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## THE SUPREME COURT AS A POLITICAL INSTITUTION

*Benjamin L. Hooks\**

The august Supreme Court of the United States is a political institution and has been virtually from the beginning. That today's Court finds itself at the center of intense ideological and political debate should surprise few serious students of American political and constitutional history.

The first president, George Washington, had his nominee for Chief Justice of the United States, John Rutledge, rejected in 1795 not necessarily because Senators objected to the would-be jurist's views of law, but to his views on the Jay Treaty with Great Britain.

In the early 1800's, the House of Representatives lodged impeachment articles against Justice Samuel Chase because of comments that he had made in the charge to the jury at a trial under the infamous (and highly partisan) Alien and Sedition Acts. The Senate failed to convict Chase, thus frustrating Jeffersonian efforts to purge the Court of Federalists. Had the ploy succeeded, almost certainly impeachment of Chief Justice John Marshall would have followed.

During the Jackson Administration, Senators rejected the President's first nomination of Roger B. Taney as Chief Justice because of the nominee's prior service as Secretary of the Treasury and concerns about his views on the Bank of the United States. Taney, eventually confirmed, went on to serve for many years. Had the Senate never confirmed him, much might have been different, for it was he who wrote the decision in the *Dred Scott* case,<sup>1</sup> harbinger of the Civil War.

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

When the unpopular accidental President, Andrew Johnson, had the opportunity to fill Supreme Court vacancies, Congress exercised its power to reduce the Court's membership (from nine to seven) to prevent Johnson from making appointments. The seats were restored with the election of President Ulysses Grant, partly to ensure that the decision of Chief Justice Salmon P. Chase in the *Legal Tender Cases*<sup>2</sup> would be overturned.

Appointments to the High Court are political acts. President Theodore Roosevelt clearly stated the political nature of the appointment process as he considered the nomination of Oliver Wendell Holmes, Jr. in 1902. In a letter to Senator Henry Cabot Lodge of Massachusetts, the President wrote:

In the ordinary and low sense which we attach to the words "partisan" and "politician," a judge (sic) of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up . . . Now I should like to know that Judge Holmes was in entire sympathy with our views, that is with your views and mine . . .<sup>3</sup>

President Roosevelt went on to say that he should account himself guilty of an "irreparable wrong" were he to nominate someone "who was not absolutely sane and sound on the great national policies for which we stand in public life."<sup>4</sup>

Interestingly, Theodore Roosevelt's presidential successor, William Howard Taft, finished his earthly course with service as Chief Justice of the United States Supreme Court. Taft is said to have recounted an incident from his early days on the Court. The Chief reportedly boasted that he had been put on the bench to change a few votes. "I looked right at old man Holmes when I said it," Taft reportedly said.<sup>5</sup>

It is a legend of American political history how Theodore Roosevelt's cousin, President Franklin D. Roosevelt, brought the Supreme Court into line on New Deal policies. His court-packing

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2. 79 U.S. (12 Wall.) 457 (1870).

3. Letter from Theodore Roosevelt to Henry Cabot Lodge (July 10, 1902), in 3 *THE LETTERS OF THEODORE ROOSEVELT* 289 (Elting E. Morison ed., 1951).

4. *Id.*

5. ALPHEUS T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 50 (1958).

plan — to add an additional Justice for every Justice over the age of seventy years who did not retire — failed in Congress and in the court of public opinion. It did, however, seemingly induce the Court to deal more charitably with New Deal recovery measures. Said one wag, “A switch in time saves nine.”

President Dwight Eisenhower may have thought he was getting a conservative Chief Justice in the politician Earl Warren, the popular Governor of California. Instead, he got the man who toppled school segregation and expanded the notion of defendants’ rights and the reach of federal power. Partly because of his experience with Warren, who had none, Eisenhower later decided that prior judicial service would be a prerequisite for appointment to the high tribunal — and gave the nation Justice William Brennan.

Presidents John Kennedy and Lyndon Johnson — like President Harry Truman earlier — seemingly had few ideological concerns in their appointments to the Court. Unfortunately, one of Johnson’s appointees, Abe Fortas, maintained both the flexible ethics and the personal and advisory relationship with Johnson that might have been tolerated or accepted from a lawyer in private practice, but were not appropriate for a Justice of the Supreme Court.

President Richard Nixon and his Republican successors set out to remold the Court according to conservative doctrine. Nixon spoke often of judges who would support “the peace forces” — the police — as against the “criminal forces” — the defendants. Nixon chose Warren Burger to replace the retiring Earl Warren as Chief Justice. Burger looked like Central Casting’s idea of a chief justice.

Had Senate Republicans not blocked the nomination, Abe Fortas, chosen by his friend and patron, Lyndon Johnson, would have been Chief Justice. However, when Warren submitted his resignation in the summer of 1968, Republicans argued that lame-duck Johnson should not appoint a new Chief Justice so soon before an election.

