9-25-2005

Make >Em Fess Up

Bruce Ledewitz
Duquesne University, ledewitz@duq.edu

9/25/05 Pitt. Post-Gazette K1
2005 WLNR 15169625

Pittsburgh Post-Gazette (PA)

September 25, 2005

MAKE 'EM FESS UP
SUPREME COURT NOMINEES SHOULD BE EXPECTED TO DECLARE HOW THEY WOULD VOTE ON MAJOR ISSUES OF THE DAY, SAYS BRUCE LEDEWITZ

Bruce Ledewitz

Now that the sham of the Judiciary Committee hearings on the nomination of Judge John Roberts for chief justice of the U.S. Supreme Court has been concluded, and before the sham hearings on the next nominee can take place, I would like to propose that future nominees be required to answer how that nominee would have voted on major cases that the Supreme Court has recently decided.

My proposal does not threaten any legitimate interest in the future impartiality of the nominee as a justice. But my proposal does allow the nomination process to serve its intended goal of furthering democratic control by the people of the way in which their Constitution is interpreted.

The Roberts hearings were a sham because Judge Roberts refused to answer whether he favors overruling Roe v. Wade, the case that legalized abortion. Judge Roberts has actually already decided whether he will vote to overturn Roe, just as every other recent nominee had already decided that question. I say this not because of any insight into Judge Roberts' answers before the committee, but because every thinking lawyer in America has already decided whether he or she would vote to overturn Roe.

Roe is the watershed case for lawyers of this generation, as Brown v. Board of Education and Dred Scott were for previous generations. Thoughtful lawyers have thought through their views on this case. Judge Roberts knows; he just would not tell us.

The reason the American people have a right to know Judge Roberts' views on abortion is that the nomination process is structured to bring democratic change to the Supreme Court. A famous example illustrates this point. In 1937, the Supreme Court, after several years of opposition to the New Deal, voted 5-4 to uphold the National Labor Relations Act. During the next few years, the four dissenters in that case left the court. FDR nominated and the Senate confirmed New Deal supporters to the court. The result was that in 1941 the court upheld the Fair Labor Standards Act in a unanimous opinion.

When the people decide that the court is on the wrong track, then replacing one jurisprudential philosophy with another is precisely what the nomination process is designed to do.

In recent years a substantial portion of the Republican Party governing majority has opposed Roe. Their votes have elected Republican presidents and now majorities in both houses of Congress. On any proper theory of democracy, it is just as legitimate for this ruling majority to seek nominees who will vote their view on the court as it was for FDR to seek New Deal proponents.

This effort is not an improper mixing of politics and law. The opposition to Roe v. Wade is, at least in part, a jurisprudential disagreement. There are many lawyers and legal thinkers who regard Roe as improperly decided. Expressing that view on the court is more than mere political power.

This proper democratic exercise has been derailed by the arbitrary refusal of Judge Roberts, and the same refusal by previous nominees, to express their views candidly on abortion and on Roe. This refusal has led to the undemocratic result that the Republican Party garners pro-life votes by promising to overturn Roe, but never is required to deliver the goods and then to pay the democratic price, if there is one, for removing constitutional protection for the right to choose.

As Sen. Rick Santorum likes to say, elections have consequences. In democracy, elections are supposed to have consequences. But that cannot happen unless people are candid about their intentions.

My proposal that nominees be required to answer how they would have voted on prior cases has the advantage that it serves democratic accountability while preserving judicial impartiality. As an example, a nominee would be asked, "Would you have voted with the majority or the dissenters in the Casey case in 1992 and why?" Casey was the last case in which the court was asked to overrule Roe. The nominee's answer would tell a great deal about the candidate's likely future votes.

An answer to this question could not possibly threaten the fairness of the nominee as a justice in a future abortion case. I say this for the simple reason that we know how Justices Souter, Kennedy, Stevens, Scalia and Thomas voted in that case, for they were on the court in 1992, and yet obviously they are allowed to vote on future abortion cases. Why is the situation of a nominee any different from theirs? They have answered the question concerning Casey so there is no reason a judicial nominee cannot do the same.

My proposal has the additional advantage that the nominee is not being asked how he or she will vote in the future on some hypothetical set of facts. That kind of question is always harder to answer and does threaten future judicial fairness.

Litmus tests for judicial nominees have been decried. What we need to remember, however, is that a litmus test can reflect faithfulness by a president to the promises that led to his election. For good or for ill, the voters would then know that their votes matter.

Bruce Ledewitz is a professor of law at the Duquesne University School of Law (ledewitz@duq.edu).

---- Index References ----

Company: MAKE

Language: EN

Other Indexing: (BOARD OF EDUCATION; CASEY; CONGRESS; DUQUESNE UNIVERSITY SCHOOL; FAIR LABOR STANDARDS; FDR; JUDICIARY COMMITTEE; JUSTICES SOUTER; MAKE; REPUBLICAN; REPUBLICAN PARTY; SENATE; SUPREME COURT; THOMAS; US SUPREME COURT) (Brown; BRUCE LEDEWITZ; Dred Scott; John Roberts; Rick Santorum; Roberts; Roe; Wade)

MAKE 'EM FESS UP, 2005 WLNR 15169625

Edition: REGION

Word Count: 1029

End of Document