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### Review of The Selling of Supreme Court Nominees, by J. A. Maltese

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media mythology of the Pentagon Papers case. Rudenstine's useful book may not satisfy all readers looking for the first, but it will also have something to offer those interested in the second.

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JOHN ANTHONY MALTESE, *The Selling of Supreme Court Nominees*. Baltimore: Johns Hopkins University Press, 1995. xii, 193 pp. \$26.95.

John Anthony Maltese has written a genial book on a subject of enormous importance and enduring interest—presidential selection and senatorial consideration of Supreme Court nominees. Readers new to this field will find *The Selling of Supreme Court Nominees* a helpful introduction to it. Those more familiar with it will not find much that is surprising.

There seems little doubt that the process of selection and consideration of Supreme Court nominees has become more contentious over the last thirty years than it generally was in the sixty years before. That is not to say that a President inevitably faces difficulty in securing approval of his choices: Bill Clinton has managed to fill two vacancies with less flutter than might be expected, by choosing well qualified candidates whose judicial views were closer to the ideological center than were those of many nominees. Maltese thinks this is the way to go: The confirmation process is inherently political, he says, and Presidents should not only “search for quality” but also set “an example of moderation” (p. 158).

I am less sure than he about the virtues of moderation. A Court full of extremists would not be a good thing, but I believe there is value in having some extremists on the Court; Louis Brandeis and Hugo Black, as well as Antonin Scalia and Robert Bork, qualify as extremists. In part for this reason, I believe, as I have argued elsewhere, that the renewed politicization of the confirmation process is unfortunate. But, for the foreseeable future, my side has lost that battle: After the Bork battle, there is no reason for any senator to pay any substantial degree of ideological deference to the choice made by the president.

The interesting historical question is why the process changed in the way it has. It is helpful here to start the story before Maltese does. In the four decades surrounding the Civil War, Supreme Court nominations were even more vulnerable than they are today. By the time of Taft's presidency, they were virtually always successful—though Wilson's nomination of Brandeis in 1916 showed how controversial a provocative nomination could still be. The easing of sectional tensions accounts for only part of the change. The growth of the Court as a national institution, rather than one consisting of representatives from each of the judicial circuits, also played a role. But most important, perhaps, was the almost deific status of judges in the early years of the century, a status suggested by the recurrent nomination during this era of sitting or former high court judges—Parker, Taft, and Hughes—for the Presidency. It appeared unseemly in such an environment for mere senators to make a political issue of nominations for the Supreme Court. I suspect that the steady erosion of this attitude of judicial exaltation has more than anything else to do with the renewed politicization of the confirmation process.

Maltese puts great emphasis on two other factors—the popular election of Senators after ratification of the Seventeenth Amendment in 1913, and the growth of interest group power. But he offers no strong evidence concerning the impact of

popular election, and the frequent rejections of nominees during the earlier period indicates that this factor may have limited explanatory force. The nomination of Mahlon Pitney in 1912, opposed by 26 Senators because of the perception (based on thin evidence but probably accurate) that he was anti-labor provides some suggestion that popular election was not necessary to give interest groups significant power in this context.

The best parts of Maltese's books are those describing how executive branch efforts in behalf of Supreme Court nominees have become more intense in recent decades; his use of papers from the Nixon Administration offers some interesting vignettes. It would have been most useful, however, if he had been able to assess the impact that interest groups have had in the selection of nominees for the Court. It is the choice of a nominee from among many possible candidates, rather than the binary process of confirmation or rejection that offers the greatest potential to determine the actual identity of the new justice—and it is also the selection process that is most hidden from public view. Maltese emphasizes the importance of the selection process, but he does relatively little to illuminate it. Of course, that process, so variable from one President to another, so hidden from public view, is a particularly difficult subject to study.

Apart from a couple of glaring bloopers in one paragraph on page 47 (William Howard Taft was never vice president, and Justice Peckham's given name was Rufus; cousin Wheeler was nominated by Cleveland but rejected in 1894), Maltese seems to have his facts straight. His writing style is rather discursive, which would be more of a problem were the book not so short and entertaining.

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PHILLIP J. COOPER, *Battles on the Bench: Conflict Inside the Supreme Court*. Lawrence: University Press of Kansas, 1995. xi, 224 pp. \$24.95.

The purpose of this book is to examine the history of conflict among the justices of the United States Supreme Court. The justices, of course, have always preferred to portray life in the marble temple as a scholarly, high-minded, and collegial effort to interpret the law in a principled and nonpartisan manner. This is one of the enduring legacies of John Marshall, who sought to promote collegiality and consensus by arranging for all of the justices to dine together after each day's oral arguments and to live in the same boarding house whenever the Court was in session. Phillip Cooper, however, points out that over a long period of time, such forced attempts to suppress conflict in the interest of harmony will inevitably lead to "intense grudges that sooner or later [will] surface in bitter words and behavior among the justices" (p. 6).

Conflict has long been a major theme in research on the Supreme Court, particularly in judicial biographies and in historical studies of major cases and controversies. It is noteworthy, therefore, that *Battles on the Bench* is the first book to analyze conflict among the justices in a thorough and well-organized manner. The book addresses four important questions: "Why do the justices fight? How do they fight? What difference does it make? Why do they not fight more often?" (p. 3). Cooper's answers to these questions are primarily based upon published judicial biographies, the justices' papers, and interviews given by some of the justices. The emphasis on judicial biography is intentional. Cooper laments that so few