In recent confirmation battles, conservative Senators have decried probes into nominees’ judicial philosophy. Theirs was a different song when the nomination of Fortas to be Chief Justice was before the Senate. Then, Senator J. Strom Thurmond of South Carolina said that the Senate had a responsibility to probe Fortas’

thinking. Indeed, Thurmond said, "I believe the Senate should reject this nomination and reverse this trend in the Court."<sup>6</sup>

Having succeeded in removing Justice Fortas (efforts against Justice William O. Douglas were unsuccessful), Nixon first sought to appoint Judge F. Clement Haynsworth and later, Judge G. Harold Carswell. Ethical concerns (and the concerted efforts of organized labor and the NAACP) helped defeat Haynsworth. Judge Carswell was an acknowledged mediocrity and the earnest plea of Senator Roman Hruska that the mediocre were entitled to a seat on the High Court proved unavailing.<sup>7</sup> Nixon then named William Rehnquist, an Assistant United States Attorney General and faithful servant of the Administration, and Lewis Powell, a Richmond lawyer of considerable distinction. Later, with the appointment of Harry Blackmun, the Court's "Minnesota Twins" (Burger was the other) were born.

President Nixon's efforts to appoint "strict constructionists" to the bench contributed greatly to placing the High Court in the political vortex. Ronald Reagan greatly accelerated this trend with his accession to the presidency (Nixon's successor, Gerald Ford, had appointed the moderate John Paul Stevens as the replacement for the fiery liberal Douglas). President Reagan, urged on by conservative elements, looked for judges who seemed disposed to "follow the election returns," as Mr. Dooley had said of the Supreme Court.<sup>8</sup> Reagan pledged to name a woman to the High Court and that vow was redeemed by the appointment of conservative Sandra Day O'Connor, an Arizona politician and jurist. On the retirement of Chief Justice Burger, Reagan named the arch-conservative William Rehnquist to be Chief Justice and appointed conservative and scholarly Antonin Scalia to fill the vacant Rehnquist seat.

Rehnquist's nomination was controversial, re-opening the debate that had ensued with his first appointment in 1971 on his role as a law clerk in the 1950's. Rehnquist clerked for Justice Robert Jackson. Supreme Court files contained a memorandum, seemingly prepared by Rehnquist, dealing with the school segregation cases that urged the affirmation of the separate-but-equal doctrine of *Plessy v. Ferguson*.<sup>9</sup> Justice Jackson joined the unanimous holding in

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6. 114 CONG. REC. 28,776 (1968) (remarks of Senator Strom Thurmond, R-SC).

7. N.Y. TIMES, Mar. 17, 1970, at 21.

8. FINLEY P. DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1969).

9. 163 U.S. 537 (1896).

*Brown v. Board of Education*<sup>10</sup> that segregation in public education was unconstitutional. Rehnquist insisted that the memorandum reflected his understanding of Jackson's thinking.

In any case, despite the civil rights community and other liberal elements' opposition to Rehnquist, he was confirmed,<sup>11</sup> albeit by the smallest vote ever given a nominee for Chief Justice.

The hottest political battle erupted the following year, with the retirement of Justice Lewis F. Powell, the moderate author of the *Regents of the University of California v. Bakke*<sup>12</sup> decision, and with the subsequent nomination of Robert H. Bork, then a Judge of the United States Circuit Court of Appeals for the District of Columbia.

Judge Bork possessed a long record of legal achievements and was the author of many a controversial statement. He had declared his belief that passage of the Civil Rights Act of 1964, with its public-accommodations provisions, represented an act of "unsurpassed ugliness" in requiring non-discriminatory operations.<sup>13</sup> Judge Bork had also declared on the record, that the Supreme Court decision which made restrictive covenants unenforceable by the courts was wrong.<sup>14</sup> He also said the Court erred in striking down a poll tax, the iniquitous device long used in the South to deny blacks the ballot.<sup>15</sup>

Based on his academic and professional background, Robert Bork was a nominee of considerable merit. What made the Bork nomination such a political battleground was the perception that Judge Bork's accession to the High Court would have tilted the balance of the Court. President Reagan and his associates made no secret of their determination to mold the courts, including the Supreme Court, to reflect conservative dogma. Indeed, a nationwide committee of leading conservatives was formed to promote Judge Bork's confirmation.<sup>16</sup>

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10. 347 U.S. 483 (1954).

11. 132 CONG. REV. 12,799 (1986).

12. 438 U.S. 265 (1978).

13. Robert H. Bork, *Civil Rights — A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

14. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 15-16 (addressing racially restrictive covenants).

15. *Solicitor General Confirmation Hearings* (1973) (statement of Robert H. Bork); Robert H. Bork, *Foreword to GARY L. McDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* at vii (1985).

