University of Richmond Law Review

Volume 41 | Issue 2 Article 3

1-1-2007

The Double Standard in Judicial Selection

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ESSAY

THE DOUBLE STANDARD IN JUDICIAL SELECTION *

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The most recent confirmation proceedings for nominees to the Supreme Court of the United States were predictably contentious. The politics of advice and consent for both Judge John Roberts to be the Chief Justice of the United States and Judge Samuel Alito to be an Associate Justice of the Supreme Court were in many ways more akin to political campaigns than to confirmation hearings as we once understood them. There were radio and television ads; there were demonstrations and rallies; there were full-page newspaper advertisements; and groups on both sides routinely held press conferences to get their views out. Some political observers estimated that interest groups on both sides would pour millions of dollars into supporting or objecting to the Roberts and Alito nominations.[1]

Unfortunately, these most recent confirmation processes were not isolated events, but rather reflected the battle for the federal judiciary that has been going on for quite some time. The starting point, in many ways, was President Ronald Reagan's nomination

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* This essay was adapted from a lecture delivered to the Federalist Society at the University of Richmond School of Law on February 21, 2006. For the convenience of the reader, these remarks have been slightly edited from the form in which they were delivered as a speech.

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1. *See* Glen Justice & Aron Pilhofer, *Set for Alito Battle, With Ad Dollars at the Ready*, N.Y. TIMES, Nov. 14, 2005, at A3 (discussing the multi-million dollar expenditures interest groups made in anticipation of Justice Alito's confirmation hearings); *see also* Rick Klein, *Ad War Targets N.E. Senators on Alito Nomination*, BOSTON GLOBE, Nov. 18, 2005, at A3 (describing various interest groups' advertising efforts in New England states).

in 1987 of Judge Robert H. Bork to the highest court. Bork was one of the most distinguished and qualified people ever nominated to the Supreme Court: Yale law professor, leading scholar in antitrust and constitutional law, Solicitor General of the United States, and a judge on the United States Court of Appeals for the District of Columbia Circuit. As everyone knows, the unprecedented ideological attacks on Judge Bork were sadly successful and he was not confirmed.

The success of Bork's opponents in blocking his appointment established a new standard for the politics of judicial selection. It inspired the growth of well-funded political groups, primarily on the far left of the ideological spectrum, whose primary objective has been to stage all-out efforts to prevent the confirmation of judges who, like Judge Bork, might believe in the faithful interpretation of the Constitution according to its actual language and its original meaning. The focus of these attacks has been nominees who believe that under the Constitution the role of the judiciary is a limited one. In short, there have been attacks against nominees who believe in judicial restraint, the idea that policy-making and law-making are the preserve of the elected branches.

It is precisely this notion of judicial restraint that motivates these political activists on the far left. These groups have a political agenda that they themselves know is too radical to get through the Congress of the United States or through any state legislature—at least any state legislature whose members are trying to get re-elected in the next election. As a result, their efforts are aimed at persuading activist judges to exceed their legitimate roles and to become lawmakers. From this point of view, it is simply imperative to prevent constitutionally faithful judges from ascending to the bench.

Ultimately, the goal of the radical left in this battle for the courts goes beyond particular policies. The true goal, as Professor Richard Epstein has written, is to exclude, from the bench, views of judicial restraint and fidelity to the Constitution in order to frame the constitutional agenda for the next generation.[2] Some of these groups are well known—People for the American Way and the so-called Alliance for Justice, for example. But they have also

2. *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, at xii–xiii (2006).

drawn fellow travelers to their cause from such otherwise legitimate and mainstream organizations as Americans United for Separation of Church and State and even the NAACP. And unfortunately, some of the nation's major newspapers aid and abet them editorially.

