original meaning of the Constitution and laws. They should ask the nominee whether he or she will interpret the Constitution according to its original meaning or according to their own personal view of “evolving standards” informed by foreign law.

- **Reject Activist Judges.** If there is evidence that a judicial nominee cannot legitimately carry out his or her oath to do impartial justice without regard to the parties before the court—that is, that he or she will rule based on empathy rather than law—then the Senators should reject the nominee. Senators must remember that they, too, take an oath to uphold and protect the Constitution.