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*United States Senate*

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## THE DISCRIMINATING ROLE

*Philip A. Hart\**

The controversy which arose in the summer of 1968 over the nomination of Mr. Justice Abe Fortas to be Chief Justice of the United States has raised serious questions about the proper role of the Senate in advising and consenting to such nominations. That my remarks may be read in perspective, it should be mentioned that I supported strongly the nomination of Mr. Fortas. I believe that were it not for the unique circumstances of last summer—the erosion of the power of the President with the approach of a political campaign, the nearness of the end of the legislative session, and the opportunity the nomination afforded for political attacks on the Court and the President—the nomination would have been endorsed by a majority of my colleagues. If my view is correct, then the nomination procedure established by the Constitution was thwarted by a minority of the Senate who turned events to their advantage and were indifferent to the support given the nominee by the bar, by the academic community, by businessmen who recognized his perceptive handling of their problems and by the deprived members of our society who felt his concern for them.

The Fortas controversy raised additional questions about the role of the Senate and that of an individual member in confirming judicial appointments. To what extent, as a member of the Judiciary Committee and as an individual Senator, was I to take into account my philosophical agreement or disagreement with the nominee? Should a sitting Justice, subjected to the confirmation process just three years earlier, be required to appear before us again at all? Was it proper for me in committee to probe the nominee's prior judicial record or to seek to defend or challenge particular opinions? What weight was I to give the nominee's relationship to the President or to his writing, speaking and teaching activities outside the Court?

These questions do not exhaust the possibilities. Many of my colleagues thought, and have frequently proposed, that the Senate should do more than simply say "yea" and "nay" to nominees of the President. Some, for example, would attempt to restrict the President in the selection process, requiring him to choose Supreme Court Justices from among sitting federal or state judges or from lists of people drawn up by bar associations or other supposedly elite groups. Others would settle for attempting to pin a nominee down as to his views on particular issues, whether they be matters of obscenity, civil rights, or the relationship of government to business. Some would attempt to assess a nominee's relative hardness or softness on crime, as though that were a sufficient test of judicial fitness.

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From my experience I have little faith in any of these mechanical solutions, nor does history give me any cause for optimism. Consider the difficulties in attempting, either by legislation or by more informal means, to define in advance the categories from which a President may nominate a Justice. The history of the Supreme Court abundantly demonstrates that great Justices and mediocre ones have come from extremely disparate settings. State supreme courts, for example, have supplied great Justices, including Holmes from Massachusetts and Cardozo from New York. These courts have also supplied mediocrities whose names are better left unremembered. Moreover, for a variety of reasons many state courts have today become relative backwaters in the law. While this is not true of all state courts and there are state judges today who certainly would grace the Supreme Court, how does one define in advance a category which would limit the President to the "great" state judges and rule out the mediocrities and the political wheelhorses? The same can be said for the federal bench: there are great federal appellate and trial judges and there are less distinguished ones.

A survey of the Court's history suggests that any effort to define categories from which Justices may be selected will neither guarantee greatness nor preclude mediocrity. Chief Justice Marshall, considered by many the greatest man ever to sit on the Court, had virtually no legal education and little experience as a lawyer. He was a soldier, state assemblyman, Congressman, diplomat (accused by historians of attempting to bribe the French), and Secretary of State. Those who propose to restrict the scope of the President in selecting nominees would certainly bar a man like Marshall. Or consider Brandeis, a successful corporate lawyer who had become a controversial social reformer and presidential confidante. The legal establishment of this country, including all then living former presidents of the American Bar Association and the heads of leading universities, fought the appointment of Brandeis as a Supreme Court Justice with a venom unprecedented in our history. Think how much poorer this nation and its judicial heritage would have been had they prevailed. Should we exclude professors, and close the Court to such different men as Story, Rutledge, Frankfurter or Douglas? Or should we preclude the selection of attorney generals, knowing that that category has supplied such different men as Chief Justice Taney, the reactionary McReynolds, the liberal Murphy of Michigan, or Stone and Jackson? What of prosecutors? On the present Court the most experienced prosecutor is Chief Justice Warren, hardly a hero to those who believe the Court lacks prosecutorial zeal. Are corporate lawyers to be excluded, although that class has contributed Hughes and Harlan? And what about country lawyers like Jackson and Black, the one by way of the Justice Department and the other by way of the Senate? If anything, history teaches that no door should be closed and that diversity is the goal.

