

## **Suggestions for ending battles over judicial appointments**

By Eugene M. Hyman

When voters go to the polls this November to vote on Proposition 77, the outcome could do more than decide whether Gov. Arnold Schwarzenegger gets a thumbs up on his proposal empowering a judicial panel, rather than politicians, to set the boundaries of legislative districts. It could also provide a model for how other critical decisions can be made, such as the appointment of judges themselves, most importantly, to the U.S. and California State Supreme Courts.

Letting judges select high court nominees would help stem the growing perception that Lady Justice isn't blind but instead winks at her political friends. In recent years, confidence in the independence of our judiciary has been undermined by the appearance of a lack of impartiality in some high-profile cases, most famously *Bush vs. Gore*. That decision, which largely followed the court's well-established conservative vs. liberal fault line, determined the results of the 2000 presidential election.

More recently, the California Supreme Court's ruling returning Proposition 77 to the ballot reinforced the idea that judicial rulings are just another type of political contest. Unfortunately, that ruling also broke down along partisan lines, with judges appointed by Democrats voting to keep the redistricting measure off the ballot while judges appointed by Republicans sided with the current governor from the same political party, again giving the possible appearance of a lack of impartiality.

At the federal level, the judicial appointment and confirmation process has become malignantly partisan, particularly since the nomination and rejection of Robert Bork in 1987. The possibility of yet another highly divisive debate over the nomination of John Roberts to the Supreme Court, and similar fights over nominees that follow, will further erode public trust in the independence and credibility of the judiciary.

The best way to insulate the Supreme Court from questions regarding its objectivity would be to set up a new procedure that allows a panel made up of one representative from each of the nation's 13 federal judicial circuits to choose future nominees. Ideally, each circuit would be free to select its representative in any way the members see fit. The name of the person they pick would then be forwarded to the president, who would formally nominate the candidate and forward his or her name to the U.S. Senate for confirmation.

This proposal could be implemented without a cumbersome and time-consuming fight to amend the U.S. Constitution if it were done voluntarily, which could certainly occur on at least a trial basis. To be sure, a judicial panel may not be entirely apolitical. But it would surely be less political than a process driven entirely by politicians. A similar procedure could also be used to fill the current vacancy on the California State Supreme Court.

There are good reasons to make this reform. Thanks to their background and training, judges are in the best possible position to evaluate the legal and analytical capacities that should determine who is worthy of being elevated to the highest court in the land.

What's more, if a judicial panel nominates candidates for the Supreme Court, there will be less reason to suspect that any of their future decisions are payback to a politician or a political party.

Implementing this reform will also let judges and other legal scholars who are interested in serving on the Supreme Court know they can get there by doing work that impresses their colleagues, rather than by playing partisan games.

These nominees will arrive at their confirmation hearings with their qualifications clearly established, which should make the hearings less contentious and destructive, both politically and personally.

Public respect for the rule of law is essential. According to a 2002 poll by the American Bar Association, 62 percent of the public already thinks there are two types of justice in the United States, one for the rich and one for the poor.

Our legal system hangs by a thin thread -- namely that judicial rulings will be based on the requirements of the law, not a desire to advance a political agenda. Reducing the role of politics in the selection of Supreme Court nominees would be an important step toward shoring up public confidence in our courts.

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