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Abstract

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ELIZABETH HOLTZMAN: I cannot say I was close to the Senate’s decision-making process on confirmation of judicial nominees. But I think there are a number of circumstances where the Senate refused to confirm an appointment or allowed some of them to die in committee. On the whole, it is fair to say that people get through the confirmation process without enough scrutiny. There are people who should have been confirmed but never were; there are other judges who may not have been as good, but who got through the process. When the spotlight is not on, there is a good chance that the Senate is going to allow politics to happen as usual. The Senate does not always have the stomach to continuously resist the President. Thus, the Senate was willing to fight over Bork, but then went along unanimously with Kennedy. Similarly, the Senate fought over Rehnquist, but approved Scalia unanimously. On the Supreme Court level, if there is not some major press disclosure about a nominee, then generally speaking that nominee seems to get through. If there is enough public outcry and enough public attention focused on some of these nominees by local groups, such as the bar association groups, the legal aid groups, the civil liberties

* The panelists for this session included Bruce Rogow, Professor Law, Nova Center for the Study of Law, Fort Lauderdale; Jon Sale, partner, Sonnett, Sale & Kehne, P.A., Fort Lauderdale, Florida; Theresa M. Van Vliet, attorney, Marc Rohr, Professor of Law, Nova Center for the Study of Law; Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas; and Elizabeth Holtzman, Comptroller of New York City, New York.
groups, and the civil rights groups, that may make a difference.

But there is another problem now: an ideological litmus test is being used as the basis for judicial appointments. It was used during the Reagan Administration with respect to opposition of scholarship, legal talent, and so forth. However, I would not bank too much on the Senate doing its job without a lot of public scrutiny or public pressure.

LINO GRAGLIA: I very much appreciate Mr. Sale pointing out that there is another way of looking at the actions of Judge Sirica. I think he is entirely right. When a judge steps out of his judicial role and behaves in a manner other than what is considered ordinary, he might achieve some remarkable fame, but it may also have some terrible consequences for our society. I can point out other examples of independent and courageous judges, but because of their political perspective, they are not so characterized. One of the most independent federal district court judges today is Frederick Hand of Mobile, Alabama. Judge Hand, a man of courage and certainly independent, has held that the Supreme Court was wrong when it decided prayer in public schools was unconstitutional. Based upon recent scholarship, he found the Supreme Court had misinterpreted the meaning of the Establishment Clause. I personally have no doubt that Judge Hand was and is correct in his holding. Of course, his decision raises the question of whether it is appropriate for a district court judge to reverse the Supreme Court. Putting that to one side, are those who speak in favor of judicial courage willing to admire Judge Hand as much as they admire other judges? Or is their admiration totally limited to the political results of which they approve?

How can one speak, as two people have here, in terms of favoring judges of independence, integrity, and character and then in the same breath attack Judge Bork, who is a person of highest integrity and independence? Judge Bork was willing in academia to take unpopular positions. At the Yale Law School, a very liberal institution, Judge Bork was admired, despite taking views not shared by most of his colleagues. Some of his problem was purely image, not the merits of his nomination. I told him to lose some weight and shave his beard, and it would help, but he would not hear of it. Further, Judge Bork's nomination to the court of appeals was easily confirmed. He was one of the most qualified people in terms of experience: he was Solicitor General of the United States, was the acting Attorney General, and held a Chair at Yale Law School. In terms of qualification, he was almost uniquely qualified. In terms of character and integrity, no charges as far as I know were ever made against him. Yet, he was rejected by the Senate.

HOLTZMAN: On the issue of character, there was one thing that meant a great deal to me. When the President of the United States illegally ordered Archibald Cox to be fired, the question was whether Robert Bork had the character to do what was right—to refuse to carry out that order and resign his job as Solicitor General. When it came down to it, he carried out that order which was illegal, wrong, and part of a coverup. To me, standing up to something that is wrong is the test of character, and Bork failed.

GRAGLIA: What you just mentioned was very important. It is a so-called fact that Judge Bork's actions during the Saturday night massacre do not demonstrate any character flaw in his past. Stanley Kutler, one of the participants here, just published a book which exhaustively examines the Watergate scandal. He said that Bork's behavior in connection with Watergate, the Saturday Night Massacre, and the Cox firing was beyond reproach. Innumerable people came to me during the Supreme Court hearings, saying that Bork showed a lack of character in that incident, but Professor Kutler said no, that his behavior was not improper.

