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Religious Commitments of Judicial Nominees - Address by Judge Bailey

D'Army Bailey

THE RELIGIOUS COMMITMENTS OF JUDICIAL NOMINEES—ADDRESS BY JUDGE BAILEY†

D'ARMY BAILEY*

Well, you know God is good because I almost did not make it here on the airplane today. I spent fifteen minutes circling in the air over Detroit, and, by the time I hit the ground, I had twenty minutes to get all the way through Concourse A to Concourse C. Then, the door to my connecting flight was closed. Fortunately, there was an airline employee that went down, typed the secret code, and got me and another nice lady on the airplane.

I suppose what might have gotten me into this posture here today was that six months or so ago, I was sitting in my courtroom, handling routine matters, when suddenly in walked a little teenage girl, a lawyer, a representative from the Tennessee Department of Human Services, and a representative of the court clerk's office. They said they wanted me to hear this young girl's petition for permission to have an abortion, which was scheduled for that afternoon. I did not know the first thing about Tennessee bypass law (which speaks to the degree of preparation that our state administrative office has made for judges on this important issue). Bypass law is generally handled by our juvenile court. As our juvenile court judge has been sick since January, the bypass case came up to me. I quickly learned that the bypass statute says a girl who is not an adult, who is under 18, can get an abortion—but that she has to first go before a judge.[1] The hearing is confidential, and so I cleared the courtroom. Then the lawyer, who is paid for by our state government and appointed to represent the girl, the Department of Human Services (DHS) counselor who talked with the girl, and the girl

† On November 9, 2005, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a symposium on The Religious Commitments of Judicial Nominees. Judge Bailey was the first speaker at the Symposium. His remarks have been revised for publication. *See also* Francis J. Beckwith, Taking Theology Seriously: The Status of The Religious Beliefs of Judicial Nominees for the Federal Bench (Nov. 9, 2005), *in* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2006); Matthew J. Franck, The Unbearable Unimportance of the Catholic Moment in Supreme Court History (Nov. 9, 2005), *in* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447 (2006).

* Judge, Tennessee Circuit Court, 30th District. J.D., Yale, 1967.

1. TENN. CODE ANN. § 37-10-302 et seq. (West 1999).

came before me. I heard testimony from the girl and from the DHS counselor. My job is to determine whether the girl has the maturity and the common sense to have evaluated the situation and made a sound judgment to get an abortion without her parents' knowledge. If that is the case, then I am to approve of her going ahead and getting the abortion.

Another judge had actually received this same case, and he had decided he did not want to hear it. He said that he had been in a law firm with one of the lawyers. Although this judge had now been on the bench for eight or nine years, he felt he should recuse himself from the case. Consequently, I went ahead and heard the case without a second thought. A few days or weeks later, I received another bypass case. This time a judge had heard it, apparently got cold feet about having heard it, and decided to reverse himself and withdraw the order approving an abortion. I later learned that two other judges had taken the position that they would not hear the bypass petitions because they felt that abortion was the taking of innocent human life. There are only nine of us, so I was a bit concerned about the ramifications of their decision. One of our judges, Judge McCarroll, later issued a statement saying that he had certain religious beliefs—he did not say religious, I apologize—the belief that abortion was the taking of innocent human life. He could not be fair and objective and, therefore, would not hear the bypass cases.

I was concerned as a judge about the judicial ethics of such a position, and I conversed about it with Dean Koh at Yale. He in turn suggested that I talk with . . . scholars on judicial ethics, which I did. These twelve scholars studied the question, and concluded in a letter to our Tennessee Supreme Court that a judge probably did not have the option of recusal in bypass cases. Whether or not a judge felt that abortion was the taking of an innocent human life, a judge had a legal responsibility, having been sworn to uphold the law of our state, to enforce the law—and a judge should do so. If a judge could not enforce the law, then, as people have often had to do when they face matters of conscience, the judge should pay the price of his or her conscience. The price of a judge's conscience would be to step down from the bench.