In recent years, these groups have undertaken to broaden the scope of their attacks. No longer do they limit their schemes to trying to halt nominees to the Supreme Court. Since 2001 there has been a systematic effort to target nominees at all levels of the federal judiciary, with special attention being given to nominees to the United States Courts of Appeal. The critical reason for this shift in tactics is quite simple: most constitutional law in the United States is not made by the Supreme Court—the Justices only take 80–100 cases a year, after all—leaving much law to be fashioned by the appellate courts in the various circuits around the country. What was once sporadic has become commonplace; and tactics have become so extreme that for the first time in history the United States Senate has used the filibuster against federal appellate nominees who would easily have been confirmed if they had been afforded the opportunity for an up-or-down vote on the floor of the Senate as is constitutionally expected.

The substance of the attacks has also grown increasingly scurrilous. Hearings in many ways are now less concerned with measuring the professional fitness of a nominee to serve as a judge or Justice than they are with attempting to intimidate the person. Such intimidation comes in the form of seeking to force the nominees to reveal how they would vote on cases they have not yet seen, based on laws they cannot really know in advance, and derived from fact situations that are wholly the hypothetical constructs of their interrogators. Since that might not be sufficient, the hearings are also used to dredge up a great deal of irrelevant material, such as memberships in organizations as far back as their college or law school days. And, of course, there are always the efforts at simple character assassination. To say that much of the questioning a nominee faces is hostile would be to sorely understate the case.

I have suggested that these sad and troubling developments have been largely the handiwork of groups at the far-left end of American politics. One can see this clearly in the evidence that exists which demonstrates an unmistakable double standard for judicial confirmations in the country. There is no denying what

happened to Robert Bork or Clarence Thomas, or more recently to John Roberts and Samuel Alito. But it was not that way during the Clinton Administration. For example, when President Clinton nominated Ruth Bader Ginsburg to the Supreme Court, she was accorded great courtesy by the Republicans who respected the fact that a president has the right to select a nominee of his choosing provided that nominee is qualified. Even though Justice Ginsburg was arguably farther to the left than anyone nominated by recent Republican presidents has been to the right, she was approved by a vote of 96-3. Similarly, Stephen Breyer, who had served as a staff member for Senator Edward M. Kennedy and who was well known as a liberal law professor at Harvard, was confirmed 87-8.

President Clinton's prerogative was not challenged, and his nominees were treated fairly by the Republicans as the party in opposition. No one ever suggested the idea of a filibuster against either Ginsburg or Breyer—nor, for that matter, against any of the lower court judicial nominees named by President Clinton. It is striking to note as a measure of how things have changed that the Democrats, who were most forceful in trying to get any information on Roberts and Alito that would have been harmful to them, were the very same Democrats who counseled Justice Ginsburg during her hearings that she did not have to answer any questions she thought inappropriate. One can only imagine the furor had Ginsburg been pressured to produce all the memoranda she had written for the American Civil Liberties Union when she was general counsel; or if Breyer had been badgered to produce all the documents in which he had advised Senator Kennedy. But such did not occur because of the double standard that threatens our independent judiciary.

The consequences of these recent confirmation struggles are serious for many reasons. Obviously, they are troubling for the nominees themselves. The pressure put on them is tremendous, and neither the nominees nor there are families shielded from the hostile and often mean-spirited attacks on their characters as well as their convictions. One can never forget Mrs. Alito leaving the hearing room in tears. This leads to a second serious problem. Such procedures may well discourage potential nominees in the future from subjecting themselves to the trial by ordeal for a judicial appointment. But the deepest problem goes beyond the nominees and even beyond the courts themselves. The new politics of

judicial selection adversely affects our entire society by making the confirmation process nothing less than a battleground for the culture wars. It does not matter whether a nominee will be a good and disinterested judge settling cases and controversies fairly; what matters is how the judge will vote on the hot button issues such as abortion, homosexual rights, and references to God in the public square.[3]

This is far from what the Founders had in mind. Of the many important things that came out of the Constitutional Convention that steamy summer of 1787 in Philadelphia, two things were especially important, and it is those two things most threatened by the new politics surrounding judicial appointments. The first important matter was the Founders' commitment to a written constitution of enumerated and ratified powers and limitations. The second achievement was the creation of an independent judiciary.

