Journal of Civil Rights and Economic Development

Volume 7, Fall 1991, Issue 1 Article 12

The Best Person for the Job: Tomorrow's Standard for Selecting Supreme Court Justices

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THE BEST PERSON FOR THE JOB: TOMORROW'S STANDARD FOR SELECTING SUPREME COURT JUSTICES

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There are nine positions on the United States Supreme Court, appointed for life by the President, with the advice and consent of the Senate.[1] In view of the importance of the role of the Supreme Court in the life of the nation, it ought not be surprising that there is often controversy respecting appointments to the Court. The nation deserves Supreme Court Justices of the highest quality. Yet, if any qualified Justices have emerged from the current highly politicized process, it was not due to the diligence of the presidential search for the best person, nor the Senate's requirement of excellent credentials for ratification. Although it is hyperbole to suggest that the process has hit an "all-time low,"[2] clearly, it is operating at a historic depression.[3]

This Article will analyze three main factors that have under-

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[1] U.S. CONST. art. II, § 2, cl. 2. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." *Id.*

[2] *See* R.W. Apple, Jr., *Spectacles Like the Thomas Hearing are a Cost of Political Standoff*, N.Y. TIMES, Oct. 20, 1991, § 4 at 1 (Americans' confidence in Congress and Supreme Court at all-time low); *The McLaughlin Group*, FED. NEWS SERV., Oct. 18, 1991 (spec. transcript) (report from capital that Americans are fed up with Congress), *available in* LEXIS, Nexis library, Currnt file. *But see Thomas Affair: A Valuable Civics Lesson*, WALL ST. J., Oct. 24, 1991, at A16, (federal judge concluded process was valuable civic lesson to nation).

[3] In 1795, President Washington's nomination of John Rutledge as Chief Justice was opposed because of Rutledge's views on foreign policy. LAURENCE TRIBE, GOD SAVE THIS HONORABLE COURT 79-80 (1985). President Grant's nomination of Ebenezer Hoar in 1870 was contested because Hoar had amassed political enemies by refusing to put politics above competence. For example, he had favored reform of the civil service. HENRY J. ABRAHAM, JUSTICES & PRESIDENTS 42 (2d ed. 1985). In 1937, President Hoover nominated John J. Parker, who was said to be an anti-labor racist. TRIBE, *supra*, at 90. President Roosevelt's nomination of Senator Hugo L. Black was strongly contested because he was said to favor court packing. He also had been a member of the Ku Klux Klan. ABRAHAM, *supra*, at 47. G. Harrold Carswell and Clement Haynsworth were unsuccessful Nixon nominees, defeated amid charges of segregationism as well as questions concerning Judge Haynsworth's ethics. TRIBE, *supra*, at 82-91.

mined public confidence in the selection process. First, it will examine the political repercussion of the controversial decision by the Supreme Court in *Roe v. Wade*. It will then suggest that the increased concentration of power in the "beltway" of Washington, D.C., coupled with the isolation and insulation of the nation's leaders from the rest of the country has also led to distrust in the process. Finally, the Article will suggest that the lack of a nonpartisian coalition has furthered the deterioration of the selection process.

I. *Roe v. Wade*

It is usual for politics to play a role in the selection of Supreme Court Justices. Democrats normally appoint Democrats; Republicans normally appoint Republicans. The party out of power understands that its turn will come.

The highly politicized issue of abortion has taken a uniquely central role in today's selection process. Former President Reagan and his successor, President Bush, campaigned and were elected on a political platform that explicitly promised to appoint anti-abortion Supreme Court Justices. Thus, it was not merely a case of a republican President "happening" to find a fellow Republican to be the "best qualified" among the top candidates in the land. Rather, the President was fulfilling a campaign promise to an important political constituency when he selected nominees to the high Court. Competence and statesmanship were secondary. Political expediency was primary.

The "Pro-Life" (or "Anti-Choice," depending on your point of view) constituency has only one national objective—the reversal of a line of judicial precedents beginning with *Roe v. Wade*.[4] The decision's central role in determining the future composition of both the executive and judicial branches makes it one of the Court's most influential decisions.