How deeply should we probe the background of a nominee? Cardozo's father was a Tammany Hall judge, yet his son became one of the saintliest figures in Anglo-American law. Stone was a rebel, both as a college student and later as a law teacher. He was also a successful Wall Street lawyer, an Attorney General, and a great Justice. Into which category does he fit?

The more I read, the less confidence I have, not only in mechanical devices, but in any kind of prediction. In the 1920's, for example, Senate liberals engineered the defeat of the nomination to the Court of federal judge John Parker. Parker was alleged to have made an anti-Negro slur in a speech and organized labor was angry at his decision in a labor case. Parker became one of our great federal appellate judges. The man the Senate accepted in his place had been a vigorous prosecutor of the Teapot Dome crowd, but on the bench Justice Roberts cast the key vote in the early decisions defeating major New Deal proposals favored by the very men who had achieved his nomination.

### **Toward Clarification of the Senate's Role**

I appear to be advocating that the Senate continue to muddle along as it has done in the past: approving most appointments, but occasionally being cantankerous. But this does not mean that there are not lessons to be learned and to be applied arising out of our experience last session with the Fortas nomination.

First, it is the unmistakable teaching of the recent controversy that use of the filibuster, an anti-democratic device in the legislative process, is intolerable in the process whereby the Senate advises and consents to a nomination to the Court. Were it not for the filibuster, Mr. Justice Fortas would now be Chief Justice. He had the support of a majority of the Senate. In the hands of a well-organized but small band of men, however, the filibuster frustrated the will of the majority. To allow this to happen again would be to threaten every judge in the land: if he wishes promotion within the federal court system, he had better trim his sails and decide cases not according to the Constitution and the laws of the land but with an eye to the prejudices of an unrepresentative group of Senators. Such a concept is destructive of the separation of powers laid down by the Constitution, and it is outrageous that this doctrine should become part of the banner of men who proclaim to be strict constitutionalists. As the Fortas experience demonstrates, the time has come to extricate the filibuster from the Senate, root and branch.

Second, the Fortas controversy revealed to me both my own and our society's uncertainty about the role of a Justice. Do we want men appointed to the Court to sever all ties with the forces which brought them to the Court? Is it appropriate, for example, for a Chief Justice Marshall to continue to serve as Secretary of State after his entry into

service on the Court? I suppose this question is academic today, but there is no law which forbids such overlapping functions, and Marshall did fill the two chairs for some six months. Do we want to erect a complete barrier between a Brandeis and a Wilson, a Stone and a Hoover, a Frankfurter and a Roosevelt? Would these Presidents have appointed these great Justices had they known that in so doing they would deprive themselves of the advice of men whose counsel they valued, perhaps more than any others? Do we want to prevent a Story from almost single-handedly creating American legal education; or can we say to a Douglas or a Black or a Fortas, "you must not write for publication, or speak your views, or teach youngsters"? Shall we say that they may do so, but may not receive compensation as do Senators,<sup>1</sup> Congressmen and other public officials? Do we want a firm rule at all? Can we not honor both those Justices and judges who devote themselves single-mindedly to their judicial work and those who enrich the potential of other departments of public service? Or is the risk of diverting judicial energies into other areas and perhaps enveloping the Court in political controversy too great?

The time has come for the Senate, for the bar, and especially for the law schools to focus on these problems. I doubt that the answer will be found in legislation. However, trenchant and fair-minded analysis of these issues, raised above the recent controversy, could influence future Presidents and the Senate, in addition to furnishing a guide to members of the Court. What must be done is to create a consensus as to what judicial propriety requires: None now exists.

The third lesson to be learned from the recent experience is that the prior judicial record of a nominee, like his prior legal career, is at best an uncertain guide with limited utility in determining whether his nomination should be confirmed and dangerously susceptible to misuse and abuse. I believe it is totally unrealistic and, indeed, foolish to hold that the Senate cannot properly consider a nominee's prior record, including judicial opinions he may have written. At the same time, I greatly doubt either the value or the wisdom of having a sitting Justice, whose opinions speak for themselves, personally testify before the Judiciary Committee. So long as the Senate has the power to say "no," those who wish to say "no" will avail themselves of whatever weapons are at hand. When the nominee is already a judge, these weapons will include his prior opinions. Indeed, a Senator who is asked to assess the fitness of the candidate cannot decline to see what he has written and how he has voted.

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<sup>1</sup> The writer does not accept "honorariums" or payment for lectures or speeches. But it is a widely practiced and presumably approved pattern.

