



Ambassador Jeffrey L. Bleich – World Bar Conference

Remarks of Ambassador Bleich at the World Bar Conference, Sydney

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Thank you Peter for that kind introduction, and thank you Chief Justice Spigelman for those welcoming remarks. And thank you to the International Council of Advocates and Barristers for hosting this conference and inviting me to speak.

As Peter mentioned, before I was appointed Ambassador, I practiced law in the United States for over two decades. So people here refer to me as a “recovering lawyer.” Nevertheless, at the risk of falling off the wagon, I thought I’d share my perspective about one aspect of the American legal system that seems to be of interest to lawyers around the world. And that is the selection of Supreme Court Justices.

Now, judicial selection is something that I’ve watched from several different angles over the course of my career.

As a young lawyer, I clerked at the U.S. Supreme Court. I was at the Court when Justices Brennan and Marshall retired and I was there for Justice Souter’s confirmation. As a lawyer, I appeared before the Supreme Court, taught courses about the Supreme Court, and wrote dozens of articles about the Supreme Court. And finally, last year, as Special Counsel to President Obama I had a hand in the appointment of our most recent Justice, Justice Sonia Sotomayor. So I have seen confirmations from virtually every perspective.

Those of you who have watched confirmation hearings in the United States on television, know that it has become almost a form of theater. In fact, some confirmations recently have been almost a national obsession, with high television ratings. The failed confirmation of Justice Robert Bork, the narrow confirmation of Justice Clarence Thomas, the withdrawal of the nomination of Harriet Miers, the recent confirmation of Justice Sotomayor were avidly watched by people around the world, and were frontpage news. I’d like to talk a little about how it came to be that way, and what it means for American law.

For those who haven’t followed the U.S. as carefully, our Supreme Court confirmations tend to follow a certain pattern.

First, a vacancy occurs on the Court – either because a Justice passes away or steps down.



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The media immediately begin projecting how their replacement could affect decisions of the Court, and in particular how a new Justice might vote on hot button issues like abortion, the death penalty, affirmative action, and prayer in schools.

Political groups on both sides get very concerned, and begin to demand a particular candidate or type of candidate. There is a great deal of speculation about who the President has on his or her short list and who they will nominate.

The President then calls a press conference to announce their selection. The President explains why he believes this is the best person for the job. Invariably, they note that the person is brilliant, principled, honorable, and has an impeccable record as a lawyer and/or judge. The President explains that there was no political litmus test, and the nominee was chosen without any concern for their political views. Instead, the only criterion used was to ensure the person was fair and impartial, and would be faithful to the constitution.

At this point, the nomination goes to the U.S. Senate, where members of the Senate, their supporters, and the media, try to prove that what the President said was not true. Staffers pore over the nominee's record looking for any hint of controversy in any public statements they made -- no matter how long ago or in what context. Speeches, panel discussions, articles, opinions, briefs, law school transcripts, are all scrutinized. They also look at who they've associated with and what organizations they've belonged to. Senators who oppose the President seize on any opportunity to complain that the person is biased; they accuse the President of trying to stack the court with legal ideologues who are out of touch with "real" America. Senators who support the President are equally vigorous in complaining that these critics are engaged in baseless character assassination and that anyone who opposes the President's choice is simply politicizing the confirmation process.

Just when this sort of debate has reached a fevered pitch, the nominee is brought before the Senate Judiciary Committee for confirmation hearings. In our process, the nominee makes a statement and then must answer any and all questions posed by the Senators on camera while the entire nation watches.

I was at the Sotomayor hearings and this is a quite a spectacle. Seated beneath the horse-shoe of Senators are dozens of photographers who are piled on top of each other to take photographs of the nominee. The photographers have to stay low so that they don't appear on camera themselves. They discover pretty quickly that one picture of a person sitting behind a desk answering questions for 8 hours is pretty much like any other picture. So they wait and wait for any sign of movement. Then they pounce. If the candidate raises her hand to make a point, you here this spray of shutters clicking that sounds like a water sprinkler --- ch-ch-ch-ch-ch. In fact, Justice Sotomayor after a while



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seemed to do this just for fun. She'd say "on the one hand, on the other hand," just to hear the shutters click.

Anyway, depending upon the Senator, many of the questions are designed to get the nominee to say how they feel about some hot-button political issue. The candidate says repeatedly that they can't prejudge any substantive issues that might appear before; that they have no personal views about any of the issues that are raised; that they will review the facts and the law as presented in the context of a case; and they will faithfully apply the law. Eventually it becomes an endurance contest, with the Senators asking the same questions and the nominee giving the same answers until time runs out.

The Senators then explain how they are voting. Senators who oppose the nominee will say that they felt the answers were evasive and that they remain troubled that some prior statement by that candidate demonstrates the nominee may not be faithful to the Constitution. Senators who support the nominee will praise the nominee's candor and patience, and will tell the nominee that they have precisely the right qualifications and temperament to be a Justice.

Both sides will attack the other for being disloyal to the traditions of the Senate and the values of the Constitution. They will state that they are guardians of a time, way back when, when politics didn't influence decisions about the choice of jurists, and when politicians acted nobly.

After all this, the candidate is selected based on who has the most votes.

This is what happens whether the President is a Democrat or a Republican.

