

COMMENTS

EVALUATING JUDICIAL CANDIDATES

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I strongly agree with Justice Grodin's observations and conclusions. The California Judicial Retention Election of 1986 revealed many dangers of popular participation in the review of judges. Three justices were removed from the bench because people perceived them as unwilling to execute a sufficient number of prisoners. The particular decisions and the merits of the justices' reasoning went virtually undiscussed in the popular arena. As Justice Grodin notes, the legacy of 1986 could be that justices facing retention elections will decide cases with an eye, perhaps subconsciously, on how their rulings will affect their chances at the polls. The ideal of a judiciary insulated from partisan politics protecting fundamental rights from majoritarian pressures will be rendered illusory. At a minimum, there will always be the possible appearance that justices are deciding cases not according to their interpretation of the law, but to please the electorate.

Thus, I agree with Justice Grodin that electoral review of justices should be abolished. Moreover, so long as retention elections exist, people should not evaluate judges based on their decisions in particular cases. Instead, to assure judicial independence, votes should be cast against justices only if they demonstrate that they are unfit for office, corrupt, or incompetent. Any other standard risks encouraging justices to shape their decisions to curry electoral favor.

Thus, my commentary on Justice Grodin's paper is not critical, but rather is an exploration of some of the ideas it generates. The recent election powerfully illustrates that Justice Grodin's proposals are not likely to be followed in the foreseeable future; judicial retention elections

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are not going to be eliminated in California, and people are not going to limit the scope of their evaluation. In light of this unfortunate reality, there are several questions of a practical nature that must be addressed. First, what should be the approach to such elections?

Second, Justice Grodin's opposition to the scrutiny of judges' records as part of retention elections raises the related question, how should the United States Senate evaluate potential justices to the Supreme Court? Is it the corollary of Justice Grodin's position that the Senate was wrong in rejecting Judge Robert Bork because of his conservative ideology? Justice Grodin limits his remarks to the 1986 California situation. In light of the events of 1987, however, his conclusion raises the question of whether it is possible to draw a meaningful distinction between the campaigns against Robert Bork and Rose Bird.

Third, if in the selection process individuals are evaluated on the basis of their likely performance on the bench, what evidence is relevant to that evaluation? Is it appropriate to ask nominees their views about judicial methodology, their opinions about previously decided cases, or their positions on hotly contested issues?

I

Justice Grodin identifies many serious dangers presented by popular review of judges. If anything, Justice Grodin understates the nature of the campaign waged against him and Justices Bird and Reynoso. Television and radio commercials explicitly asked voters to cast their ballots against these justices and to vote for the death penalty. A carefully orchestrated media campaign employed family members of crime victims who recounted stories about how the California Supreme Court had reversed the death sentences of murderers of their loved ones. No mention made in these or any other commercials concerning whether the death sentences should have been reversed based on the *legal* merits of the cases. Nor was any mention made of the fact that in the vast majority of these death penalty cases there were egregious errors committed by the trial courts—as reflected in the fact that forty of sixty-one death penalty cases were unanimous and another sixteen were either six-to-one or five-to-two decisions to reverse the death sentence.

The media campaign against the justices received heavy contributions from big business interests that were angry with the court's decisions protecting consumers', tenants', and employees' rights. The supporters of the incumbent justices, on the other hand, had less resources and had difficulty conveying the merits of the court's decisions

to the voters. They found it impossible to explain complex constitutional decisions in commercials lasting only thirty seconds. The California election was not the occasion for serious public discussions about legal doctrines or the proper role of the court, as were the more recent Senate confirmation hearings concerning Robert Bork's nomination to the United States Supreme Court. Instead, the issues were trivialized so that the failure of the court to carry out the execution of convicted murderers was taken as irrefutable evidence of judicial incompetence. Capital punishment is a powerful symbol, and an electorate that was frustrated with crime and with the criminal justice system saw the retention election as a means of assuaging that frustration.

It is too soon to know whether 1986 will be a historical aberration in California or whether it will be a precedent which shapes future retention elections. On the one hand, it might empower those who wish to defeat justices with the knowledge that a concerted, well-financed media campaign can shape public opinion. At minimum, it might cause justices to increase their fundraising to prepare for election fights—a practice, as Justice Grodin notes, that results in judicial campaign committees raising money from those who will appear before the judges. This, in turn, might cause people to wonder whether decisions made in the months before a retention election are a reflection of the justice's convictions or a move to appease the voters.

