

**TESTIMONY BEFORE THE U.S. HOUSE JUDICIARY COMMITTEE'S SUBCOMMITTEE
ON COURTS INTELLECTUAL PROPERTY, AND THE INTERNET**

Hearing on "Maintaining Judicial Independence and the Rule of Law: Examining
the Causes and Consequences of Court Capture

JUDGE NANCY GERTNER (RET.)

September 22, 2020

I was a federal judge for seventeen years, serving in the District of Massachusetts. I left the bench to become a full time Professor of Practice at Harvard Law School. I changed my full-time status to part time and continue to teach at Harvard Law School, Law and Neuroscience and Mass Incarceration and Sentencing. This semester, I am also teaching criminal law at Yale Law School.

My testimony today derives from my judicial experience. My goal is to describe what I see as the problem in the most dispassionate way I know how.

As a judge, I was especially concerned with the way the public viewed the institution of which I was a part. I testified in favor of cameras in the courtroom while I was on the bench because of my concern that the institution had to be more transparent. In an age of internet coverage of many of the institutions of government, when respect for the judiciary could no longer be assumed but had to be demonstrated, I wanted to open the doors of the court to the new virtual world. My testimony was in opposition to the position taken by the Judicial Conference of the U.S. Courts. I also spoke out about sentencing policy – particularly mandatory minimums and sentencing guidelines – which were unfair, irrational, and excessively punitive.

I testify today because of my concern about the public's growing view of the bench as partisan, and as such, not meaningfully different from the other branches. The legitimacy of the courts depends upon the public's belief in its neutrality. Their faith in the institution depends upon their trust that it is independent of the political process.

Attacks on the judiciary by our President undermine that legitimacy and that faith. When the President criticizes opinions with which he disagrees as coming from “Obama” or “Clinton” judges, he undermines all judges and invites disrespect for the institution. That is why Chief Justice Robert made it clear that “we don’t have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”¹

But the selection process for federal judges under the Trump administration may well undermine the Chief Justice’s observation. While in the past, there have not been Bush I, Bush II, Clinton or Obama judges, there are - or at least the public perceives there are - “Trump judges.” The administration has explicitly said as much; these are “his” judges. The unique judicial selection process of this administration has produced them. And the public’s perception of “Trump judges” could well infect the rest of the bench.

How you select a judge for a life tenured position is as important as *who* you select. How you select plays a role in determining the respect with which the public holds the bench. As I describe, this administration’s judicial selection process, unlike that of any other administration, has effectively ceded the work to one organization, the Federalist Society. The Federalist Society selects judicial candidates from a narrow pipeline of candidates who have its imprimatur, and virtually none other. And because it is making the selection, the Senate’s advise and consent role is necessarily undermined. The process can be rushed; it does not even pretend to bipartisanship.

Before I go further, however, I want to make clear that I am not debating the substance of the policies these nominees reflect. Nor am I addressing their qualifications. I want to address the impact of this selection process on the public’s perception of the neutrality of the judges that emerge from it.

The appearance of bias

Sitting Judges are subject to rules governing not merely the actuality of bias, but the appearance of bias. 28 U.S. C. § 455 (a) calls for a federal judge to be

¹ Robert Barnes, “Rebuking Trump’s criticism of ‘Obama Judge,’ Chief Justice Roberts defends judiciary as ‘independent,’ Washington Post, November 21, 2018.

disqualified not only when she is biased against a party, but whenever her impartiality “might reasonably be questioned.” It was this concern that animated the United States Judicial Conference to investigate privately funded programs for judicial education. Since 1979, such privately funded programs for judicial education had been the subject of considerable public discussion and criticism.² Several organizations petitioned the Judicial Conference seeking clarification of whether the code of judicial ethics allowed federal judges to attend these programs. The charge was that these conferences were a “veiled effort to lobby the judiciary,”³ that judges might be influenced by those who sponsor the programs and may become litigants before them. The issue was not the reality of bias; it was the appearance of bias to the public judges serve.

