Journal of Civil Rights and Economic Development

Volume 7, Fall 1991, Issue 1 Article 17

Supreme Court Nominations and "Political" Decision-Making

Jonathan Mallamud

SUPREME COURT NOMINATIONS AND "POLITICAL" DECISION-MAKING

JONATHAN MALLAMUD*

In recent years close consideration of judicial philosophy, including the discussion of particular issues, has marked the confirmation process for Supreme Court nominees. Although this intrusive consideration of specific views on law may have resulted in the failure of Judge Robert H. Bork to win confirmation by the Senate, subsequent appointees have been confirmed despite their refusal to answer questions about their views on the most controversial issues, such as a woman's right to choose to have an abortion. At the same time, the nature of the questioning and the close examination of a nominee's background suggests that the confirmation process has been marked by a high level of political intensity.

Nothing in the Constitution, which provides for presidential appointments to the Court subject to confirmation by the Senate, suggests that politics should not play a role in the process. Furthermore, nothing suggests that either the President or the Senate should refrain from learning a nominee's views on particular issues. The political intensity surrounding the nominations of Judge Robert H. Bork and Justice Clarence Thomas, coupled with the close questioning of nominees on their views about particular issues likely to come before the Court, does suggest that there is reason to be concerned about the nature of the confirmation process. In my opinion, any evaluation of the merits of particular aspects of the nomination process must take into account the role of that process within the system of separation of powers. In this essay I propose to do that by focusing on the merits of closely questioning nominees on particular issues that seem likely to be presented to the Supreme Court for resolution.

Under our system of separation of powers, no branch of gov-

* Professor of Law, Rutgers-The State University-School of Law-Camden. A.B. 1958, Oberlin College; J.D. 1961, Harvard University.

ernment has absolute power; each is subject to checks by another branch. In this way we are protected from the dictatorial exercise of power, because if any agency of government abuses its power, there exists another agency to check that abuse. Through its power of judicial review, the Supreme Court sets aside unconstitutional actions of the executive and legislative branches of government, which are subject to the political controls of a democratically responsible process. The Court may strike down those actions of the executive branch which it deems to be outside the scope of statutory authority. The Court also has the authority to invalidate actions of state governments that are in violation of the Constitution or federal legislation. Despite this tremendous checking power, the Supreme Court, whose members enjoy life tenure, owes no formal allegiance to the electorate; the appointments process is one of the primary checks on the exercise of power by the Supreme Court.[1]

The appointments process serves as a useful corrective to the danger that the Supreme Court might unduly interfere with the formulation of policy by the democratically controlled branches of government. For example, if the Court uses outmoded justifications for denying popular reforms as it did in the "*Lochner* Era,"[2] the appointments process can be utilized to pack the Court with Justices who are more sympathetic to those reforms. The process may take time, but the point is that while the Court protects fundamental rights against legislative encroachment, the Court itself is ultimately controlled by the legislature through the appointments process; this is evidenced by the New Deal appointments of Justices who brought about the repudiation of the *Lochner v. New York*[3] line of cases. The same process could be used, of course, to appoint people to the Court who, for example, would not be sympathetic to the protection of certain fundamental rights. This contradiction is inherent in the system, and probably cannot be

[1] The Exceptions Clause, U.S. CONST. art. III, § 2, cl. 2, also serves as a check on the Court's power. In addition, the Supreme Court lacks taxing power and depends on the executive branch for enforcement assistance where there is strong resistance to its decisions.

[2] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[3] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 77 (1991).

avoided unless we wish to give one of the branches dictatorial power. The process works because the participants exercise a certain amount of self-restraint.[4] Were nominees to the Court able to win confirmation only if their views on fundamental rights conformed to the dictates of the democratic process, a danger would arise. That danger would consist of the possibility that our fundamental rights would be limited to those recognized by the democratic process, the very process from which the Supreme Court sits to protect us. The recognition of this contradiction by the Supreme Court serves, in my view, as a concrete discipline on the Supreme Court, reinforcing the Court's own inclination to exercise judicial self-restraint. Thus, the Supreme Court must protect our rights actively, but must do so only when those rights are so important that the risk of retaliation through the appointments process is outweighed.

In the case of Justice Thomas, the Senate confirmed him despite his refusal to express an opinion on *Roe v. Wade*.[5] Since President Bush, who nominated Justice Thomas, had taken a strong anti-abortion position and certainly did not dispel the notion that his nominee would likely vote to overrule that case, it is readily understandable that the pro-choice forces wanted to elicit the nominee's views on abortion in order to support their opposition to him. Yet one wonders what the result of an answer either way would have been. Arguably either position, if known, could have generated more opposition to him.

