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INTRODUCTION

RESTORING REASON AND CIVILITY TO THE JUDICIAL SELECTION PROCESS

Rodney A. Smolla *

Few subjects of academic and public policy inquiry are more pressing on the fate and health of the nation than the process by which our democracy selects the members of its non-democratic branch, the judiciary. Appointments to federal courts, particularly to the Supreme Court of the United States, have become increasingly fractious, politicized, and partisan. The appointment wars have become enveloped in the culture wars.

In the aftermath of the two presidential election victories of President George W. Bush, the national map is now commonly colored as “red” and “blue.” We have red and blue states. Do we as a nation want to think of the judicial selection process in the same red and blue hues? Are senators red and blue? Are Supreme Court nominees red and blue?

Those who are content with a red and blue confirmation process have any number of justifications to proffer. One is a kind of fatalistic historical determinism. The confirmation process ought to be partisan and cut-throat; the thought goes, because *it is* partisan and cut-throat. This is history; this is what the process has become—and there is no turning back the clock. There is a cynical sense in some quarters that war is war, and all is fair. Besides, the other side started it.

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My own view is that while we may not be able to turn back the clock, for the good of the country we ought to move the clock forward. Let us call a cease-fire and disarm.

What might peace look like? I invite the reader to examine carefully the very thoughtful historical, political, theoretical, and legal insights of the contributors to this Symposium, and join in the national dialogue. We ought not pick Supreme Court Justices, or any federal judges, through resort to a discourse laced with glib euphemism, political slogans, or demonization.

Invoking the wisdom of Martin Luther King, Jr., we ought to measure the suitability of nominees by the content of their character. The touchstone should be character, not caricature.

Most critically, ideology ought not matter unless a nominee's views are demonstrably outside the perimeter of acceptable legal thought. This makes it appropriate to reserve as legitimate a senatorial rejection power in the extraordinary case in which a president has nominated a true maverick. Never say never. But in my view it ought not be deemed proper for a senator to vote "no" merely because the senator's prediction of the nominee's future judicial performance leads the senator to conclude that he or she would not agree with the nominee's likely voting pattern. Something more ought to be required.

If a nominee is otherwise well-qualified, my own view is that a senator ought to stand down and vote "yes" if the senator simply thinks that the senator, if he or she were on the same court as the nominee, would dissent from the nominee's opinions.

Why do I take this view? Admittedly, it is a tough position to swallow, for it means accepting on a court—on the Supreme Court in crucial cases—a voice that may change the fundamental direction of the country on some issue of profound importance. I believe, however, that there are larger values at stake.

The nomination wars exact a terrible, corrosive toll on the quality of our public discourse and on our respect for the rule of law. I am enough of a realist to accept that ideology and politics inevitably influence a jurist's disposition and rulings. Yet, I am enough of an idealist to believe that the judicial process is not and ought not become mere politics in disguise.

The more our political and opinion leaders politicize the nomination process, the more we politicize the law. The more we politicize the law, the more we weaken it, in substance and symbol.

In the fine articles that follow, you will find many different perspectives on these issues, and I have learned much from them. I hope you will also. On behalf of all who are connected with the law school, I wish to thank the Allen family for its generous support, and thank my faculty, colleagues, and *Law Review* members for all the terrific work that made this Symposium possible.