The Judicial Conference adopted a policy that provides for timely disclosure by educational program providers and the judges who attend the programs. Judges are to disclose the dates and times of the program, the topics, the speakers, the funding source, and the sponsors of the program. The goal was greater transparency to the public; party, attorney or the public could check on the local court’s website to determine whether a judge has recently attended a seminar covered by the policy. The judge may factor in who the sponsor was in deciding whether to attend at all.

While the situation is not entirely analogous, some of the concerns that drove the private seminar policy should apply to the judicial selection process – transparency about who is funding a judicial candidate’s campaign, who are the donors, how much money have they given, what seminars have they attended, etc.

In a similar vein, the Judicial Conference Code of Conduct Committee, released a draft of Advisory Opinion 117, which indicated that judges could remain members of the American Bar Association, but not the Federalist Society or the American Constitution society. The concern was that membership in these organizations, as opposed to attending conferences run by them, ran the risk of linking the judge to the policy positions of the organization of which they were a member. It may be false; the judge may well entirely disagree with some or all

² Bruce Green, *May Judges Attend Privately Funded Educational Programs? Questions of Judicial Ethics and Policy*, 29 *Fordham Urb. L. J.* 941, 942 (2002).

³ *Id.* at 943.

the organization's policies. While the Judicial Conference ultimately withdrew the opinion, in part because of the difficulty drawing lines between organizations that judges could be members of and those it could not, the controversy underscored my point. The issue was the appearance of bias, the impact membership would have on the public perception of, and respect for, the judiciary.

Judicial Selection Prior to the Trump Administration

While in the past, the public surely understood that the process for the selection of federal judges was political in the sense that the president nominated the candidates, subject to Senate confirmation, one thing was clear. No matter who the president was the pipeline for judicial appointments was wide and often bipartisan. The range of acceptable views was broad. The candidates were those in the mainstream of judicial thought, even if on the right or left side of that stream. In the confirmation of Elena Kagan as an Associate Justice of the Supreme Court, for example, Senator Lindsey Graham stated that he based his vote in favor of Justice Kagan not on whether he agreed with her views but rather on whether he believed she was qualified for the federal bench and situated in the mainstream of American legal thought. Senator Jim Talent agreed, making it clear that there was not "one narrow mainstream" of views, that a judicial nominee can hold "a wide range of reasonable positions."⁴

The Blue slip process insured a degree of bipartisanship. Under President Bush, for example, no single sitting federal judge was nominated by President in the face of a negative vote by the home state senator.⁵ Indeed, as Professor William K. Kelley pointed out in a Federalist Society Panel Discussion, in 2001 two of President Bush's ten court of appeals nominees were nominees of President Clinton who didn't get confirmed.⁶ One was a judge who had been nominated after the Democratic Party had lost the election.⁷

⁴ Wm. Grayson Lambert, *The Real Debate Over the Senate's Role in the Confirmation Process*, 61 *Duke L.J.* 1283, 1284-85 (2012).

⁵ Meryl J. Chertoff, William K. Kelley, William P. Marshall, Harold F. See, Jr., Diane S. Sykes, *Federalist Society Panel Discussion: Judicial Selection, Federal and State*, 32 *Am. J. Trial Advoc.* 453, 458 (2009).

⁶ *Id.* at 473.

⁷ *Id.* at 473.

Judicial Selection in the Trump Administration.

A judicial selection process that is truncated, intensely partisan, and that seems to depend upon the imprimatur of one conservative organization, directly affects the way the bench is perceived by the public, the appearance of bias standard of § 455(a). Even before the President was sworn in, his campaign announced a “slate” of nominees, in a way that resonated with the kind of slate one sees in judicial election. And it was no ordinary slate as Professor Hollis-Brusky has described. It had been “curated” by the Federalist Society to attract Republican votes.⁸ Leo described the list to President Trump (in an interview with *New Yorker* writer Jeffrey Toobin) as follows: “That’s a great idea- you’re creating a brand.”⁹

It is fair to say that the pipeline of candidates for that slate was extremely narrow, narrower than it had ever been before. It was restricted to candidates known to, identified by, and vetted by the Federalist Society. As Professor Hollis-Brusky has reported in her conversation with federalist society member Michael Greve, “on the left there a million ways of getting credentialed, on the political right, there’s only one way in these legal circles.”¹⁰ It was not simply a question of whether these candidates were in the judicial mainstream, as Senator Graham described; the issue was that they were all in one channel, or at least, that is how it appears.