HOLTZMAN: I would use my own view of character and my own sense of moral appropriateness. The Attorney General of the United States, Elliot Richardson, resigned rather than carry out that illegal order. The Deputy Attorney General of the United States William Ruckelshaus resigned, rather than carry out that illegal order. It was an order to stop somebody from getting at the truth, and it was an order to participate in a coverup. Bork was going to be named to the Supreme Court of the United States. What could we tell our children and our grandchildren about moral character if he were sitting on the United States Supreme Court? To me the firing was central; I do not want to tell the young people of this country that the cowardly carrying out of an illegal order is a sign of moral character and qualifies someone for the Supreme Court.

I also want to go back to a remark you made about courage and independence. I did not use the word intelligence, but I think it was implicit in what I said. In addition to courage and independence, one of the characteristics of a judge has to be basic smarts.

GRAGLIA: You challenge his smarts?

HOLTZMAN: No, I am just speaking of the characteristic that one
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HOLTZMAN: No, I am just speaking of the characteristic that one
has to find in federal judges when they are appointed. The incident I pointed to in which Judge Nickerson in effect overruled Swain v. Alabama, was not, obviously, a normal situation. What Nickerson had before him were five Supreme Court justices showing concern about Swain, including three who said that lower federal courts should reconsider Swain. To suggest that lower courts reconsider Swain is to suggest the possibility that these courts would overrule Swain. I think it is quite different from a judge saying that he or she disagrees with the decision in Brown v. Board of Education, or with the decision on prayer in school, or that the Supreme Court is wrong and that the judge, therefore, has the right to do whatever the judge wants. Judges are bound by the Supreme Court's decisions—unless the Court "unbinds" them, as happened in the case I gave you. There are many federal judges in Judge Nickerson's place who would have said, yes, the Supreme Court is inviting me to overturn Swain, but I think that is not appropriate for me, a mere district court judge, to do, and so I will not do it. I think Judge Nickerson's actions were very different from that of a judge who blatantly disregards a Supreme Court precedent.

Today, those who exorcize activism on the bench really want to reverse the extraordinary work that was done by the Fifth Circuit, which not only broadened our concept of human rights, but allowed the Civil Rights movement to proceed basically in a peaceful manner and produce the dismantling of Jim Crow and the South of today. It was an unusual role for the federal courts to play, but I think they did an extraordinary job and we should all take pride in that.

JON SALE: In some of the Watergate-related issues concerning Judge Bork, I agree with much of what Ms. Holtzman said. Elliot Richardson explained, in part, his resignation by saying that, in addition to doing what he thought was right, he had a relationship with Archibald Cox, and he had made a special commitment to Archibald Cox. It was this context which accounted, at least in part, for his decision when he accepted the special prosecutor position.

In the case of Mr. Ruckelshaus, it was a totally different situation. He had no such personal relationship. I know that he and Haig were casually acquainted. General Haig called him and ordered him to fire Archibald Cox as special prosecutor. Haig told Ruckelshaus that this was a direct order from the Commander in Chief. Even though he stood to become Attorney General of the United States, Ruckelshaus summarily refused to carry out the order. He said it was wrong and resigned rather than do it. However, Haig refused to accept Ruckelshaus' resignation and instead fired him.

With the firing or resignation of Ruckelshaus, the decision fell to Judge Bork. There was an argument, in fairness to Judge Bork, that continuity of the Department of Justice was at stake. The entire institution could crumble if someone did not carry out this presidential order. So it could have been that Judge Bork thought this was an illegal order, but in light of institutional needs and his being subordinate to the President, he was bound to carry it out.

I submit that if he was trying to save the Department of Justice, then there was a middle ground. Judge Bork should have fired Archibald and then resigned. This would have made clear his principled objection to the illegal order and preserved the institutional integrity of the Justice Department. But to fire Mr. Cox in what I thought was an unconscionable fashion and then to stay on, and, if the political wind had been different, to become either Attorney General or a Supreme Court Justice, then I thought at that time that this was very immoral and unethical conduct on his part. I still have a personal bias in that regard; while on some other points I might disagree with Ms. Holtzman, in this I could not agree with her more.

GRAGLIA: But Judge Bork was instrumental in subsequently getting Leon Jaworski appointed as special prosecutor.

SALE: That is absurd. Judge Bork was not instrumental in continuing in the Special Prosecutor's Office. That just is not the way it happened. The staff in the Special Prosecutor's Office were very much involved and concerned about who was going to replace Archibald Cox. What actually happened was that public outcry and political reaction required the administration to give Leon Jaworski certain assurances of independence. This really was a political matter. The White House had to give him assurances which it had not given Archibald Cox. It is true that, at the time, Judge Bork gave lip service to the fact that the office should continue. During those weeks we were reporting to Henry Peterson in the Justice Department and he was quite unsure of whether the Special Prosecutor's Office would exist from day to day. Henry Ruth testified about all of this at Judge Bork's confirmation hearing before the Senate Judiciary Committee.