To me the questions on abortion highlighted the contradictions inherent in the process. Since the protection of fundamental rights is always going to be protection from the actions of the democratically driven branches of government, I would think that intrusive consideration by the Senate of a nominee's views about particular rights would not be protective of those rights in the long run. For that reason, I think it is probably better that Justice Thomas did not answer the questions about his views on *Roe v.*

[4] We are all familiar with the concept of judicial self-restraint. In dealing with conflicts between the legislative and executive branches, Senator Orrin Hatch made the point that those branches, as well as the judiciary, must exercise self-restraint. Orrin G. Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1041-42 (1987).

[5] 410 U.S. 113 (1973).

Wade. Indeed, from a rights-protective standpoint, I am more comfortable in the long run with a nominee's refusal to answer questions on controversial issues. At the same time the process is a hardy one. I think that the Senate usually seeks to consider a nominee's overall legal ability and that specific questions are used more to give the Senators a chance to hear the nominee discuss issues than to obtain commitments on issues. The Senate does exercise self-restraint in the confirmation process; the last three appointees to the Court were confirmed without publicly committing themselves on the abortion issue. Furthermore, the specific issues that might engender controversy at the time of appointment are not necessarily those that will give rise to controversy in the future. Thus, while I would be more comfortable with an appointments process in which overall ability rather than specific views were considered, if the problem were merely that questions on specific issues were being asked, I would not be seriously concerned.

Unfortunately, I fear that the specific questions, such as those on abortion, are symptomatic of an increasing tendency to view the Court as driven by overtly political considerations. In recent years there has been a tendency among some scholars to classify Justices as liberal, progressive, or conservative, and to believe that they decide cases in accordance with those labels.[6] A perception has also arisen that Presidents have chosen judicial candidates in an effort to achieve judicial decisions that reflect conservative viewpoints.[7] Thus, it is evident that some people are acting on the belief that specific results can be obtained from the Court by ensuring the appointments of candidates of their choice, with political views sympathetic to theirs. Certainly, such a belief rests on substantial truth. And the whole idea of democratic control over the appointments process requires that the appointments can affect judicial decisions. At the same time, were outcome-specific ap-

[6] *See e.g.*, Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 646, 648 (1990). "As I try to show, however, the deepest divisions in modern constitutional thought are a function not of jurisprudential differences, but of political orientation." *Id.* at 648.

[7] *See, e.g.*, HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 3-9 (1988).

pointments to become the rule, I think that the cause of protection of fundamental rights would suffer in the long run. The idea is that the appointments process should serve as a corrective, but, if used to a very great degree to affect specific outcomes, the Court's role as a protector of fundamental rights against the democratic process would be diminished. But even more important than that possibility is the potential effect that the attention to specific issues in the appointments process may have on the public perception of the Supreme Court.

Acceptance of Supreme Court decisions protecting fundamental rights, despite the anti-democratic nature of those decisions, depends on a public perception that the Court acts on a basis other than raw power limited only by actual political checks. Now that our realistic view of the legal process includes an overt recognition of the huge area of discretion enjoyed by the Court, concepts of precedent and the controls of past doctrine fail to provide the appearance of limits sufficient to justify the legitimacy of the Court's actions. Natural law, while much in the current vocabulary, serves more to reflect political positions than to suggest some neutral, independent basis for judicial decisions that garner respect and public acceptance. In my view, the focus in the confirmation process on the specific views of the nominees creates a public perception that the Court renders decisions based on particular political viewpoints held by the nominees prior to their joining the Court. To the extent that the process creates that perception, it encourages people to continue to demand that the process consider each nominee's specific views, leading in turn to a reinforcement of the perception. Thus, the perception that the Court decides on political views and commitments, rather than by some independent process will, in the long run, weaken the Court's ability to protect fundamental rights by fostering a Court whose members are committed to protect only those rights deemed worthy by the democratically controlled branches.