Roe was written and delivered by Justice Blackmun, a Republican appointed by President Richard Nixon. Chief Justice Burger, also a Nixon appointee, joined the majority in overturning state

[4] 410 U.S. 113 (1973).

abortion laws. That Justices Blackmun and Burger are Republicans is ironic, because opposition to the right to abortion eventually galvanized into the "Right to Life" lobby that, with the exception of the single Carter term, has since helped to elect republican Presidents. Those Presidents pledged to change the make-up of the Court, and have done just that. With the addition of Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, as well as the elevation of Justice Rehnquist to Chief Justice, the Court is now solidly conservative.

The strong shift to the Right in both the executive and judicial branches was an unintended consequence of *Roe v. Wade*. While the decision was not the exclusive reason Reagan was elected President, nor the only reason the Court has become more conservative, it was a contributing factor to the former, and the driving force of the latter. Although Reagan might well have been elected in any event, *Roe* guaranteed that the "Right to Life" constituency was part of the winning coalition, with its main issue dominating the Supreme Court nomination process.

It would be easy to disparage the Republican party for allowing itself to be captured by a single-issue pressure group and to criticize the willingness of that group to place its issue above the institutional structures of our government. However, the difficulty with the process does not lie with interest groups of the Right or with interest groups of the Left organized in opposition. A closer look at the *Roe* decision will reveal that the problem, in part, lies in the decision itself.

It is axiomatic of the judicial role that courts should adjudicate real disputes, confining themselves to the facts at issue.[5] There must be an injured party with standing to seek relief.[6] In *Roe*, an exception to the standing requirement was applied. Because it invariably takes the Supreme Court longer to decide a case than the nine-month term of a pregnancy, most abortion issues are technically moot when they reached the Court.[7] Indeed, in *Roe*, the peti-

[5] *See* Muskrat v. United States, 219 U.S. 346, 356-58 (1911).

[6] *See* Frothingham v. Mellon, 288 F. 252, (D.C. Cir.) *aff'd sub nom.* Massachusetts v. Mellon, 262 U.S. 447, 484-85, 488 (1923).

[7] *See Roe,* 410 U.S. at 125; *see also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

tioner had already given birth by the time the case came before the Court; nevertheless, the Court permitted the case, since it was likely of repetition but eluded review in the normal course.[8]

Unconfined by the facts of the case, the Supreme Court rendered, in effect, an advisory opinion that was far broader than the facts and statutes in question.[9] Evolution of law by precedent operates well in small increments. Yet *Roe v. Wade* was not an incremental addition to the law. It was not even a substantial shift in the law. It was a revolution.

The *Roe* decision was based upon the privacy right to contraception recognized in *Griswold v. Connecticut*[10] and *Eisenstadt v. Baird.*[11] The step from the right to contraception to the right to abortion is, itself a substantial leap. More fundamentally, the precedents relied upon by the *Roe* Court were not based on firmly reasoned ground.

In *Griswold*, the Court offered a plethora of rationale for its conclusion that there was a right to reproductive freedom, including a constitutional root in the penumbra of the Bill of Rights,[12] in some combination of various rights,[13] as a fundamental right covered by the liberty clause of the Fourteenth Amendment,[14] or as a Ninth Amendment unenumerated right.[15] The only thing clear after *Griswold*, was that the basis of the right to reproductive freedom was obscure at best. The plurality decision in *Eisenstadt* left similar uncertainty.

Roe could have been the first clear expression of the right to reproductive privacy. But the Court did not take the opportunity to arrive at a consensus as to the theoretical underpinnings of that right as a matter of constitutional jurisprudence. The soundness

[8] *Roe*, 410 U.S. at 125; *see also* Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

[9] *See Roe*, 410 U.S. at 117-19. The Texas law in question in *Roe* forbade abortion except when necessary to save the life of the mother. *Id.* at 118. In order to resolve the dispute, the Court needed only to hold it overbroad. *Id.* at 164.