And let me just hasten to say that I have not criticized any of these judges because I do not think that I, as a judge, should single out any of my colleagues for criticism. Yet, I disagree with the proposition that a judge should have a blanket recusal in cases of this sort.

After I was contacted about the issues of this forum, I began to think about this issue of judicial philosophy in a broader context well beyond abortion. I remembered that when I was practicing law, I handled a number of first degree murder cases where my clients were facing the electric chair if they were convicted. I had to "death qualify" juries. "Death qualifying" the jury in a capital case meant that I had to ensure all the jurors—regardless of their beliefs about capital punishment—would be willing to impose the death penalty if the facts and circumstances as presented by the prosecutor justified it. I had the toughest time as a defense lawyer. The prosecution knew that Black prospective jurors tended to be less supportive of capital punishment than White prospective jurors, for the most part. And so the prosecution could often streamline and eliminate a lot of Blacks from the panel by going first to the question of whether or not the Black jurors would support the death penalty. As the prosecution gets to examine the jurors before the defense, the prosecution would lock the jurors into saying that they were against the death penalty and that they would have problems imposing it. Then the prosecution would turn around and look to the judge for a disqualification for cause. I would then have to get up and almost beg the prospective juror, saying, "Look, you don't have to be in favor of the death penalty, but everyone on this jury has to be willing to set their views aside and impose the death penalty if the facts justify it."

I turn now to the specific question raised by the forum: What is the appropriate level of inquiry into a judge's religious beliefs? My answer to this question is twofold. First, inquiries into the religious beliefs of judges are very important and pertinent if the judge is intending to recuse him- or herself in cases where the law conflicts with religious belief. Situations like the one we are experiencing in Tennessee with several judges refusing to hear the abortion bypass cases could perhaps be avoided—or at least anticipated—if searching inquiries were made at the outset. Second, with the questions of capital punishment, same-sex marriage, and other cases before the courts today, I believe it is wise and relevant to inquire into a judge's religious beliefs. A judge's beliefs about these issues are likely to influence the judge's judgment in the cases in which he or she participates. President Bush said as much when he offered the nomination of Ms. Miers. The code word was, "Well, we know her religious beliefs." This was intended to say something to the public about what we could expect of Ms. Mier's decisions. I believe that whether we are talking about religion, or even in the broader context, we are far too restrictive in our inquiries of the opinions,

attitudes, and beliefs of nominees—particularly of those who want to serve on the Supreme Court of the United States.

It is not often that I cite the conservative majority of the United States Supreme Court, but in the 2002 case of *Republican Party of Minnesota v. White*,[2] having to do with whether candidates for elected offices in Minnesota could state their positions on controversial legal and political questions, the Supreme Court shared some very interesting observations in dicta. I will briefly reference them as I think they shed new light on this issue of what is proper inquiry and what is not. The opinion was delivered by Justice Scalia, who thought it was somewhat disingenuous to say the public should not ask judicial candidates what they think about issues. Everyone knows that the judge has a position. In fact, in the language of *Republican Party of Minnesota v. White* he says, "[A] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing it is virtually impossible to find a judge who does not have preconceptions about the law."[3] He goes on to quote from another Supreme Court case: "Proof that a justice's mind at the time he joined the court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[4] Both the majority and the dissent go on to talk about the refuge that some judicial nominees, in fact pretty much all of them, take in refusing to answer questions about their beliefs. The majority opinion in *White* says that a candidate's refusal to answer questions is just a voluntary deferral from taking a position; there is no real threat to the concept of equal justice and fair justice in finding out what candidates think.

And yet, at the Supreme Court level in particular, we are hearing just this excuse to answering questions about beliefs. In my opinion, this excuse is polite—but unfounded—fiat. The excuse sounds noble, and it is very convenient in avoiding the ire of people who disagree with, and thus may not vote for, you. In reality, however, the judges have beliefs, their beliefs are relevant to their decision-making, and sharing those beliefs will not threaten impartial justice. Those beliefs should be open to inquiry.

2. 536 U.S. 765 (2002) (holding that restrictions on the speech of judicial candidates violate the First Amendment).

3. *Id.* at 777.

4. *Id.* at 778 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).