

AS ORIGINALLY PUBLISHED IN HUFFINGTON POST.COM

OCTOBER 9, 2012

The Presidential Debates: Judges Shouldn't Be Swayed By Opinion Polls

By Joel Cohen

The results are in. By virtually every account -- most importantly, the public's -- the President lost the first debate. Notably, the adverse reviews aren't about his message. Rather, it was his messaging.

The President will correct. Neither Governor Romney nor we will see the same President Obama next time. Yes, all candidates, incumbent presidents included, sometimes tack during public appearances and debates based on how their earlier remarks came across. Called for here, though, is something altogether different. Next time, the President will look Governor Romney square in the eye. He won't look down at his lectern, sheepishly, indifferently, disdainfully or simply tired, depending on how the different commentators saw it. He won't wait until the next day's rally to counterpunch Romney and his statements of yesterday. The President will be in his opponent's face to confront him. He *will* change. His supporters demand that and, if he is the least bit introspective, he probably does too.

Still, *any* candidate would tactically change his presentation the next time, even if the public's uniformly adverse reaction to a debate performance was to the candidate's legislative or executive platform, not simply the way he communicated it. Popularly elected officials *should* be influenced by popular opinion - not just their presentations, but also exactly what it is that they are articulating. While the public cherishes popularly elected officials who hold strong views, it also expects, maybe demands, that they respond to how the public reacts to those views. Great presidents, indeed, great candidates for the presidency, are "great" precisely because they are resilient and resourceful enough to strategically allow their views to evolve - indeed, maybe even change almost on a dime, if necessary - when adverse public opinion effectively demands it. That is, as long as they don't expediently discard core principles along the way. The same, of course, applies to members of the legislature, any legislature, who run for office. They, too, must be willing to change their views or stated

views that appear to be roundly rejected by the public.

Not so, though, with the judiciary. Judges can't simply decide to go with the flow, and cave or even react to popular or editorial opinion. True, newly elected presidents (or governors) have the perfect right to appoint new judges allied with their view of the world, as long as they don't apply litmus tests in so doing. And we do indeed want judges who will admit their mistakes and change their opinions the next time around if, in retrospect or due to societal change, the earlier opinions no longer make sense.

At the same time we, as a society, don't want judges who are easily influenced to change the way they decide cases, ignore (or even defy) their own precedent, or even cavalierly tack with the wind, essentially because opinion polls tell them that their decisions aren't well-received by the public or their "surrogates," as editorialists sometimes like to see themselves. Judges aren't supposed to follow the election returns. In fact, judges, at least federal judges, are accorded life tenure, as wisely urged by authors of The Federalist Papers, precisely to ensure that they aren't pushed around by the sudden gusts of public opinion that rise up at particular moments in time. The role of the judge is not intended to be influenced by whether the judge is liked or even despised for his opinions.

The legendary Chief Justice Earl Warren, for example, was famously met in the late '50's and '60's throughout the South with billboard screeds demanding his impeachment in the wake of *Brown v. Board of Education* and other progressive Warren Court decisions. Still, neither he nor the rest of the Justices of that Court backed down in response. Neither did Justice Harry T. Blackmun despite the hate-laced threats that filled his mailbox after he authored *Roe v. Wade*. Nor should judges or justices

today do so, no matter the provocation from vituperative tabloid writers, talk show hosts, or even editorialists at mainstream "papers of record."

Yes, some Warren Court decisions were partly undone by the successor Burger Court, but not because the Warren justices changed their minds. It was because the Court's composition changed when President Nixon got to appoint justices more in line with his own thinking, as is fair (in both directions). While strategically astute, the famous ignoring of precedent by Roosevelt Court Justice Roberts, when "a Switch In Time Saved Nine" helped avoid Roosevelt's court packing scheme, was not the proudest moment in American jurisprudential history. The contrast between a judge's need to be true to, or at least ever mindful of, precedent, and the acceptability of a presidential or legislative candidate's tropism toward malleability in the face of declining poll numbers is stark indeed. And it should be!

Whether one likes President Obama or Governor Romney (and this piece is not intended to support either), if the President is able to turn this thing around at the next debate by bringing his game - even if (though unlikely) he were to boldly and strategically change his stated platform, not just his debater's communicator skills, to increase his popularity as election day impends - no judge watching should ever conclude that he or she should likewise change his or her earlier decisions or ignore binding precedent in order to achieve their popular approval.

Great judges or justices (e.g., Holmes and Brandeis) are great when they persuade their colleagues on the bench to change their views, as happened following their famous dissents. Not when judges expediently change their own stated views to allay or placate a then-underwhelmed or even excoriating press or public.

The President should, and surely will, learn from his experience. Judges, however, must be ever-mindful of how exquisitely different their separate role in a tripartite government truly is. For them, November, every four years, should be just another month in the calendar.

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