On the other hand, the 1986 experience might be a reflection of a unique combination of circumstances. There was a single, visible issue to galvanize voters. Largely due to defects in a poorly worded death penalty law, the court had a strikingly one-sided pattern of decisions on the issue. The chief justice was a controversial figure, having won her last retention election by the smallest percentage in California history. She, and two of the others facing electoral review, were appointed by a former Governor who had become very unpopular. Perhaps most importantly, the opponents of these justices realized they could completely change the ideology of the court if their campaign succeeded. If the three targeted justices were defeated, the conservative Governor (who was predictably victorious in his own campaign in 1986) would replace the liberal justices with conservatives who would be far more acceptable to these opponents.

Rather than wait for the 1986 experience to repeat itself, I agree with Justice Grodin that electoral review of judges should be abolished in California and elsewhere. Justice Grodin identifies three powerful arguments for the elimination of such elections. First, judges should exercise their discretion according to their best judgments about the law and its

application to particular cases, not according to how decisions will affect the polls. Indeed, the entire concept of the rule of law *requires* that judges decide cases based on their views of the legal merits, not based on what will please voters. The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this countermajoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their rulings.

Second, elections are a particularly poor way of evaluating judges. Because few people read judicial decisions, popular opinion will be shaped by short television commercials and mass media characterizations of judges.

Third, fundraising for judicial elections creates, at least, the appearance of impropriety. As Justice Grodin observes, public disclosure of campaign contributions means that judges can know who donated both money for and against them. There will be the inevitable suspicion that certain judicial votes were influenced by the dollars spent in the election campaign.

Thus, I strongly favor the abolition of judicial elections in all states. Whether judges are given life terms (as in the federal system) or given long fixed terms is less important than abolishing electoral review. Realistically, however, this will not happen in California in the foreseeable future. Most people regard the defeat of the three justices in 1986 as a triumph of democracy. I cannot imagine the people, either through a referendum or through the legislature, eliminating retention elections. Forty-six states have some form of electoral review of judges and it is unlikely that many will eliminate this practice. There is a strong populist streak in this country that makes limiting the power of voters quite difficult politically.

Justice Grodin proposes that so long as retention elections remain, voters confine themselves to narrow criteria, such as whether the justice performed competently and honestly while on the bench. Again, I agree with Justice Grodin that to preserve judicial independence, elections should not serve as popular referenda on the court's decisions. But again, I am skeptical of whether such a limitation on the scope of electoral review will occur. During the 1986 election, defenders of the justices campaigned on a theme that politics should be kept out of the courts; that justices should not be evaluated based on their rulings in particular cases. Similarly, in 1987 the Reagan Administration argued equally unsuccessfully that nominees for the United States Supreme Court

should be evaluated solely on their professional qualifications and not on their views on particular issues. Both cries to limit the evaluative criteria failed resoundingly. It appears that judges are inevitably going to be evaluated based on their past or likely rulings on specific, controversial topics.

Thus, while I support Justice Grodin's proposals, they seem too utopian. The search for a solution must focus, more realistically, on alternatives to limit the ill effects of judicial elections. For example, the problem of fundraising needs to be directly addressed. Possible solutions include very strict limitations on campaign contributions and even public funding of judicial retention elections. The problem of an ill-informed and misinformed electorate must also be addressed. The bar must consider ways of better educating the public about incumbent judges and their performance. Too many people received their information from short, emotional, highly misleading commercials. Attorneys and bar groups—opinion leaders on matters of law—deserve blame for the failure to better educate people about the justices and the court in 1986.

Another problem that needs to be addressed has to do with the frequency of retention elections in California. Although judges have twelve-year terms in California, they face retention elections in the first general election after their appointment. Thus, if they were appointed to fill an unexpired term, they face elections when that term is completed. It might be more feasible politically, to decrease the number of retention elections so that justices would truly face only one election every twelve years or longer.

In other words, until it seems politically feasible to eliminate judicial elections, the crucial question is how can they be conducted in the least damaging way. Now, while the experience of 1986 is still fresh in mind, this question must be addressed.

II

Although Justice Grodin confines his remarks to state judicial elections, the themes raised have relevance to the evaluation of nominees for the Federal bench. In fact, there is an ironic parallel in the events of 1986 and 1987. In 1986, liberals in California argued for evaluating the justices without regard to their votes in particular cases; they contended that evaluation should be solely in terms of competence and honesty. Conservatives, by contrast, emphasized the need for scrutiny of the justices' voting records on controversial topics such as capital punishment.

But in 1987, the rhetoric was reversed. Liberal opponents of Robert Bork argued that he should be rejected because of his unacceptable views on issues such as civil rights, privacy, and freedom of speech. On the other hand, conservatives contended that such an inquiry was improper and threatened judicial independence.