On the same day it decided *Roe*, the Supreme Court, in Doe v. Bolton, 410 U.S. 179 (1973), invalidated a Georgia abortion statute. A more modest Court could have remanded *Doe* to permit the lower court to consider the effect of *Roe* on the Georgia statute.

[10] 381 U.S. 479 (1965).

[11] 405 U.S. 438 (1972).

[12] *Griswold*, 381 U.S. at 484-85.

[13] *Id.* at 483-84.

[14] *Id.* at 486-88 (Goldberg, J., concurring) & 499 (Harlan, J., concurring).

[15] *Id.* at 486-88 (Goldberg, J., concurring).

of the *Griswold* decision, and its recognition of the right of privacy also remained in doubt until the political process placed it in the mainstream.

Unwilling to draw the line at *Roe*, the Senate held the line at *Griswold*. Refusing to ratify the nomination of Judge Bork to the Supreme Court, the Senate labeled him an extremist for opposing *Griswold* as well as *Roe*. As a result, what the Supreme Court failed to accomplish in *Roe*, the Senate achieved through the confirmation process; the establishment of *Griswold* as indisputable, although vague, jurisprudence.

The Senate had, in effect, performed a judicial function by "ratifying" *Griswold*. At the same time, the *Roe* Court attempted to legislate the parameters of future abortion statutes through its trimester approach.[16] The revolutionary scope of the decision, however, left no room for political forces to operate.

In deciding *Roe* as it did, the Supreme Court overstepped its bounds and misjudged its power. The nine-month gestation period justified the Court's exception to standing. It was, therefore, warranted in pretending that a pregnant woman stood before it. However, she was not at one and the same time in all three trimesters of pregnancy. Rather than limiting its decision to any set of facts, the decision was overbroad.

Under whatever theory of *Griswold* the Court might have chosen to adopt in *Roe*, the Court could have justified striking down the Texas statute as unconstitutional. The Court could, and in its judicial role should, have ended its explanation on those grounds, leaving future cases to determine the propriety of subsequent legislation restricting abortion. Subsequent battles would have been fought in the state legislatures, with the Court authorized to strike down state laws which unduly restricted a woman's right to abortion. Although the Court would still be involved in, and ultimately in control of, the outcome of the controversy, it could have remained above the fray, rather than becoming the central target. With the wealth of abortion cases that have bombarded the Court since *Roe v. Wade*, it is clear that not only did the holding fail to achieve judicial economy, but it also insured the Court's participa-

[16] Roe v. Wade, 410 U.S. 113, 163-65 (1973).

tion in the debate.[17]

This is not to say that the Court should never take a giant step or render a controversial opinion. *Brown v. Board of Education*[18] is one example of a valuable and necessary revolutionary decision. However, in *Brown*, Chief Justice Warren waited until a unanimous opinion could be delivered. Moreover, there had been pre-*Brown* incremental steps in the evolution from the segregationist case, *Plessy v. Ferguson*.[19] Prior to *Brown*, the Court had forbidden segregation in upper-level education based upon records that graphically showed the nature of the segregation.[20]

In segregation cases, the picture of the black law student forced to sit in a roped-off section of a classroom had a face.[21] That powerful image manifested its own justification for the pre-*Brown* anti-segregation rulings.

In contrast, Ms. Roe presented no public face at all. This set the tone for a public debate in which the pro-abortion parties were Dr. X, Planned Parenthood, or at best, the masked Ms. Roe or Ms. Doe. There was no child raped by a step-parent and no deformed or genetically doomed baby. The most powerful image in the abortion controversy did not come from any case; it was the fetal face, drawn by political forces in anti-Court, anti-abortion literature.