Nor was the effort remotely subtle. At a 2018 Federalist Society gala, former Senator Orin Hatch noted: “Some have accused President Trump of outsourcing his judicial selection process to the Federalist Society. I say, ‘Damn right!’”¹¹ Indeed, in an earlier speech before the same group, Don McGahn, former White House Counsel under President Trump and Federalist Society member, joked that it is more than that; President Trump through McGahn has been “in-sourcing” judicial selection to that group.¹² Jeffrey Toobin referred to

⁸ Testimony of Professor Amanda Hollis-Brusky, “Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture,” (September 22, 2020) at p. 14.

⁹ Jeffrey Toobin, The Conservative Pipeline to the Supreme Court, *The New Yorker* (April 10, 2017).

¹⁰ Testimony of Professor Amanda Hollis-Brusky, supra n. 7 at p. 13.

¹¹ Caroline Richardson and Eric J. Segall, Trump Judges or Federalist Society Judges? Try Both, *The New York Times* (May 20, 2020).

¹² Id.

the Federalist society as President Trump’s “subcontractor” in the selection of Justice Gorsuch.¹³

And since the administration had effectively ceded the nominating process to the Federalist society, and Republicans controlled the Senate, nominations could speed through at a pace unheard of in other administrations. Not only was the input of the opposing party undermined but also that of a wide range of organizations. Leonard Leo, executive vice president of the Federalist Society, as the *New York Times* reported in 2017, “sits at the nexus of an immensely influential but largely unseen network of conservative organizations, donors and lawyers” all of whom are committed to filling the federal courts with those who share their ideology.¹⁴

Contrast this selection process with those of other Republic administrations. Indeed, in a Federalist Society panel discussion in 2009, Professor William P. Marshall was critical of an approach to judicial selection that looks very much like that of this administration. He said:

“ From my perspective, I read Attorney General Meese's papers that came out of the Reagan Justice Department talking about how Republican administrations needed to appoint judges with particular philosophies in order to be able to accomplish constitutional change. That does not sound to me like a blueprint for the appointment of judges who are going to apply the law in an evenhanded fashion. It sounds to me like Attorney General Meese believed judges should be picked with an ideological agenda in mind.”¹⁵

And he added,

“We now treat elections as if they are mandates to change the meaning of the Constitution. This, to say the least, is more than troubling. And we need to fix it.”¹⁶

¹³ Toobin, *supra* at n. 8.

¹⁴ Eric Lipton and Jeremy W. Peters, In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary, *The New York Times* (March 28, 2017).

¹⁵ 32 Am. J. Trial Advoc. 453, 460–61.

¹⁶ *Id.*

Professor William P. Marshall took his remarks one step further:

“I think we all need to do what Professor Kelley discussed. We all need to get above the game a little bit. We need to talk about qualifications more. We need to talk about other kinds of neutral criteria in order to be able to move the process along so that it is not broken and there is not a continual escalation of tactics... But I think it's going to have to be people like the people on this panel and others who talk about the necessity of trying to de-politicize the process if we're going to have the kind of judiciary we desire.”¹⁷

And he added that the politicization of the judicial selection process could well skew judicial decision-making:

“[I]t seems to license people to do what they otherwise might not do. It is one thing to have a political view when you come into office. It's another thing to be told by the election process that it is okay to apply that political view in your judicial opinions. I'm afraid the over-politicization of the process provides license to judicial nominees to seek to effectuate their political choices in a way they should not.”¹⁸

Conclusion

I do not go as far as Professor Marshall did in these remarks, that the politicization of the process will provide “license” to judicial nominees to implement their views – their agenda, if you will – after they have taken the oath of office and ascended to the bench. Nor am I addressing the qualifications of these nominees. I focus only on the process by which they were selected, what that process communicates to the public, and the ways in which it undermines the public’s perception the bench. If the public believes that the bench is nothing more than the arm of one political party, or worse, the arm of a subgroup within that party, the core faith in an independent judiciary, on which checks and balances depend, will be diminished.

¹⁷ Id. at 473.

¹⁸ Id.