What struck me, especially during Judiciary Committee sessions on the recent nomination, was the danger of irresponsible use of a nominee's prior record. Some examples will illustrate the magnitude of this danger. One of the chief issues which arose last year concerned Mr. Justice Fortas' position on the terribly complex subject of obscenity. Here was an opportunity for critics of the present Court, well organized and well financed, to use a controversial subject to punish a sitting Justice and thereby threaten every other judge in the country. The record gave these forces very little support. Mr. Justice Fortas had in fact contributed the deciding vote which sustained the conviction of Ralph Ginzburg.<sup>2</sup> Until he came to the Court, no obscenity conviction had been sustained on the merits for more than a decade. Moreover, although Mr. Justice Fortas had not himself written an opinion for the Court in any obscenity case, one of his separate opinions made clear his view that the states had ample power under the Constitution to protect children from obscene materials and to protect the public at large from panders. But those who opposed his nomination totally overlooked his role in these cases, choosing instead to fasten upon his votes in a number of minor obscenity cases decided by the Court without opinion. I deny anyone to draw any intelligent conclusion with respect to the Justice's position on the law of obscenity from these cases. The cases, as former Dean O'Meara of the Notre Dame Law School has pointed out, bristle with alternative grounds for decision relating to both procedural and substantive issues. Some cases involved genuine efforts at artistic expression, however misguided, while others involved no more than hard core pandering. Critics of the Justice did not make these distinctions. They used little more than case names as sticks with which to pummel him. The same tactics characterized the attacks on the nominee's role in such sensitive areas of the law as criminal procedure and civil rights.

How unfair these tactics are! Even when a Justice has written a majority opinion for the Court or has written a dissent, one cannot rightfully assume that one knows his entire position. It is impossible for Senators carefully to examine the records in the thousands of cases which come before the Court, much less the records on which a nominee from a state or lower federal court has acted. Nor do we know, and it would be highly improper for a nominee to tell us, what alternatives faced him and had an influence on his vote. Did he vote for a position with which he did not fully agree in order to stave off an even more distasteful result? Did he vote out of concern for the effect of this case upon another case, or upon another area of the law? Surely the fact that

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<sup>2</sup> Ginzburg v. United States, 383 U.S. 463 (1966).

a Justice joins the opinion of one of his brethren does not establish that he agrees with every word, or that he would not have written the opinion differently, or even that he would not have come out the other way if he had the votes.

Even more disturbing, indeed frightening, were the inquiries of some Senators as to the identity of clients the nominee had represented as an attorney. It was improper to require Mr. Justice Fortas to justify the pursuit of his professional duty in defending victims of political hysteria when that was decidedly unfashionable.

In short, our recent experience demonstrates to me the need for far greater responsibility in the use of the ammunition provided by a nominee's prior opinions. Of course, the same is true when a state or federal judge is appointed either to the Supreme Court or to a federal appellate bench. It is totally unfair for the Senate to attempt to second guess opinions written in the heat of work or votes necessarily cast with little or no explanation. One might counter that part of the fault lies with the judges who have a duty to explain carefully and accurately what they are doing. One might hope that this responsibility were truly reciprocal: the courts would show legislative handiwork sympathetic understanding of the factors affecting the writing of legislation and Congress would give the same consideration to a judicial nominee's written opinions.

The fact of the matter is that, if we are to continue selecting our judges in the present way, the treatment accorded prior judicial opinions and legal background must be made more responsible. In an age when professors and students, particularly law professors and law students, are so vocal on so many issues, one might have expected these groups to have addressed themselves to these matters last summer, as many did with respect to the use of the filibuster. But few bothered to cry out when Mr. Justice Fortas was being pilloried for the *Mallory*<sup>3</sup> and *McNabb*<sup>4</sup> decisions which were decided long before he came to the Court and in which the Court relied not on constitutional interpretation but on the Federal Rules, an area in which Congress has always had power to act. Only a few joined Dean O'Meara in his brave effort to clear the air on the obscenity issue. In my judgment a certain shame attached to this general silence.

But that is spilled milk. The profession, and especially those who teach and write, ought now to correct those errors of omission and help define for us some guidelines in dealing with the problems I have discussed. To arms! *i.e.*, to thought!

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<sup>3</sup> *Mallory v. United States*, 354 U.S. 449 (1957).

<sup>4</sup> *McNabb v. United States*, 318 U.S. 332 (1943).