The Court in *Roe v. Wade* engendered the anti-*Roe* ideological climate by behaving in an unjudicial fashion. Ironically, this single failure has been the driving force in subsequent Court appointments. Nevertheless, the overruling of *Roe v. Wade*, or any substantial part of it, will similarly create its own backlash. If the con-

[17] *See* Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); Thornburgh v. American College of Obstreticians & Gynecologists, 476 U.S. 767 (1986); Simopoulos v. Virginia, 462 U.S. 506 (1983); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird [II], 443 U.S. 622 (1979); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

[18] 347 U.S. 483 (1954).

[19] 163 U.S. 537 (1896).

[20] *See, e.g.*, Sweat v. Painter, 339 U.S. 629 (1950); State of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[21] This issue was raised, and resolved favorably to the black student in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

servative Reagan-Bush appointees proceed in a more judicial manner, they will incrementally dismantle *Roe v. Wade*, much like the Court's dismantling of *Miranda v. Arizona*.[22]

Justice Scalia, in *Webster v. Reproductive Health Services*, stated that he was ready to reverse the revolution by overturning *Roe v. Wade* entirely.[23] If the majority of the Court completely rejected a woman's right to abortion—including as a life-saving procedure for the mother, or within the first few days of pregnancy—the controversy would be certain to continue. Worse yet, the Court would remain entangled in a seemingly endless controversy. In twenty years, the litmus test for Supreme Court appointees may be that the nominee favors restoration of abortion rights. In order to escape this "Catch-22," recapture the dignity of the Court, and restore confidence in the selection process, the Court must return to its proper judicial role.

II. Beltway Isolation and Insulation

A second factor which has led to a deterioration of the selection process relates to the governing class. Republicans seem to have a lock on the presidency; Democrats a lock on Congress.[24] Incumbents are so seldom defeated that the term "entrenched incumbent" is usually a redundancy. A number of factors, including greater visibility, the methods of financing campaigns, and the format of media coverage of elections, protect the power elite from all but the most serious of political miscalculations. With respect to the appointment of Supreme Court Justices, the reason for beltway entrenchment[25] is less important than the fact.

[22] 384 U.S. 436 (1966). *See, e.g.*, Connecticut v. Barrett, 479 U.S. 423 (1987); Colorado v. Spring, 479 U.S. 564 (1987); Moran v. Burbine, 475 U.S. 412 (1986); Colorado v. Connelly, 479 U.S. 157 (1986); Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Mosley, 423 U.S. 96 (1975), *aff'd*, 254 N.W.2d 29 (Mich.), *cert. denied*, 434 U.S. 861 (1977); Michigan v. Tucker, 417 U.S. 433 (1974).

[23] Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Scalia, J., concurring).

[24] *See* Dennis Camire, *Louisiana Lawmakers Disagree on How the Year Went in Congress*, Dec. 18, 1991 (Republican Jim McCrery states Democrats control the Senate "lock stock and barrel"), *available in* LEXIS, Nexis library, Currnt file.

[25] The term "beltway" has come into common parlance to refer to Washington D.C. and its surroundings. More particularly, it refers to the elite governing class, rather than to the general inhabitants of the region that includes Washington D.C. and nearby suburbs in

The power elite in Washington, D.C. includes appointed and elected officials, as well as lobbyists and others who share a common political culture. Although congressmen and Senators have a toe in their home states, they associate in the local beltway with professional colleagues from both parties, as members of an elite class. Staffers, bureau chiefs, and heads of executive departments round out the social and professional cadre of the leaders of our nation.

It is not surprising, therefore, that Supreme Court nominees often descend from this group. Justice Rehnquist was an attorney on the White House staff. Since his appointment, the two most controversial and divisive confirmation battles have concerned Washington insiders. Justice Thomas first worked as an aide to Senator Danforth and then held high offices as a political appointee in the executive branch. He was confirmed only after a process so grueling that he stated that he wished he had never been nominated. Prior to Justice Thomas's nomination, another beltway nominee, former Solicitor General Bork, ultimately failed to be confirmed in a similarly controversial confirmation battle.