Were both sides simply using the best available arguments, despite the inconsistencies, to advance their political agendas? As someone who actively campaigned against Judge Bork's confirmation and in favor of the retention of Justices Bird, Grodin, and Reynoso, I struggled to find a principled way to reconcile my seemingly inconsistent positions.

There are at least two ways to distinguish the California retention election from the Senate confirmation process. First, ideology should play a role in selecting judges, but once they are confirmed, the need for judicial independence requires that it play no role in evaluating their performances for retention in office. Because judges' beliefs affect their decisions, it is appropriate to consider ideology in choosing and approving them for judicial office. As Justice Grodin explains, judges possess substantial discretion in deciding cases; thus, the individual judge's views inevitably will influence decisions. It is no accident that virtually every president in history has selected judicial nominees who shared the incumbent administration's basic political beliefs.

It is thus appropriate, and inevitable, that Presidents and governors consider the probable voting patterns of their appointees to the bench. It is also equally proper for members of the Senate and state ratifying bodies to consider a nominee's ideology when casting their votes. For example, Ronald Reagan chose Robert Bork precisely because of Bork's very conservative views about constitutional interpretation and individual rights. The Senate rejected him exactly because of those views, which fifty-eight Senators believed were outside the mainstream of academic and judicial thought.

Once judges are on the bench, however, they should be completely insulated from the judgment of politics. The best way to ensure an independent judiciary, short of abandoning retention elections, is to avoid using agreement with the judges' previous rulings to decide whether they should be retained in office. Retention elections should not be viewed as popular referenda on the judges' decisions. As Justice Grodin argues, review should be limited to the question of whether the judge is competent and honest in performing the duties of the office.

Thus, it is possible to distinguish the process of initially placing someone on a court, where considerations of ideology are appropriate,

from a retention process, where review should not be based on the judge's actual rulings while on the bench. Although I believe in this distinction, it is not without problems. For example, when a judge is being elevated from a lower to a higher court, should that judge's previous decisions be considered? When the Senate evaluated Robert Bork should it have considered his votes as a judge on the United States Court of Appeals for the District of Columbia Circuit? When William Rehnquist was being considered for the position of Chief Justice should the Senate have considered the fact that he never once voted to reverse a death sentence? (It was ironic that conservatives used Rose Bird's failure to ever affirm a death sentence as proof of her closed-mindedness and improper approach to judging, but obviously found nothing objectionable in Rehnquist's equally consistent voting pattern).

Where prior rulings are a basis for evaluating judges, whether for retention or for appointment to a new post, there is the risk that the judge will alter his or her decisions in order to please the evaluators. Admittedly, a judge who faces a certain retention election has more incentive to be influenced than a federal judge who has only a relatively small chance of elevation to a higher court.

A second way of distinguishing the California retention election from the Senate's consideration of Judge Bork is in terms of the nature of the evaluators. There is a difference between review by millions of voters, many of whom are poorly informed, and a decision by the Senate, one hundred individuals who are likely to be well prepared about a controversial nominee for the federal bench. The argument is that the Senate is in a far better position to substantively evaluate a potential judge than are the voters. For example, the Senate Judiciary Committee exhaustively questioned Robert Bork and many other witnesses. These Committee members were thoroughly prepared by staff members. Without a doubt, many California voters had little more information than that conveyed in short television commercials.

Again, although I find this distinction persuasive, it is overdrawn. Senators are influenced by how voters will perceive their conduct. Certainly many Southern Democratic Senators were influenced to vote against Robert Bork because of political pressure from black constituents who announced that the Bork vote would be used as a litmus test for evaluating the Senators for years to come. At the same time, some who voted against the justices in California were very well informed.

Ultimately, the concern is whether there is any principle to guide the evaluation of judicial candidates. A cynic might say that the events

of the past two years illustrate one principle: if your position with regard to the appointment of a particular judicial candidate is consistent with popular opinion regarding that candidate's specific views, then you take the position that those views are the proper subject of examination; if, on the other hand, your position is not consistent with popular opinion regarding the particulars, you claim that evaluation should focus on general competence and qualifications, not particular issues. My suggestion is that there is a principle that liberals and conservatives should follow in the future: it is appropriate for the Senate to consider a nominee's ideology in the same manner as is done by the President, but voters, especially in retention elections, should not base their decisions on the justice's prior rulings. Although the principle is not unassailable, there is a powerful distinction between initial appointments and on-going review, and between Senate evaluation and popular elections.

III

The above discussion raises one additional issue that warrants consideration. If it is appropriate to evaluate nominees for a court on the basis of their likely performance on the bench, what evidence is relevant to that evaluation? Few nominees will have produced detailed written descriptions of their views, such as the many articles and speeches that were available in evaluating Robert Bork. The issue inevitably arises concerning what questions are appropriate in scrutinizing candidates.

