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## Judge Picking

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*United States Court of Appeals for the District of Columbia Circuit*

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## JUDGE PICKING

*Abner J. Mikva\**

**GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY.** By *Laurence H. Tribe*. New York: Random House. 1985. Pp. xix, 171. \$17.95.

There are many pleasant surprises in Professor Tribe's new book, *God Save This Honorable Court*. First, it does not read like a book written by a law professor. There are no footnotes, no long, involved reconciliations of conflicting views on obscure points. There is only one table, and it is intelligible. While every participant in the law and justice business ought to read it, others can and should too. The style is easy, the substance, accessible; at 150 pages, it is a pleasant evening's read.

The next surprise is that the message — and the book does have a message — is not laid on with a heavy hand. You know from the Prologue (which reveals the author's well-known biases) what the text of the sermon will be, but there is no pontificating or chest-thumping over the simple message that Tribe seeks to deliver. Instead, he does what all good lawyers do: he lets the facts speak for themselves.

The message will be no surprise to Tribe's friends or detractors. He is deeply concerned that the electoral decisions of 1980 and 1984 will drastically alter some traditional notions about the High Court, both philosophically and institutionally. Tribe makes no secret of his belief that the current process of selecting Supreme Court Justices, which is heavily dominated by the President, has led to unfortunate results, and that this process needs to be reevaluated to reflect fact, not widely accepted myth. The heart of Tribe's message is that, contrary to popular belief, judge picking can be and should be more than a one-man show. He claims that history proves that the members of the first branch also have important roles that go beyond discovering whether nominees to the Court paid their income taxes and were honest with their clients. This message makes an important contribution to a critical public controversy — one particularly worth noting when it is advanced by the man many consider the most successful living private practitioner before the Court.

One of Professor Tribe's peeves (and a reason he gives for speeding up the book's publication) is a speech given by Justice William Rehnquist on October 19, 1984, shortly before the election (p. x). Justice

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Rehnquist stated that Presidents have had limited success in trying to pack a Supreme Court, but that there was no reason why a President should not make such an effort. Some commentators strongly disagree with both parts of Justice Rehnquist's opinion, although Tribe skirts the question of whether the President should be free to try. Some, for example, argue that who goes into the White House should not affect what comes out of the Court. Judge Irving Kaufman of the Second Circuit has insisted that elections really do not affect the judge-picking process, or at least they shouldn't. In a December 9, 1984, article in the *New York Times Magazine*, he insisted that Presidents must resist the temptation to appoint like thinkers to the bench. He said:

Unless the public believes that issues of great moment are decided by reference to constitutional principles that transcend shifting political vicissitudes, the Court's stature as an independent body is in jeopardy.

. . . .

. . . [A] President must be steadfast in avoiding the temptation to treat the Court as an institution that is expected to hew to a particular ideological position.

. . . .

Grave dangers exist in formulating a substantive talisman for admission to the judiciary. This insures a partisan confirmation battle on the floor of the Senate, which would be widely reported by the nation's news media. A public spectacle of this variety is certain to reinforce the perception of the judiciary as a politicized branch of government.

Tribe characterizes Judge Kaufman's views as "naïve" (p. x); I think the description is charitable. Indeed, what colors the critical part of the argument — the role that the Senate and outside groups play in judge picking — is the naïve and mischievous notion that judges should come to the bench with naught in hand or head but their robes and the Ten Commandments. If that is the desideratum, then Senators (and outside participants) should not seek to despoil the pristine process by asking questions about whether the judicial nominee thinks about political questions, and if so, what he thinks about them. It is true, as Judge Kaufman says, that the independence of the judiciary is absolutely essential to its constitutional mission. But it cannot follow that judges must be without political beliefs or ideology when they approach the bench.

I believe it was the *Washington Post* that once ran an editorial deploring the view that a person with political beliefs is unfit to serve as a judge. The editorial suggested that if we really want to avoid judges who have been exposed to politics, we should breed a class of judges. These judges would be selected in early childhood, trained to make decisions as Little League umpires, and shielded from all pressing questions of our times except the infield fly rule. The editorial pointed out that this system might improve the quality of baseball umpires, but it would not do much for the judiciary.

