

## **Legally Speaking**

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The election is finally over. Win or lose, we can all breathe a sigh of relief that we won't be bombarded by electioneering commercials for well, at least three or four months. I thought it interesting as I went to vote that a number of state trial and appellate judges found themselves on the ballot, at least in the sense that the voter is asked whether they ought to be retained. They are nearly always retained, largely because most of us have no earthly idea who they are or what they stand for, and because judges are sharply restricted from campaigning.

While in Colorado the voter has at least some voice in who sits as judge for state judges, this is not the case for the federal judiciary, who are appointed for life. They can only be removed through the cumbersome process of impeachment. You can't impeach a sitting federal judge merely because you disagree with his or her decisions, only for high crimes and misdemeanors. Thus, while we go to the polls to elect two branches of our federal government, the third—the judiciary—is not subject to immediate voter accountability. Instead, we “select” who our judges are by deciding what sort of judge the President will appoint, and the Senate will confirm. This indirection may partly be responsible for the discouraging ignorance of too many of us on just what the judiciary is and does. Orrin Hatch wrote that twice as many Americans know the number of Rice Krispies characters than know the number of Supreme Court justices and fifty percent more teenagers can name the Three Stooges than can recite the first three words of the Constitution. When one considers the immense power that the judiciary has acquired in our governance in the last fifty years or so, this is more than just a little dismaying.

The drafters of the Constitution did not intend the judiciary to be as powerful as they have become. Alexander Hamilton wrote in the Federalist Papers that the judiciary was to be the weakest of the three branches of the federal government. Yet, over time, the power of judicial review—that is, the power to strike down both state and federal legislation—has grown geometrically until today a single judge on the Massachusetts Supreme Court can decide the issue of gay marriage for the entire country. (The Full Faith and Credit Clause of the Constitution means that other States may be obliged to honor any marriage recognized as legal in another State. That's why most Constitutional scholars agree that the Constitution would likely have to be amended to prevent that result.)

Whatever you think about the various hot button cultural issues that seem increasingly to be decided in the judiciary (gay marriage, abortion, separation of church and state, the Pledge of Allegiance), it is important to understand that the kind of judges appointed to the federal bench can have profound and enduring effects for decades to come. Look forward in the coming months to some interesting, and likely rancorous, confirmation hearings in the Senate Judiciary Committee, particularly as Supreme Court positions may become open through death or retirement. The outcome of these hearings may likely have a greater impact on our future than anything that happens in either of the

other two branches. Knowing that, it behooves us to learn the issues and to exercise our right as voters to let our senators and our president know where we stand.