It is possible to imagine a continuum of questions that a nominee might be required to answer as a prerequisite to appointment. At one end of the continuum, the questioning might be confined to questions concerning the nominee's background and experience. Alternatively, the inquiry might include questions designed to ascertain the individual's general approach to judging, such as his or her views about the role of precedent and the appropriate judicial methodology in constitutional cases. Another possibility might be to ask the nominee how he or she would have voted in particular cases that have already been decided by the relevant court. Still another alternative might be to question the nominees concerning their personal views on controversial topics, without asking how they would vote on any particular case; for example: what are your views about abortion, school prayer, or affirmative action? At the opposite end of the continuum, the questioning might include inquiry into how the individual would expect to vote on particular cases that would likely be before the court in the future.

If Presidents and governors choose individuals largely based on predictions about how they will perform on the bench, why shouldn't judicial candidates be asked directly about their views? And if the nominator can obtain the information, should not the approving body hear the same answers?

I believe that much of our reluctance to permit detailed inquiries to candidates about their views is based on anachronistic assumptions about the nature of judging. If judges had little discretion and were simply mechanically applying the law, then the identity and views of the individuals on the bench would matter little in determining results. But in the post-Legal Realist world few believe in such a formalistic approach to judging. Because a judge's views inevitably affect his or her decisions, the nominator and the evaluator should be informed as to those views. To artificially limit the inquiry would be to participate in a charade designed to perpetuate an anachronism, thereby forcing the nominator and the evaluator to guess as to essential decisional criteria. It is also argued that if individuals were forced to state positions on controversial issues prior to being confirmed, the appearance of judicial neutrality would be lost. Sometimes litigants would be confronted with judges who already had popularly announced positions on the issues presented in their cases. I do not dismiss this concern; the appearance of justice is enormously important. I wonder, though, whether the illusion comes at an unacceptable price. All nominees come to the bench with some combination of settled views and unsettled opinions. Hopefully, all will leave open the possibility of persuasion once seated on the court. Yet, if a judge has views on a topic, I would think that the litigant is better off knowing that and addressing them directly, rather than guessing and pretending that the judge is a blank slate.

Thus, I contend that the scope of Senate inquiries should be broadened. At minimum, nominees should be required to explain their judicial methodology: when do they believe precedent should be overruled; do they believe that it is appropriate for the Court to protect rights not stated in the Constitution's text or intended by its drafters? Also, I believe it is appropriate for nominees to describe their positions on past Court decisions and on controversial issues. Robert Bork was rejected because of his writings on these topics; an individual with identical views should not be able to secure confirmation simply because he was less prolific or scholarly. Nominees, of course, can state that they are undecided about issues; but the fact that an issue might come before the Court is no reason why it should not be discussed. I do not favor requiring a nominee to answer as to how they will vote on specific issues because

such an inquiry is unnecessary; the same information can be gained through other less direct questions. Furthermore, the very essence of judging is deciding cases narrowly on specific facts, not on some preconceived notion. Regardless of the judge's views on any given issue, he or she should not be forced to commit to a position without the opportunity for careful consideration, in a specific factual context, of all the implications of the decision.

I recognize there are major dangers to my position. Various groups will formulate issues that they will use as litmus tests for evaluating candidates. Those who oppose legalized abortions might ask every nominee his or her views on the subject and automatically vote against those who express support for a pro-choice position. This is hardly a fanciful possibility as demonstrated by the Republican platforms in 1980 and 1984, which pledged that only individuals committed to the anti-legalized abortion position would be nominated to the Federal bench. The Reagan Administration's judicial selection practices make clear that such ideological screening already occurs. The Reagan Administration is not unique even though its more extreme ideology, compared to most past administrations, makes ideological criteria more visible. Increasing the information available does not create a new danger.

Ultimately my position is that nominees for a new position on a court should be evaluated in terms of how they are likely to perform. Questions designed to gather accurate information for this task should become the norm. Again, I emphasize that this suggestion is limited to evaluation of nominees for a position on a court, it should not be applied to retention elections which are distinguishable for the reasons discussed above.

CONCLUSION

Without a doubt, the events of the last two years—the defeat at the polls of Justices Bird, Grodin, and Reynoso, and the defeat in the Senate of Robert Bork—raise important questions about the manner of selecting and evaluating judges. Justice Grodin's paper provides an occasion for thinking again about how judges should be selected and held accountable. I deeply hope that legislators in California and elsewhere will be moved by his paper and his experience and will act to assure that the events of 1986 will never be repeated.