We do not want judges who are devoid of political content, for that would mean they have spent no time in the mainstream of American life and have no understanding of the hopes and fears of the American people. Being detached from day-to-day partisan affairs is one thing; being divorced from the real world is something else. A jurist who has lost touch with our evolving expectations of privacy is poorly prepared to evaluate fourth amendment claims; a judge who is ignorant of politics or world affairs cannot make reasoned decisions on separation-of-powers or national security questions. In short, the legal system does more than tolerate informed judges; it relies on them. Justice Rehnquist recognized this when, in a memorandum explaining his refusal to withdraw from a case, he said, "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

I put aside the question of whether it is realistic to expect the President to forego political considerations in the nominating process. Even if it were a good idea, the President will be as political in his appointments — all his appointments — as he is allowed to be. Jack Kennedy appointed his brother to be Attorney General because he could. Dwight Eisenhower appointed Earl Warren to the Supreme Court because he had to. When Herbert Hoover showed one Senator a list of possible Supreme Court appointees in the order of Hoover's preference (Cardozo was listed tenth out of ten) the Senator replied, "your list is all right but you handed it to me upside down." Cardozo got the appointment, not because the Senator persuaded Hoover on the merits, but because the Senator was William Borah, Chairman of the Foreign Relations Committee (p. 81).

Maybe, in fact, we do not want the President to put aside his political preferences and opt for the best nominee, regardless of the nominee's political preference; perhaps this denigrates an important part of the legitimizing chain for a lifetime, appointed judiciary in a democracy. If the President were to set aside political considerations in the judge-picking process, and the Senate abjured its role to independently consider a candidate, then the people would have no input at all. It might have been wise for Tribe to spend a little more time explaining why presidential restraint is not as realistic, or even as desirable, as is sometimes believed.

On the other hand, Tribe certainly does not urge that the President should have a free hand in the appointment process. An ideal system will build a number of restraints around the appointer, but they must be external restraints, not simply exhortations and wishful thinking. Tribe correctly notes that these restraints should start with the Senate.

It is a good starting place because the Constitution starts there. Article II says that "[the President] shall nominate, and by and with

the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” Because the appointment of Supreme Court Justices is lumped together with the general appointment powers of the President, the passion for symmetry (or simplism) compels some to insist that the role of the Senate is the same for a Justice as it is for a Cabinet Secretary. After all, the argument goes, the President is entitled to his own lieutenants — that’s what the people voted for. The obvious differences are the judge’s tenure and his role in the constitutional scheme. In the case of a Cabinet official, an Ambassador, or any other executive official for whom senatorial confirmation is required, the maximum term is either for the years that the President holds office or is fixed by statute. Only for judges does the Constitution spell out the “good-behavior,” lifetime term, and only they are entitled to coequal status with the executive and legislature. Tribe persuasively argues that this difference in tenure and function calls for a different reviewing process by the Senate.

What should the Senate look for? What standards should it use? It would be nice if we could spell out the do’s and don’ts of a Senator’s judicial confirmation prerogatives. Even the good Doctor Tribe is not as precise as he would like to be. After spending a whole chapter explaining why the Senate should be fully involved in the selection process, he offers the following: “For the Senate must serve as a fierce and tenacious guardian over access to these nine important chairs. Only a broadly based, aggressively contested, scrupulously considered choice now can ensure that the Supreme Court’s constitutional vision will be a bright one” (p. 137).

How to put meat on those bones is another matter. One obvious question is whether the Senate’s “aggressiveness” should include proposing nominees to the President. In the case of the lower court judges, there has been a long-standing tradition that the bulk of the nominees are proposed by the Senators from the affected states. That tradition has been jeopardized during the current administration, and has often been criticized by both political parties as bringing “politics” into judicial selection. This practice usually does not extend, however, to the Supreme Court.

The question of Senate prerogative brings us back to what kind of judges we want. If the model is the baseball umpire, obviously Senate input (or any kind of political input) is not helpful. Senators are collectively no better at keeping politics out of the process than the President is. But if we agree that judges not only may but *should* bring to the bench ideological notions about law and society, then senatorial input is indispensable. It fulfills a neglected part of the constitutional command to *advise* as well as consent. It is useful because it helps to bring pluralism to the process that selects members of the least accountable branch of government.