The strong challenge to both the Bork and the Thomas nominations did not emanate from the Senate itself, but from the country. A Supreme Court appointment may be important to the nation, but is not of great concern to the average Senator. A republican Senator who broke with the President would do so at substantial cost, yet, there is no mechanism to insure that democratic Senators oppose confirmation in unison. Inevitably, there will be favors owed or sought. Token opposition of the President's choice would only become true rejection when fortified with demands from back home.

In the case of the two beltway nominees, Bork and Thomas, people back home did object. In the case of the Bork nomination, "People for the American Way" joined a coalition of interest

Virginia and Maryland. *See, e.g., Rep. Swift's Visit—Hazardous Waste Not Forgotten as an Issue Needing Attention*, SEATTLE TIMES, Nov. 10, 1991, at A23; *see also* Garry Sturgess & Eric Effron, *Thomas Tempest Leaves Losers in Its Wake*, N.J. L.J., Oct. 31, 1991, at 15 [hereinafter *Thomas Tempest*] (referring to influence of "inside the Beltway elites" on candidate); Hearing of the House Armed Services Committee, Dec. 13, 1991 (different mentality inside Beltway than rural Western Maryland), *available in* LEXIS, Nexis library, Currnt file.

groups in order to lobby effectively against Judge Bork on a national scale.[26] In a true grass-roots effort, the lobby convinced the Senate that Judge Bork was an extremist, or at least, that there was more to lose back home than there was to gain in the beltway by supporting his nomination.

The objection from back home with regard to Justice Thomas was a charge of sexual harassment leveled from a Professor of Law in Oklahoma. The Senate was both shocked and outraged by this torpedo from the heartland.[27] They empathized with Justice Thomas, not only as a particularly privileged male, but also as a Washingtonian with provincial problems. Prior to this assault from the heartland, Justice Thomas was well on the way to confirmation in spite of inadequately explored allegations that his character was seriously flawed. A national outcry resulted in a delay in confirmation. Although Justice Thomas was eventually confirmed, the Senate has been criticized from both the Right and the Left for the way it conducted the proceedings.[28] From a Senator's point of view, the nomination was politically costly.[29] Although the outcry ultimately failed to materialize in sufficient numbers to block confirmation, the political cost back home was real.

Beltway candidates may be convenient appointees for the President, but their selection may continue to be costly to the Senate. More importantly, they may prove to be costly to the nation. The Supreme Court does not ride circuit in any true sense. It too may be in danger of becoming a "beltway institution," cut off from the

[26] People for the American Way also opposed the Thomas nomination, but did not use the all-out advertising tactic it had relied upon in opposing Judge Bork. *See* Douglas Frantz, *Emotions Swirl over Fairness of Hearing Process; Committee: Thomas and Biden Differ over Role of the Inquiry. At Issue is Whether the System is Out of Control*, L.A. TIMES, Oct. 13, 1991, at A15.

[27] *See Nightline: A Town Meeting: A Process Run Amok: Can it Be Fixed?* (ABC television broadcast, Oct. 16, 1991) [hereinafter *Nightline*], *available in* LEXIS, Nexis library, Currnt file. A particularly revealing discussion of the Senate Judiciary Committee process occurred on the ABC News *Nightline* television program hosted by Ted Koppel on October 16, 1991. In that discussion, Senator Simpson referred to the charges of Professor Hill as a "low blow" and as "throwing stuff over the transom." *Id.*

The transom metaphor is consistent with the notion of the beltway as a tangible barrier, a closed door locking out the rest of the nation. Like a "bolt from the blue" or a "shot out of nowhere," "throwing stuff over the transom" suggests an invasion of supposedly safe space by an outsider.

[28] *See id.*

[29] *See Thomas Tempest, supra* note 25, at 15.

realities of the rest of the nation. This is particularly so if its ranks are to be filled from the capital's elite rather than from the most qualified persons in the entire nation.