The Framers were well aware of the unpredictability of the way power might be exercised under the unwritten British constitution. Believing that a constitution properly understood was the binding expression of the intentions of the sovereign people, they were committed to the idea that the fundamental law could only be changed by that same sovereign people through what Alexander Hamilton described as the "solemn and authoritative act" of formal amendment.[4] No institution created by the Constitution—not the legislature, not the executive, and not the judiciary—could by enactment, policy, or decree change the original meaning of the people as expressed in their basic law. This was why Chief Justice John Marshall in his famous opinion in *Marbury* v. *Madison*[5] unambiguously proclaimed the written constitution to be "the greatest improvement on political institutions."[6]

This idea of a constitution—the provisions of which were to be understood as both "fundamental" and "permanent"—was intimately connected to the idea of an independent judiciary.[7] In order to vest the courts with the power of what we would come to

3. *See* CHARLES PICKERING, SUPREME CHAOS: THE POLITICS OF JUDICIAL CONFIRMATION & THE CULTURE WAR 18 (2005).

4. THE FEDERALIST NO. 78, at 527–28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

5. 5 U.S. (1 Cranch) 137 (1803).

6. *Id.* at 178.

7. *Id.* at 176.

call judicial review, the power to declare laws unconstitutional, the Framers insisted that the judges had to be independent from the politics of their day, from the whims and passions that might pass through the society at any given moment. This independence was necessary to enable them to interpret faithfully the language of the Constitution as it was originally intended and to faithfully interpret the laws as they were actually passed without the fear of political retribution. This independence was secured in the Constitution by providing for the judges and Justices to hold their positions "during good [b]ehavior," and to protect their compensation from being reduced during their tenure.[8] The judges could only be removed for bad behavior by the complex and cumbersome process of impeachment.

The Founders had in mind a constitution that would be a solid and dependable foundation for judging, not what we might think of as a trampoline for activist judges to jump off in all directions substituting their own policy preferences, political biases, or personal moral judgments for what the Constitution and the laws made pursuant to it actually say. Justice Antonin Scalia, never at a loss for sharp and wise words, excoriated judicial activism this way:

> What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?[9]

Such an exercise of judicial power was simply beyond the pale, Scalia thought. "Day by day, case by case," he concluded, the Supreme Court "is busy designing a Constitution for a country I do not recognize."[10]

Professor Lino Graglia has argued in a similar vein that judicial activism does great harm to the people themselves by distorting the Constitution. Rightly revered as "a guarantor of basic rights," he wrote, "the Constitution has been made the means of depriving us of our most essential right, the right of self-

8. U.S. CONST. art. III, § 1.

9. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 688–89 (1996) (Scalia, J., dissenting).

10. *Id.* at 711 (Scalia, J., dissenting).

government."[11] The fact is "contemporary constitutional law . . . has very little to do with the Constitution."[12] Under the scheme of government by judiciary that has been imposed on the people, the Justices of the Supreme Court "have chosen to make themselves the final lawmakers on most of the basic issues of domestic social policy in American society."[13] And these are the very issues, Graglia concludes, "that determine the basic values, nature, and quality of a society."[14]

This debate about the proper nature and extent of judicial power is what the battles over confirmations of nominees to the federal courts are really all about. Even a brief look at the cases shows the rather dire assessments of Justice Scalia and Professor Graglia to be true. Consider cases as early as the 1960s—*Baker v. Carr*[15] and *Reynolds v. Sims*[16]—in which the Supreme Court determined how the states could allocate the seats in their legislatures. Up until that time, the states had followed the same pattern as Congress, with an upper house based on geographical jurisdictions and a lower house based on population. But the Supreme Court said such apportionment by the federal model was prohibited by the Equal Protection Clause of the Fourteenth Amendment.[17] A constitutionally acceptable model for apportionment had to reflect the idea that all votes were equal, hence the shorthand notion of "one-man, one-vote." It is safe to say that had the founding generation of Americans even suspected that one day the Supreme Court might decree how the states must fashion their own legislatures under their own constitutions, the Constitution might never have been ratified, leaving us with a form of confederal government far different than we have.