These broad principles do not offer any clues on whether or what kind of people the Senators should recommend, any more than Tribe's book does — but they do establish some reasons for precluding the President from having the sole initiative. One reason for pluralism in the selection process is to cut down on what Tribe calls the “cronies and mediocrities” (p. 81), those who are nominated primarily because they have earned presidential favor. The most recent case of this is Richard Nixon's nomination of Harold Carswell, which is described by Tribe as follows:

Carswell, also a Southern federal judge, was a lawyer most memorable for being eminently forgettable. During his tenure as a federal judge, Carswell compiled an almost unequaled record for being reversed by higher courts, and earned a solid reputation for shallow and dubious rulings. Even Carswell's supporters in the Senate had difficulty finding good things to say about the nomination. Senator Roman Hruska defended Judge Carswell on the floor of the Senate by saying, “Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they?” With such friends, Carswell needed few enemies. A bipartisan coalition of Senators answered the Hruska query when they defeated the nomination by a vote of 51 to 45. [p. 82]

Perhaps because of cases such as Carswell's, Professor Tribe gives short shrift to the notion that there are or should be many limits to the Senate's review of the nominees once they are submitted for scrutiny. He begins his history of the confirmation process under the heading of “The Myth of the Spineless Senate” (p. 77). The book describes how, especially in the early days of the Republic, the Senate frequently rejected the President's nominee (pp. 77-92). Tribe goes on to debunk (quite properly) the idea that the Senate should roll over like an obedient dog every time the President sends up a name (pp. 93-124). Tribe misses the mark, though, when he debunks the notion that the Senate can also affect the balance of power — and the independence of the judiciary — if the “advise and consent” function overwhelms the appointment function (pp. 125-37). The founding fathers intended that both branches lay their hands on in the picking of judges. If the Senate cuts away at the executive initiative, this also distorts the process.

For example, while it is easy to defend the Senate's role in shooting down Carswell's nomination, it is less easy to defend the shooting down of a Clement Haynsworth. And it is very hard to defend the prime example of Tribe's history of the activist Senate, the refusal to confirm John Rutledge as Chief Justice. Rutledge had been selected by President Washington to succeed John Jay. His credentials as a jurist and as one of the country's founders were impeccable. Tribe describes the opposition to Rutledge:

A few weeks after his nomination, Rutledge attacked the Jay Treaty — a conciliatory treaty negotiated by the Washington administration to

ease tensions with Great Britain. The treaty was ardently supported by the Federalists, Washington's Senate allies, as an integral part of party policy; it was opposed by Democratic Republicans as an affront to the nation's former ally, France. To the minds of many Senators, Rutledge's opposition to the treaty called into question his views on foreign policy and his judgment in taking so strident a position on an issue that polarized the nation. Rutledge's behavior even fueled rumors that he suffered from mental instability.

....

The debate over Rutledge raged in the country, the press, and the Senate for five months while he continued to preside over the Court by virtue of the interim appointment Washington had made while the Senate was not in session. Rutledge was ultimately rejected by a vote of 14; to 10, as much by his own party as by the Senators of the opposition. Even the insistence of the Father of our Country himself was insufficient to overcome the Senate's decision to exercise independently its power of confirmation. [pp. 79-80]

The problem, of course, is that the lines of authority between President and Senate are not clearly drawn, so that we do not know when the Senate is simply protecting its own turf, and when it is treading on executive land. But the fact remains that a hyperactive Senate can cause some of the very problems that Tribe hopes to avoid by getting the Senate to participate in judge picking. Litmus tests administered by Senators can create as imbalanced a Court as presidential litmus tests. And if Senators get judges to commit themselves on specific issues just to get confirmed, the damage to judicial independence is even greater than if those commitments are made in private to the President, where they are easier to fudge or forget.

That is why the Senate, as a reflector of popular will, must be circumscribed in its inquiries. What the Senate should not do is try to determine a nominee's views on emerging constitutional doctrine, or on issues likely to face courts in the near future. Why? Because these questions are really a signal to a nominee that he or she will become a judge only upon promising to be obsequious, to be a yes-person to the powers that be.

The Constitution does not permit the judiciary to be a subdivision of the Senate, nor judges to serve as inferior officers to the President. Just as the President must not seek to affect the independent and frequently unpopular judgments of the judges, the Senate also cannot use its confirmation power to create judicial I.O.U.'s. Justice Rehnquist has said that

[f]or [a nominee] to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

*Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972).

There is another, equally disturbing side effect of these judicial I.O.U.'s. When we ask prospective judges their views on an issue likely to arise in the future, we are locking them into a position. Today's litmus tests tell nominees that when the question is abortion, the answer is no, and when the question is prayer, the answer is yes. Do we want judges who have decided the outcome of a case even before looking at its facts? Do we want judges who are willing to disregard statutes and regulations to reach a predetermined result? The constitutional prohibition on advisory opinions tells us that justice is achieved by well-informed, concrete decisions, rather than by speculation.

