

Picking Judges Online

As we go to press, it seems likely that one or more justices will soon retire from the United States Supreme Court. Chief Justice Rehnquist's thyroid cancer has led to months of speculation about an impending departure, and other justices—most notably Sandra Day O'Connor—are also rumored to be ready to call it quits.

While judges in many states are elected, the process for selecting new Supreme Court justices was intended by the Framers to be thoroughly undemocratic. Under the Constitution, the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” The process of nominating and confirming Supreme Court justices was thus intended to be doubly insulated from the people: Justices were not elected by the people, and neither were presidents or Senators. (Presidents were to be picked by the Electoral College and Senators by state legislatures.) The Framers never even considered the direct election of justices—it just wasn't feasible: As Alexander Hamilton explained in *Federalist* No. 76, “the exercise of [the appointing power] by the people at large will be readily admitted to be impracticable; as waiving every other consideration, it would leave [the people] little time to do anything else.”

The Framers clearly intended to keep a “constitutional distance” between the people and the selection of judges, but that distance has badly eroded since 1787. Not only are Senators now directly elected, removing some of the insulation between the people and the confirmation process, but several modern extra-constitutional innovations—such as opinion polling and broadcast media—have further shrunk the gap between the judiciary and the people. The cumulative effect of these changes has been to make the appointment of Supreme Court justices much more politically charged than intended by the Framers. Presidents pay close attention to polls and popularity in considering nominees, and Senators consider their own re-election needs when deciding whether to support or oppose nominees.

The Internet will exacerbate this trend. Since the last Supreme Court appointment, the Internet has become a powerful tool for popular political debate. Advocacy groups on the left and right have spent months gearing up online efforts for a confirmation battle—mass e-mails, press releases, video ads, fundraising appeals, and more. Marches and protests will be organized and energized over the Internet, and bloggers, some with “little time to do anything else,” will pore over every available detail of any nominee's past, providing a thorough vetting (or smearing).

This trend may be celebrated by those who think the Supreme Court has a duty to represent the people's will; it may be lamented by those who think the Court is already too close to the people and too inclined to invoke society's “evolving standards of decency” in its decisions. But who knows? It may have the unexpected result of bringing a new public attentiveness to the excesses of the judiciary, a salutary consequence any originalist would applaud.