III. The Partisan Political Split

Indisputably the process of selecting a nominee is complicated; neither Republicans nor Democrats totally dominate the process. However, the Senate has demonstrated that it is willing to confirm even conservative candidates, so long as the nomination does not come at the expense of votes back home.[30]

The most liberal of Senators are able to work with the most conservative of Presidents when both are politically advantaged by the interaction. Why then, can't the President's operatives unite with the Senate Judiciary Committee to agree on a list of highly qualified and acceptable candidates?

Both the President and the Democrats on the Judiciary Committee have, in the past, concluded that there is a partisan advantage in continued controversy. Apparently, the President can score points with parts of his constituency by going to battle with the Senate liberals. No glory need be shared with the opposition if a nomination is confirmed through an embattled victory. In the case of defeat, another nominee can always be had. Similarly, democratic Senators can maintain their liberal constituencies by opposing the President's will, even if they do so ineffectively. A victory benefits the President, as does an occasional defeat. Defeat benefits the opposition Democrats, so long as there is the occasional victory. The balance of power is maintained, and both parties benefit by the continued battle. At least, so it has been in the recent past.

However, Americans are beginning to see the damage to the nation caused by the partisan wrangling over Supreme Court

[30] The majority of the Court currently consists of Reagan/Bush nominees. Justices O'Connor, Scalia, and Kennedy were Reagan appointees; President Bush nominated Justices Souter and Thomas. To these should also be added Chief Justice Rehnquist. Originally a Nixon appointee, he was elevated to the Chief Justice chair by President Reagan. In addition to Justice Rehnquist, President Nixon appointed Justices Blackmun and Powell. Justice Stevens was appointed by President Ford. All of the Justices sitting today were nominated by a republican President. All were confirmed by a democratic Senate.

nominees. When the complaints from back home overcome the political points scored by continued conflict, a new spirit of cooperation and statesmanship may begin to prevail. Such a change, if it comes at all, will not come too soon.

IV. The Process: A Need for Reform

There is, among the electorate, an increasingly vocal sentiment to "throw the politicians all out."[31] Perhaps this sentiment, coupled with the obvious debacle of the Thomas nomination, will encourage future Presidents, in consultation with the Senate, to draw a long list of the most highly qualified men and women in the nation. Should another vacancy arise, the selection should come from that list.

If the President does not develop a selection criteria with greater emphasis on candidate quality and less on single-issue politics, the Senate could take the high ground by doing so itself. Recent exposure to the public eye may inspire the Judiciary Committee of the Senate to draft some standards in advance, documenting the qualities they expect of a Supreme Court Justice. A public expression of objective criteria would permit the Judiciary Committee and the Senate to exercise a more positive role in the process.

A process that focuses on qualifications need not preclude other factors, including political party affiliation and ideology, from consideration. However, some standards other than ideology, partisanship, and cronyism, stated as objectively as possible and in advance, either by the President or the Senate, would surely help to restore public confidence in the process.

Ultimately, both the President and the Senate should be leery of nominations from the beltway. No matter how competent and honorable the candidate, there is a danger of insularity on the Court, as well as the likelihood of opposition from back home.

[31] The most recent election was marked by an anti-incumbent fever. In addition, there have been a number of voter initiatives to limit the terms of elected officials. *See* Marshall Ingwerson, *U.S. Elections Display Voter Ire at Incumbents,* Christian Sci. Monitor, Nov. 7, 1991, at 1; Paul Jacobs, *Schabarum to Seek Term Limits for California Congressional Delegation,* L.A. Times, Nov. 6, 1991, at A3, A4.

Conclusion

In the end, the American public has the power to resolve the problem simply by electing a Congress and a President from the same party. In selecting that party, it would do well to consider the role of both parties in creating the current cloud over the reputation of the Court. Who has done the better job—the President in selecting the brightest and best possible Supreme Court candidates, or the Senate in fulfilling its obligation to advise and consent?

Regardless of the outcome of the political process, the Supreme Court Justices hold the fate of the Court, as an institution, in their hands. The quality of the nominees will be judged by their performance as ratified Justices. When performing their judicial functions, however, the Justices should be ever mindful of the danger to the Court and the process when they step out of their judicial roles.