There is still another defect to the litmus test approach to picking and confirming judges, as Tribe notes. The test is always about a single issue, a single cause. It *diverts* attention from the rest of the corpus and from other critical ingredients, such as intellect, temperament, and integrity. What must be avoided is the selection of a nominee based solely on how he or she would decide a particular issue. Judges are appointed for life. No one can predict what issues will be important in ten or twenty years. But a judge selected today will still be making decisions then.

For example, Professor Tribe describes the irony of the Roger Taney appointment. President Andrew Jackson wanted to appoint a Justice who would vote to eliminate the national bank — Jackson's ogre. Taney was clearly that man, but, Tribe says,

[t]wenty years after President Jackson left office, there were no Bank cases left to decide, but Chief Justice Taney was still around to author the infamous opinion in *Dred Scott v. Sandford*, which sanctified the status of blacks as property and made the Civil War all but inevitable. The plaudits that some legal scholars have accorded to Taney's tenure as Chief Justice cannot erase his leading role in the case that must rank as the greatest disaster — and greatest obscenity — in the history of the Court. [p. 98]

Taney was a presidential litmus baby, but the point is true whichever branch of government focuses too narrowly on one issue.

Some scholars insist that all of this handwringing about the ways and means of judicial selection and confirmation is irrelevant. Once a Justice is appointed, he or she is going to march to the Court's drummer, and the influence of the appointing drummer will wane to insignificance. Tribe classifies these observers as believers in the "Myth of the Surprised President" (p. 50). His review of the Court's history persuades him that most of the time the President — and the Senate — get who they want. For every "surprise" there are many more norms: the fact that the actions of William Brennan or Felix Frankfurter may not have been accurately predicted by their appointers is overwhelmed by the number of Justices who usually line up the way the President expected when he appointed them. Richard Nixon



found this out — to his dismay — when the justices he appointed to bring “law and order” to the country voted to compel the President to comply with a court order to turn over the White House tapes (pp. 70-74).

That is why the Senate must engage in strong oversight, even under the constraints suggested above. That is also why the input of outside groups is essential. One group that has had historical input has been the members of the Court itself. In some eras, the Chief Justice (Taft, for example) or some of his associates have had inordinate influence in suggesting successors or colleagues. The American Bar Association has played a technical role, seeking to measure the nominee’s previous experiences and judicial temperament. The ABA has been less concerned with the philosophy of judges than it has with making sure candidates meet certain baseline standards.

The most important nay-sayers, however, have been ad hoc coalitions of interest groups. These coalitions have sometimes centered around a single issue, whether it be civil rights, abortion, or the Bank of the United States. These groups often use the same techniques to “defeat” a judge as they would to defeat a person running for elected office. Sometimes, for example, they have enrolled the media to carry the message; when such a coalition failed to block Hugo Black’s appointment, it was not because the newspapers did not make the effort. The *New York Herald Tribune* called it a “nomination as menacing as it is unfit.” The *Chicago Tribune* called it “the worst” President Roosevelt could have found.

These outside groups’ opposition is usually very narrow in scope. Just as the Senate itself should not impose litmus tests, it is a bad idea to allow nongovernment groups to demand ideological purity in judicial nominees. The Senate must be as careful about avoiding excessive pressures from its constituents as it is in avoiding pressure from the President to acquiesce in a nomination. But the objective of pluralism is helped along when as many outside forces as possible, pro and con, are encouraged to state their views in a responsible fashion. Aside from an occasional Holmes or Brandeis (or Learned Hand), there are not too many instances in which there is only one right candidate for the job. If the objective is to find out whether the President has found one of the right ones, then the more inquiry the better.

Professor Tribe’s book is timely not only because of what he calls the “greying” of the current Supreme Court (p. xv). The political branches of government are so busy doing temporal work — like balancing budgets and reforming tax laws — that they and their watchers tend to slough over some of the less frequently used powers ordained to them by the Constitution. There is something awesome about appointing judges for life. The tenure frees up judges to perform their antimajoritarian role in our society. But the consequences can remind

a President — and the confirming Senators — that the judicial appointment process is one of the most important pieces of political power in our democracy. It needs to be wielded carefully, and it must be shared by all the players.