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A COMMENT ON DANELSKI

*Dennis J. Hutchinson**

The past remains an irresistible cure for the present, and the question about the proper role of the Senate in the confirmation of Justices to the Supreme Court is no exception. Anti-Bork forces—most prominently represented by Laurence Tribe—have produced arguments that ideology has always played a role in the process. Pro-Bork forces—less singularly identified—have claimed that ideology has played the central role only once: in the 1916 confirmation of Louis D. Brandeis. David Danelski carefully reviewed confirmations between 1795 and 1970 and stakes out a moderate middle ground: “ideological opposition to Supreme Court nominations began at the [beginning of the twentieth] century but did not result in a rejection until the vote on Parker in 1930.”¹

Although I agree with much of what Professor Danelski has said, I prefer to qualify the data we are discussing in a number of ways. In the first place, it is a mistake to view the confirmation process as if the President and the Senate have always stood in the same static political relationship to each other. I think it is safe to say that the two branches are on rather different footings in the nineteenth and twentieth centuries. The nineteenth century was the period of congressional government. The President frequently was politically weak in comparison to Congress, and it should be no surprise that twenty-five percent of Presidential nominees to the Court during that century were rejected by the Senate. During the twentieth century the political power of the Presidency grew enormously.

Second, beginning just before the turn of the century, the Court itself became a political issue. In 1896, Democrats and others campaigned against the Court because of its recent rulings on the Sherman Act and the income tax. The 1896 Democratic platform even called on Congress to reconstruct the Supreme Court. In 1912, Theodore Roosevelt, campaigning for President, attacked the Supreme Court—indeed, all the courts—and called for recall of judges, easier means to amend the constitution, and popular sovereignty over judicial decisions. Although Roosevelt lost, the popular dissatisfaction with the Court, especially re-

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¹ Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 Nw. U.L. Rev. 900, 920 (1990).

garding its invalidation of pro-labor statutes, remained a smoldering issue.

It is no coincidence that, during this period, organized labor for the first time institutionally opposed a nominee to the Supreme Court, Horace H. Lurton in 1909, for fear that he would consolidate the anti-labor bias demonstrated by the Court in *Lochner v. New York*² and similar cases. Indeed, and this is my third point, political factions opposed to the Court's pro-business and anti-labor posture began during this period to institutionalize opposition to appointments that they viewed as inhospitable to their causes. Progressive senators and labor leaders became frequent critics of what they saw as regressive appointees. The dominant ideological thrust of opposition to nominees between the election of 1912 and the nomination of Charles Evans Hughes as Chief Justice in 1930 was against nominees who were perceived rightly and sometimes wrongly, as in Hughes's own case, as conservative.

The later rejection of John Parker in 1930 is not so much sport as a culmination of growing and well-organized resistance to the pro-property, anti-labor tenants of the Court under Melville W. Fuller, Edward D. White, and William H. Taft. Parker's confirmation battle added a new factor—race. Walter White's condemnation of Parker's supposedly racist views was critically important to the ultimate vote, and the success of White's intervention legitimized raising the issue of a nominee's racist attitudes. The Parker defeat in 1930 thus represents what might loosely be called the institutionalization of ideology as an explicit issue in the confirmation process.

Having made this claim, I should immediately backtrack and qualify myself. First, the role of ideology in the confirmation process cannot be comprehensively understood, as Professor Danelski implies, by examining only unsuccessful nominations. Even successful nominations from Worton in 1909 through Hugo Black in 1937 triggered what can only be characterized as substantial ideological opposition.

Second, even during the period of the most intense criticism of Supreme Court decisions in Congress and by the public at large, the Senate routinely masked its ideological concerns with other labels. The point is worth pausing on for a minute. For me, the most startling passage in Professor Danelski's paper was the summary of Alphens T. Mason's explanation of why Brandeis's opponents did not press their ideological cause. Mason believes it was because, at that time, both sides were still captive of the myth that judges were the mere passive instruments of the law. Thus, it never occurred to Brandeis's opponents to fight his nomination on ideological grounds. I think this analysis is unsound. I find it hard to believe that any President, certainly not Woodrow Wilson or his predecessor, who privately complained about many

² 198 U.S. 45 (1905).

judges, had ever bought the myth of judges as ideologically neutral oracles of the law. Nor is there any reason to believe that the Senate, especially just before the turn of the century, subscribed to the myth.

The posture taken by Brandeis' opponents in 1916 was a calculated rhetorical choice and *not* a substantially dictated adherence to a mythical view of adjudication. Why? The most compelling explanation is that ideological attacks on the Court were widely viewed at the time as bad politics. After all, the anti-Court platform run by the Democrats in 1896 had been unsuccessful. The party lost the Presidency and failed to gain control of either house of Congress. Teddy Roosevelt's anti-Court campaign in 1912 was widely viewed to have cost him votes. The choice made by Brandeis' opponents thus is understandable, but not for the reason Danelski provides. The point takes on larger significance when we turn to the nominations of Abe Fortas (to be Chief Justice) in 1968, Clement F. Haynesworth in 1969, and G. Harrold Carswall in 1970. In all three cases, as Professor Danelski notes, ideology played an important role in fueling the opposition to the nomination; yet, other factors—Fortas' extracurricular activity, Haynesworth's insensitivity to conflicts of interest, and Carswall's mediocrity—seemed in the end to be dispositive. Those nonideological factors, however, historically would have been insufficient to defeat the nominations.

The tendency has been for the Senate to disguise ideological objections as reservations about character and ethics. Only when there has been unambiguous evidence of objectionable ideology, as in the Parker and Carswall cases, has the Senate abandoned surrogate issues.

Professor Danelski closed his paper by wondering that the framers of the Constitution would have thought of the battle over the Bork nomination. I think the point is instructive, but I would add that the Senate's constitutional responsibility in the appointments process—as distinct from its formal authority—is now shaped far more by the seventeenth amendment than by visions of the framers two hundred years ago. The Constitution was originally framed and ratified before the rise of political parties and on the assumption that senators would be appointed by state legislatures. That assumption was destroyed with the ratification of the seventh amendment, providing for direct election of senators, in 1913.

The amendment is deeply important to the appointments process, both for its historical origins and for the political dynamic that it establishes. We must not forget that the amendment was the product of the same Progressive Era impulses that condemned the Supreme Court for being out of touch with American life and the Senate for being out of touch with the electorate. The amendment was widely viewed at the time as an imperative ratification of the popular will in lawmaking. A secondary, but by no means tangential, effect of the amendment was to make the Senate's other constitutionally imposed duties—such as treaty ratification and the confirmation of Presidential appointees—inevitably

part of the electoral discourse. If the Senate is to advise and consent on nominations, then, after 1913, at least notionally its judgment is subject to instructions from constituents and, ultimately, verification at the ballot box. To view the confirmation process as inherently political, with all the half-truths and self-serving gestures that politics entail, is not to reveal a mischief but to state a truism—and a constitutional truism at that.