The question we all must ask afterward is whether it is true, as the Senators claim, that this system has broken down and we no longer choose Justices based on neutral principles; that we've instead allowed politics to infect this process. My view is that, in fact, this is largely how the American system was always meant to operate, and that by and large it works. I think some improvements could be made, but – as I'll explain in a minute -- if one looks back over the course of history, the selection of Justices has always been political, and yet the United States has managed to develop an excellent and effective legal system, with a very strong and respected Supreme Court.

If one goes back to the Constitution itself, the process of requiring the President to submit nominees to the Senate for its "advice and consent" was designed to ensure some political check on the President. The section of our Constitution that gives the Senate this power intentionally provides no standards for Senators to use. This is because the writers of the Constitution couldn't agree on any specific standards. So they compromised and provided none. They simply agreed that the President would choose the candidate, and



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the senate would consent . . . or not based on whatever criterion Senators use. Not surprisingly, Senators have used a combination of factors including many political ones.

Rejecting nominees is nothing new. The Senate has rejected nearly 20 percent of all the Supreme Court candidates Presidents have submitted to them. Specifically, the senate has rejected 28 of 147 candidates. On top of that, another 12 candidates, including for example, Harriet Mier, President Bush's original choice to replace Justice Sandra Day O'Connor, were withdrawn because the chances of Senate approval seemed dim.

The Senate has rejected candidates regardless of the popularity of the President or the Senate's belief that he made a nomination in good faith. The very first nominee to be rejected was a Justice nominated by the father of our Country, George Washington, the hero of the revolution, a man often considered our greatest president, and a man revered by every American child for his honesty and commitment to the nation. Even George Washington couldn't secure the nomination his first nominee to be Chief Justice.

The truth is, that with only a few very notable exceptions, Presidents almost always nominate highly qualified people for these jobs – lawyers who had good legal training, many years of successful practice or public service, and the sort of temperament that is likely to help them succeed on the bench. So, the main reasons that the Senate has rejected nominees have tended to be political ones.

Sometimes, the candidate may be too closely aligned with some controversial issue. For example, George Washington's candidate was rejected because he had supported a Treaty with France that some Senators had opposed. Or it could be that the nominee staked out a position on a range of issues where the Court is closely balanced, and changing one member could affect the outcome of a case. Both President Hoover and President Reagan had picks rejected because of concerns the nominee would shift the balance of the Court. Interestingly, in both cases, they went ahead and picked people who were just as conservative, but who managed to be less obvious about it. President Reagan's nomination of Robert Bork failed because people thought he was too aggressively conservative. Later, President Reagan nominated Justice Scalia who was confirmed unanimously, despite the fact that Justice Scalia is arguably just as conservative as Judge Bork would have been.

On the other hand, a candidate can be rejected for not being political enough. President Grant lost two nominees because Senators felt his picks were too impartial, they were nervous that they couldn't predict how the Justice might ultimately vote. This factor was probably also significant in President Bush's decision to withdraw Harriet Miers because of concerns among some Senators that she was not a reliable enough conservative.



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Now there are some very rare cases in which people are nominated who really do seem mediocre and not up to the job. But that is rare, and the results may explain why Presidents today tend to pick competent, qualified people. President Taft successfully nominated Justice Mahlon Pitney, although Pitney was considered an intellectual lightweight. Taft later got some form of karmic justice; after leaving the Presidency, Taft himself became Chief Justice of the Court and he was forced to serve with Pitney. Taft complained that Pitney was such an embarrassment that he refused to assign any opinions to him. President Chester Arthur picked a friend who had no idea what being a Supreme Court justice required. Five days after being confirmed, his pick, Roscoe Conkling decided he didn't want it, and he refused to be sworn in. But my favorite case involved a candidate who was actually rejected for a lack of competence. This was G. Harrold Carswell, nominated by President Nixon. There was so little good to say in support of Carswell's achievements that his Senate sponsor, Senator Hruska of Nebraska, defended the nomination by saying this:

“Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation aren't they, and a little chance? We can't have all Brandeises, Cardozos and Frankfurters and stuff like that there.”

Not the best argument.

But those exceptions prove the rule. The selection and occasional rejection of justices is only very rarely about qualifications or professionalism; most of the time it is about politics. Over 90 percent of nominees are members of the president's party, and they are invariably picked with the expectation that they will advance the president's goals. This may include some broad policy goal such as “strict construction” or “economic reform.” It may also mean some more limited political objective such as satisfying a particular interest group, geographical region, or a faction of the party. Likewise, the Senate does not approach confirmation based purely on ideals about judicial independence. Instead, it will vote at least in part on whether it supports or opposes the President and his goals, and whether it has the public support to defeat a nominee.

And so to me the definition of a confirmable Supreme Court nominee may come down to a fairly simple formula: a person who is not incompetent and has the good luck to be nominated when the President's party has a substantial majority in the Senate.

So this is my point in the end. We can't remove politics from the confirmation process and we don't need to. Politics has always played a large role in the process. If I have any specific concern, it is that by avoiding the real political nature of the process, we've distorted the nature of confirmation hearings. In 1987, Robert Bork was rejected in part because he was very vocal about his controversial views. Since then, Presidents and their



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nominees have refused to discuss their philosophies in anything but the most general terms. This has changed the process from being one that openly considers political issues, to one in which we simply guess about the political consequence of a confirming a candidate. So the challenge is not to hide politics, but to make the confirmation process more transparent.

So I do not lament the system of selecting Justices in the United States. Although it can still be improved, it remains largely in line with what the Constitution intended, and history has shown that ultimately, that process works.

Thank you, and I wish you a very successful conference.