16. Lynne Weil, *Committee to Support Bork Announced*, UPI, July 22, 1987, available in LEXIS, Nexis Library, UPI File.

The fight over the Bork nomination was bitter and bruising. Opponents resorted to an intensive media and advertising blitz. Ultimately, the Senate rejected the nomination.<sup>17</sup> An embittered Judge Bork left the federal bench.<sup>18</sup>

Faced with his first appointment to the High Court, President Bush chose David Souter, a little-known New Hampshireman and a very recent appointee to the United States Second Circuit Court of Appeals bench. Justice Souter replaced ultra-liberal Justice William Brennan.<sup>19</sup> Judge Souter, who had no extensive paper trail and who disclosed nothing of any views he may have had, easily became Justice Souter.<sup>20</sup>

President Bush's next appointment was destined to be a political hot potato. In late June, 1991, Justice Thurgood Marshall, the first African-American to sit on the High Court, announced his intention to retire.<sup>21</sup> To replace him, Bush chose a conservative African-American appellate judge of recent vintage, Clarence Thomas, the former controversial Chairman of the federal Equal Employment Opportunity Commission.<sup>22</sup> According to Bush, Thomas was the best man in the country for the appointment. In political terms, he was the best black man with sufficiently conservative ideology to be considered.

Thomas' known and perceived hostility to many traditional civil rights concerns and remedies, and his strictures on black leaders with whom he disagreed, served to render him objectionable to the civil rights community. Even so, there was division and hesitancy about opposing his confirmation. The NAACP acted to oppose Thomas after a study of his record, including public statements, and face-to-face discussions with him. Some groups withheld judgment and others endorsed the nomination. Polls indicated broad, popular support for Thomas among blacks, and many Southern Democrats, heavily dependent on black votes, were in a quandary. Ultimately, eleven Senate Democrats voted for confirmation, giving

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17. 133 CONG. REC. 15,079 (1987).

18. *Senate Judiciary Committee Approves Nomination of Reagan Supreme Court Nominee*, DAILY LAB. REP. (BNA), Jan. 28, 1988, at A11.

19. *President Bush Names David Souter to Supreme Court to Fill Brennan Vacancy*, DAILY LAB. REP. (BNA), July 24, 1990, at A10.

20. 136 CONG. REC. 14,413 (1990).

21. *Justice Marshall Announces Retirement*, DAILY LAB. REP. (BNA), July 28, 1991, at A12.

22. *Bush Nominates Judge Clarence Thomas to be Associate Justice of Supreme Court*, DAILY LAB. REP. (BNA), July 2, 1991, at A12.

Thomas the narrow 52-48 victory and placing him on the High Court.

The first round of Thomas hearings elicited little from the nominee other than hymns of praise for his supposed self-help philosophy and discussion of the absence of indoor plumbing in his early life. After the first hearings were concluded, the Committee held a second round of hearings to inquire into charges of sexual harassment made against the nominee by a female law professor, Anita Hill, who had been a Thomas subordinate at the federal Department of Education and EEOC. The alleged incidents were a decade old. Republican Senators were merciless in their questioning of Hill and her supporters. Thomas made an emotional defense (and had the advantage of having the widest possible television audience for his denial). He called that phase of the hearings, "a high-tech lynching for uppity blacks who . . . deign to think for themselves."<sup>23</sup>

The recent cases — Bork and Thomas — demonstrate that where political and ideological concerns motivate the Executive, Senators and interest groups will not prove laggard in mounting a political counter-offensive.

Quite apart from the merits of particular nominees, so long as government is divided between the parties, with one holding the White House and the other in control of the Senate, there will be intense debate. It is true that the President has the appointing power, but it is not a unilateral power. Confirmation requires the advice and consent of the Senate. Presidents select nominees reflective of their views and the views of their supporters. Many Senators feel that they, too, represent a broad body of opinion — opinion that deserves to be respected.

The Senate has no duty to "rubber-stamp" the President's nomination of an ideologically chosen jurist. True, there is a long-standing principle that a president ordinarily is entitled to have his nominees approved. That principle, however, is more appropriately applied to the Cabinet and other officers who will serve in the President's official family.

Comity between the executive and legislative branches does not and cannot require that the Senate slavishly follow the executive

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23. Clarence Page, *Clarence Thomas Feeds Blacks Conspiracy Fears*, CHI. TRIB., Oct. 16, 1991, at C19.

lead in appointments to the courts. The Constitution created the courts as independent, co-equal branches of government. The President bears the power of choice. The Senate has the power of approval. Thus, the one un-elected branch of government is the product of agreement between the elected branches.

Alexander Hamilton, writing in *The Federalist* No. 76, observed that “[i]t will be readily comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the Legislature.”<sup>24</sup>

According to Hamilton, a President faced with possible rejection of a nominee would show “care in proposing.” A president, Hamilton wrote,

would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations, candidates who had no other merit, than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them obsequious instruments of his pleasure.<sup>25</sup>

It is not wrong for presidents to seek judicial appointees who share their views. Neither is it wrong for Senators to probe deeply into the views (in general terms) of nominees.

Senators have every right to vote their convictions on judicial nominees.

That is not wrong. It is politics.

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24. THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

25. *Id.*