HOLTZMAN: Actually, the decision with regard to the Jaworski ap-
has to find in federal judges when they are appointed. The incident I pointed to in which Judge Nickerson in effect overruled Swain v. Alabama,ª was not, obviously, a normal situation. What Nickerson had before him were five Supreme Court justices showing concern about Swain, including three who said that lower federal courts should reconsider Swain. To suggest that lower courts reconsider Swain is to suggest that these possibilities would overrule Swain. I think it is quite different from a judge saying that he or she disagrees with the decision in Brown v. Board of Education,² or with the decision on prayer in school, or that the Supreme Court is wrong and that the judge, therefore, has the right to do whatever the judge wants. Judges are bound by the Supreme Court's decisions—unless the Court "unbinds" them, as happened in the case I gave you. There are many federal judges in Judge Nickerson's place who would have said, yes, the Supreme Court is inviting me to overturn Swain, but I think that is not appropriate for me, a mere district court judge, to do, and so I will not do it. I think Judge Nickerson's actions were very different from that of a judge who blatantly disregards a Supreme Court precedent.

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HOLTZMAN: Actually, the decision with regard to the Jaworski ap-
pointment was the result of an agreement worked out with the members of the House and Senate as to what his powers would be. That agreement was central to his appointment.

SALE: Under that agreement you recall it required a consensus of the leadership of the House and Senate before he could be fired.

HOLTZMAN: Absolutely.

Audience Comments and Questions

AUDIENCE: In the case where certiorari was denied, but reconsideration of the Swain decision was invited, how did it happen that five Justices seemed to favor granting the petition when you only need four votes to grant the petition?

HOLTZMAN: That is an interesting question which I cannot answer. Two of the Justices who wanted to grant certiorari—Brennan and Marshall—felt that Swain should be overruled. Three other Justices said that it was an important question and invited consideration and experimentation on the issue by the states, and re-examination of the case by the lower federal courts. I think they were really hoping to have a variety of decisions so by the time the issue got to them they could see a variety of different ways of dealing with Swain. They did not want to overrule Swain without seeing the consequences of doing so. Of course, there were examples in Massachusetts and California, and subsequently in Florida, which banned racial peremptory challenges. But sometimes the Supreme Court wants to have the benefit of lower court decisions. That is another reason that quality in the lower courts is so important. The Supreme Court is educated by the process of having thoughtful and intelligent analyses of issues before it both on the state and the federal level. That would be my sense of why the Justices ruled as they did on certiorari.

Roundtable Discussion: The Judiciary Act of 1789*

ROGER ABRAMS: Welcome to the fourth and final session of our Bicentennial Symposium on the Judiciary Act of 1789—Courts and American Society, taking place at Nova Law Center. When I introduced the symposium yesterday morning, I talked briefly about the intentions of the members of the first Congress to create a marketplace of ideas. While the press was certainly influential two centuries ago, it was through the mechanism of the town meeting that citizenry expressed their ideas about the direction of the new country. We hope to recreate that town meeting atmosphere this afternoon with the help of our symposium guest speakers, Professors John Anderson, Ted White, Lino Graglia, and Stanley Kutler. We hope in the process of this roundtable discussion to shed some light, as well as create some heat. The rules, gentlemen: that there are no rules except that everyone has the full opportunity to express his view without treading on each other’s toes. Let us first of all begin by establishing some historical perspective. Professor White, we have been spending a lot of time the last two days talking about events of two hundred years ago and the important decisions of the Marshall Court. But the federal courts have changed over the last two hundred years. How has the role of the courts changed and do you think that is for the better or for the worse?

G. EDWARD WHITE: The Supreme Court has changed in fundamental ways—notably, its membership and its deliberative process. And in several other mundane but important ways, the present Court is also different from that on which Marshall sat. The Justices have their own offices; in Marshall’s day they met in a boarding house. Counsel are limited severely in their time for oral argument; in Marshall’s day they could speak as long as they wanted. In oral arguments there are colloquies between counsel and the justices; in Marshall’s day the justices did not interrupt counsel. Today the Supreme Court holds regular

* The participants of this panel included Dean Roger Abrams, Dean of the Nova Law Center; Professor John Anderson, Distinguished Visiting Professor, Nova University Law Center; Professor Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas; Professor Stanley Kutler, E. Gordon Fox Professor of American Institutions, University of Wisconsin; and Professor G. Edward White, John B. Minor Professor of Law and history, University of Virginia.