In many ways, one sees judicial activism at its worst in the area of criminal procedure. In *Miranda v. Arizona*,[18] the Court decreed that the police had to give the now well-known warning—

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11. Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, *in* "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES 1, 2 (Robert H. Bork ed., 2005).
12. *Id.*
13. *Id.*
14. *Id.* at 3.
15. 369 U.S. 186 (1962).
16. 377 U.S. 533 (1964).
17. *Id.* at 575–76.
18. 384 U.S. 436 (1966).

thanks to generations of television shows—that suspects had the right to remain silent, to have a lawyer, and so forth. At the time of *Miranda*, the Court suggested that the warning was not a constitutional requirement but only a prophylactic requirement of the Court. Subsequent efforts to get rid of the *Miranda* warning led to the recent case of *Dickerson v. United States*.[19] In that case, in an opinion written by Chief Justice William H. Rehnquist, a long-time critic of *Miranda*, a majority of the Court held that time had somehow transformed what had once been merely a prophylactic requirement into a full-blown constitutional demand.[20] In other words, the Justices openly read into the Constitution a meaning that they had specifically said was not there just a few decades before.

Finally, there is a tendency in recent Supreme Court opinions that can only trouble those committed to a faithful interpretation of the Constitution, and that is the willingness of the Justices to look to foreign courts and foreign law to support their interpretations when they cannot find adequate grounds for their decisions in the legal tradition of the United States.[21] In this, what he has called the internationalization of American constitutional law, Judge Bork says that "[i]t may seem bizarre that the Constitution of the United States, written and ratified over two hundred years ago, should be interpreted with the guidance of today's foreign court decisions and even the nonbinding resolutions of international organizations."[22] But it does not seem at all preposterous to some of the Justices of the Supreme Court or to the elites to whom they respond. As Professor Michael Dorf points out, in a recent study of the Supreme Court there is something now known as the "Greenhouse Effect," the influence on some of the Justices by the praise or criticism of them offered by the Supreme Court reporter for the *New York Times*, Linda Greenhouse.[23] Greenhouse has approvingly noted that "it is not surprising that the

19. 530 U.S. 428 (2000).

20. *Id.* at 437–44.

21. See, for example, the opinion of Justice Anthony Kennedy in *Lawrence v. Texas*, 539 U.S. 558 (2003).

22. Robert H. Bork, *Introduction* to "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES, at ix, xi–xii (Robert H. Bork ed., 2005).

23. Michael C. Dorf, *The Hidden International Influence in the Supreme Court Decision Barring Executions of the Mentally Retarded*, *in* FOURTH ANNUAL SUPREME COURT REVIEW: OCTOBER 2001 TERM 109, 115 (Erwin Chemerinsky & Martin A. Schwartz eds., 2002).

justices have begun to see themselves as participants in a worldwide constitutional conversation."[24] But as Judge Bork sharply put it, "She might more accurately have said 'a worldwide constitutional convention.'"[25]

I am convinced that if the people of the United States understand the stakes that are involved, and understand the respective merits of the two sides in this great debate, that they will also understand the importance to our culture of preserving a Constitution that leaves political decisions to the people's representatives in order to preserve the people's most fundamental right, the right to be self-governing. Our Constitution has served our nation well for over two centuries and has been imitated throughout the world, and we should respect our fundamental law by restoring the dignity and civility to the process of confirming judges and Justices.

We must return to a process where judicial nominees will be treated with the respect owed to the high public officials they are going to be. Let us replace the uncivilized and vicious attacks with a civilized and vigorous assessment of their intellectual qualifications and their professional experience, making sure they possess the integrity that they must have to serve as the stewards of the rule of law. The process of judicial confirmation must be carried out in a way that will benefit both the legacy of the Founders who gave us our Constitution and the kind of judges and Justices we would like to see on our courts. There can only be one standard; anything other than that will be a profound failure on our part.

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24. Linda Greenhouse, *Ideas & Trends: Evolving Opinions; Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2006, § 4, at 3.

25. Bork, *supra* note 22, at xii.

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