

Appointing Judges

Shabbat Yitro 5777

February 17, 2017

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November brought an acrimonious election, featuring an onslaught of negative campaign ads. Many voters reported that they were choosing the lesser of two evils, not happy about either candidate.

I'm referring, of course, to the race for Chief Justice on Arkansas' Supreme Court. One candidate was buffeted by massive campaign contributions from the plaintiff's bar – above all from lawyers, including the candidate's husband, who find Arkansas to be particularly hospitable to class action lawsuits. Her opponent was lavishly supported by business interests eager to frustrate such legal action.

The issue is difficult. Law suits, including class actions, are often the only tool that consumers have to assure product safety and honest business practices. However, when plaintiffs prevail, lawyers reap infinitely greater benefit than any consumer who has been harmed. On the other hand, if attorneys didn't earn generous fees, harmed consumers would be priced out of the courtroom. Businesses argue persuasively that excessive judgments, not to mention the cost of defending frivolous law suits, drive up prices and make Arkansas an unfriendly environment for employers.

We have no trouble understanding why the plaintiffs' bar and business interests would both spend lavishly on such a campaign. The way they may do that in Arkansas is shameful. Judges are permitted, even expected, to attend fundraisers for their campaigns. Paradoxically, these same judges aren't supposed to know who donated or how much. Because of their supposed lack of awareness, judges regularly rule on cases that involve their most generous campaign donors. Anybody think the judges don't know when they're ruling in favor of a campaign contributor, or against a donor to an opponent's campaign coffers?

Deuteronomy admonishes judges not to take bribes. In American law, campaign contributions are not bribes, unless donors and recipients agree on a *quid pro quo*, detailing what the donation is buying, for instance a judge's ruling in a specific case. Deuteronomy, though, is stricter. "Bribes," we are taught, "blind the eyes of the discerning and upset the plea of the just." When a party to a lawsuit has made a payment to a judge's campaign, even an otherwise honest judge may not be able to see the contribution's impact on a ruling. We cannot

have confidence that the just cause will prevail. Our Arkansas system of judicial campaign contributions creates, at the very least, a glaring appearance of constant conflicts of interest.

Some argue that Arkansas needs appointed judges. Freed from campaign contributions, they say, judges could devote all their time to justice, rather than fundraising and electioneering. They wouldn't be tempted to rule in favor of those who had given most generously to their campaigns.

Americans have plenty of experience with that system, since federal judges are appointed. They do not run for office. They do not solicit or receive campaign contributions. Any money paid to them by a person with a case before them, attorney or litigant, would indisputably be a bribe.

Not long ago, though, after a ruling against him, the President of the United States referred to the federal jurist involved, an appointee of the second President Bush, as a "so-called judge." The President seemed to be alleging that Judge Robart's ruling was anything but judicial.

That argument is frequently made about rulings of the United States Supreme Court, even by justices in the minority in any given case, who are the object of that charge when they are in the majority. Not without reason, Eric Segall, a Supreme Court scholar and professor at Georgia State University of Law School, has written a book entitled, *Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges*. Conservatives would agree that the Supreme Court is not a court, often usurping the power of the legislative branch and of the people, particularly in rulings such as *Roe v. Wade*, forbidding the states to outlaw abortion, or *Obergefell v. Hodges*, requiring states to provide equal marriage rights to same-sex couples. Liberals would agree that the Justices are not judges, pointing above all to *Bush v. Gore*, when they would claim that an entire presidential election was stolen by a vote of five Republican appointees over four Democratic selections.

When we look at Supreme Court appointments, we see that ideology typically motivates a president's selection. While business interests are fundamental at the state level – and, in reality, in the federal courts, too – broad societal issues drive the evaluation of Supreme Court nominees. Civil rights, states' rights, the separation of powers, abortion rights, and gun control take the lead when Americans discuss the nine individuals charged with interpreting our Constitution.

We may rightly ask: Is ideology the appropriate yardstick for selecting a judge? Torah thinks not.

In this week's portion, Moses's father-in-law, Jethro, suggests that Moses appoint judges: "You shall seek out from among the people capable men who fear God, trustworthy men who spurn ill-gotten gain." That's it. The judges must be male, not surprising in those days, but one rule we would all reject. Otherwise, like Moses and the elders of Israel before us, we could all agree to Jethro's qualifications: The judges must be capable and trustworthy. Above all, the judges must possess unimpeachable integrity.

President Obama suggested an additional qualification: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old – and that's the criterion by which I'll be selecting my judges." We might add to President Obama's list of those with whom a judge should be able to identify. Our judges must also have empathy for white working-class Americans and business owners, too, even though we might caution that those interests have been protected since the nation was founded. The Holiness Code in Leviticus emphasizes that we must not pervert justice in any direction: "Do not favor the poor or show deference to the rich; judge fairly."

Sadly, our federal judicial nominations process, at least at the highest levels, has degenerated into an exclusively ideology-driven partisan battle. The most disgusting display began on the day that Justice Scalia died. The Justice's body had not yet been returned to the capitol when the Senate Majority Leader announced that the Senate would take up no nominee offered by President Obama, who had nearly a year remaining in office. Or perhaps the low-point was when Justice Ruth Bader Ginsberg made her disdain for the Republican Party's nominee, now our President, so public. Justice Ginsberg, at least, recognized her mistake and apologized for it. Still, her bias against the President will remain at issue.

Neither the Supreme Court of Arkansas nor the Supreme Court of the United States is a court; the justices of neither are judges. On one, elected judges pursue the goals of their campaign donors. On the other, most justices' rulings can be predicted in accordance with the ideology for which they were selected.

The only solace to be found, perhaps, was in the November 8 election of Arkansas' Chief Justice. When I went into the polling place, I selected the judge

with whose ideology I disagreed, but whom I imagined to be the more discerning judge with greater integrity. He won.

Still, I'm with Jethro. Done right, appointment is a better system. We need judges above reproach, competent at the law, not the person who's best at selling his or her soul through campaign fundraising and electioneering.

If only Moses were making the appointments.

Amen.