

The Case For A Nonpolitical Federal Judiciary

SEPTEMBER 23, 2020

This article was originally published in [Law360](#). Any opinions in this article are not those of Winston & Strawn or its clients. The opinions in this article are the authors' opinions only.

In the United States, justices are not elected to the highest court in the land. And for good reason. It's a terrible idea and a very toxic way to think about how an independent federal judiciary should work.

In our federal system, judges are the exact opposite of political partisans. It is not some naïve fairy tale that they are supposed to act as neutral arbiters of the law and decide cases, based not on the judge's preference for a particular litigant, or what the judge would herself want to see as the "right" result, but on what the law—found in statutes and prior case authority—requires.

It is sometimes jarring to say, but absolutely true, that judges, especially those who sit on the U.S. Supreme Court, are not moral actors, trying to divine the correct moral result. Only if a particular moral result is embodied within a particular law is it correct to say that a judge's decisions are in any way the result of a moral judgment of right and wrong.

To many of our fellow citizens who are not lawyers or judges themselves, this can seem like an odd result. After all, when a federal district judge strikes down as unconstitutional a state statute that imposes an undue burden on a woman's right to choose whether to seek an abortion, isn't that judge obviously a "pro-choice" judge as a moral matter? The answer should be plain: Not at all.

In fact, the judge's personal views about abortion, gay rights, or any other political issue should not enter into the analysis at all. Indeed, judges swear a solemn oath upon ascending the bench that they will not rule based upon their own beliefs, but rather on following the Constitution and the laws of the United States. And if a judge's personal views do guide a ruling, that judge is not being true to the oath they took to decide cases fairly and impartially, and on the basis of the law, and nothing else.

Put another way, a judge that allows her personal views of morality, or politics, to enter into any judicial decision is being a bad judge. It would be no different than a referee in football throwing a penalty flag against one team because he wanted that team to lose.

But wait. Aren't judges, just like referees, human beings with real preferences, biases and opinions? Of course. That's why it requires special skills and talent to act as a judge.

When the officials are selected to work the NFL's Super Bowl game every year, it isn't done by lottery or popularity. The officials are chosen because of their skill in making the correct calls, based on the rules and the circumstances on the field of play, and nothing else. The officials for that game are not a mixture of people who favor both teams to create "balance," and one team doesn't get to select an official whom they believe would be favorable to them.

So it should and must be for the United States Supreme Court. As two longtime judges and a trial lawyer, respectively, we have become increasingly disconsolate when we see partisan language and analysis infect our federal or state judicial systems.

It is commonplace now, and has been for years, that when the media report any kind of controversial or high-profile federal court decision, the identity of the president who appointed that judge is part of the story. Thus, the media reports are littered with references to the "Obama judge" or the "Trump judge" who made a particular decision. We cannot think of our judges that way, else we make the independent judiciary, sworn to uphold the law, nothing more than Cowboys fans or Patriots fans.

We are seeing this play out in a particularly awful way after the death of Justice Ruth Bader Ginsburg. Within hours of her death, senators and other elected officials from both parties were staking out their political positions regarding when the vacancy should be filled and whether the current president, or a subsequent one, should be the person to nominate a replacement.

We think such discussions are bad for the country and bad for the reputation and, ultimately, the public's perception of the legitimacy of the Supreme Court.

It was within all of our lifetimes that discussions about who would be a good justice of the U.S. Supreme Court did not begin and end with a partisan political view of what kind of justice would be better for a particular "side." Instead, the debate focused on whether the nominee was qualified or, as was famously the case with the nominations of Abe Fortas and Harrold Carswell, for example, whether the nominee had some ethical shortcoming that made them a questionable nominee.

Some will point to the controversial nomination hearings of Judge Robert Bork as a turning point but, in fact, many of the prevailing Democratic arguments against him were in actuality criticisms of his views as being out of the "mainstream" of judicial thinking. Similarly, the Republican opposition to the nomination of Elena Kagan was framed as a debate about her qualifications, given that she had never before been a judge, even though she held an esteemed legal position as the dean of Harvard Law School.

For the last 20 years or so, at the insistence of both parties, Supreme Court nominations have been fierce ideological battles. So much so that when a confirmed justice rules in a way that does not support the ideological viewpoint of the party that supported the nomination, he is characterized as a "disappointment" or a "turncoat." Chief Justice John Roberts and Justice Neil Gorsuch have both been so characterized after delivering votes in cases that conservative pundits did not view as toeing the party line.

We remain convinced that all citizens should appreciate the value of an independent, nonideological judiciary and understand the consequences to our institutions if that independence is in any way tainted. Our elected leaders should speak forcefully, deliberately and carefully in terms of a nominee's judicial qualifications only, and not pander to the politics of one side or another. Consensus is not a dirty word and the idea of seeking a nominee who would have broad bipartisan support ought not be viewed as a childish fantasy. Indeed, the consensus of the citizenry is one critical component of the legitimacy of the Supreme Court.

To use a deliberately provocative metaphor, professional wrestling was, at one time in the distant past, a real sport of skill, talent and effort where the results of a match were not predetermined. Not so today of course. As a country, we probably haven't lost much by losing authentic professional wrestling. We would lose quite a bit if we lost our independent judiciary.

5 Min Read

Related Locations

Dallas

Related Regions

North America

Related Professionals



Thomas M. Melsheimer