This essay is hardly the forum in which to expound a view on the legitimacy of the Supreme Court's decisions in the fundamental rights area. I do think that the Court's protection of rights, as well as the potential for a democratic corrective, coincides with the view that the Constitution divides power to prevent the exis-

tence of dictatorial power in any one place. I also think that the Court acts out of a genuine regard for the public good with due regard for the Court's unique role in protecting individual rights, and with the knowledge of how our system of separation of powers operates to permit anti-democratic decisions by the Court, limited by the Court's appreciation of the need for judicial self-restraint to facilitate its continued role in this area. While I find an appreciation of the Court's role within the system of separation of powers sufficient to give its decisions legitimacy, others would like to develop substantive justifications for the Court's role in protecting fundamental rights.[8] Some would like to see the development of "neutral principles" to confine the discretion of the Supreme Court.[9] For many reasons the reality of life and the law makes it unlikely that principles will be developed that would command sufficiently wide acceptance in our pluralistic society to serve that function.[10] The decisional process of the Court depends on many factors, including the Court's position in the separation of powers system of government, and, while principles certainly play a part and permit the development from time to time of useful doctrines, I think that there are too many variables involved to expect that we will find satisfying "neutral" principles.

The complexity that prevents the development of satisfying neutral principles also requires that before they can develop a judicial philosophy, new appointees must reformulate views developed in their previous positions in the light of their experience on the Supreme Court. I think this takes some time, and, if I am cor-

[8] *See, e.g.*, David A. J. Richards, TOLERATION AND THE CONSTITUTION 252 (1986) (emphasizing "the background right of respect for moral independence . . . .").

[9] *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12, 15, 19 (1959).

[10] *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-79 (1980) (compelling electoral candidates to articulate their purposes and then basing their election on race, religion or politics is unconstitutional) *with* Paul Brest, *The Fundamental Rights Controversy: Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096 (1981) (Brest says they "are vulnerable to . . . criticisms based on their undeterminancy, manipulability and, ultimately, their reliance on judicial value choices that cannot be 'objectively' derived from text, history, consensus, natural rights, or any other source.") *and* Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (Ely puts forth a representation-reinforcement justification for judicial review of legislation. Tribe criticizes such theories as "radically undeterminate and fundamentally incomplete").

rect, it suggests that a nominee will probably not have, at the time of confirmation, a well-developed philosophy of judging that will drive his intellectual analysis once on the Court.

My view on this matter suggests that consideration of a nominee's specific views during the confirmation process will be less of a threat over the long term to the actual decisions of the Court than it will be to the public perception of the process. Whether I am correct could probably be shown by research, and, I suppose, I am suggesting a topic for an article. My recollection of the image that I had of Justice Harry A. Blackmun when President Richard Nixon appointed him hardly suggests that he would have been the author of the Supreme Court's opinion in *Roe v. Wade*. Indeed, he began his service on the Court voting with Chief Justice Warren Burger, but later "he distanced himself from the Court's conservative bloc and increasingly joined Justices Marshall and Brennan in dissent."[11] Similarly, the fact that Justice Hugo L. Black was once a member of the Ku Klux Klan, a fact revealed shortly after his confirmation,[12] was hardly indicative of his judicial record. In this context, it will be with great interest that I view the development of a judicial philosophy by Justice Clarence Thomas, in order to compare his record on the Court with his public image as it evolved during the confirmation process.

In conclusion, I would like to see the nominations to the Supreme Court as well as the confirmation process depend primarily on a determination that the nominees possess a very high level of legal ability and an appreciation of the role of the Court in the separation of powers system of government. At the same time, the appointments process serves as a corrective to the exercise of power by the Supreme Court, and, to serve that function, particular views of nominees must play a role in both their nomination and confirmation. Fortunately, the process is a resilient one and evidence exists to suggest that the Senate exercises self-restraint in considering nominees. Perhaps what troubles me the most is that the attention given in recent years to particular views of nominees on fundamental rights suggests a perception of the Court as a

[11] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW lvi (1st ed. 1986).
[12] *Id.* at lv.

body that renders decisions based solely on the political viewpoints of the Justices. While I think that the Court decides cases on a much broader basis, to the extent that the confirmation process reinforces the "political" image of the Court, some correctives seem in order. Senatorial deference to presidential decisions nominating candidates probably goes too far; the Senate has an important role to play. At the same time, some public recognition of the need for self-restraint in the operation of our system of government on the part of the executive and legislative branches of government would help. Most importantly, I think that a need exists to counter the notion that the Supreme Court decides cases on a "political" basis. While "political" is not a wholly inapt characterization of the decisional process, it substantially distorts the reality and invites the executive and legislative branches to use the appointments process for political ends. That cannot be wholly avoided, nor should it be. Rather, it is necessary to foster public appreciation of the complex process of decision-making by the Supreme Court so that it can be seen as public-regarding and, in an indirect way, bound by the democratic process. Thus, the attention given to particular viewpoints of nominees to the Court should serve as an early warning that too many people are fostering an unduly narrow view of the Court and its decisional process.