The Politics of the Confirmation Process

The Selling of Supreme Court Nominees. By John Anthony Maltese.* *Baltimore, MD: Johns Hopkins University Press*, 1995, Pp. xii, 193. $26.95.

I

Ever since the brutal confirmation hearings of Robert Bork, President Ronald Reagan's failed nominee to the Supreme Court, scholars and commentators have bemoaned the current state of the judicial confirmation process.[1] Some critics have invoked a golden age of Supreme Court nominations when the qualifications of the nominees took precedence over petty politics and ideological infighting (p. 10). In *The Selling of Supreme Court Nominees*, John Anthony Maltese argues that the flaw in this widely held view is that such a golden age never existed. If the confirmation process is a mess today, it was just as much of a mess at the dawn of the Republic.

Maltese brings a fresh eye to the confirmation process, using historical and archival resources to construct engaging accounts of past and current confirmation contests. He has a political scientist's appreciation for the larger political context within which the confirmation process is situated. And he writes an appealing and lively narrative of several critical confirmation struggles, describing the political intrigues of the past as if they were the subject of a contemporary journalistic account.

But while Maltese's short book is illuminating and lively, it is also incomplete. Maltese's claim that the confirmation process has always been "political" offers only a superficial response to critics of the current process. His analysis of how the confirmation process has evolved since the early nineteenth century does not adequately explain the fundamental changes in confirmation politics that he describes. Nor does Maltese take sufficient account of what may be the most important historical development shaping the politics of judicial selection: the changing role of the Supreme Court itself.

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* Associate Professor of Political Science, University of Georgia.

1. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS 3–22 (1994); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK 221–26 (1990); DAVID M. O'BRIEN, JUDICIAL ROULETTE 95–106 (1988); R.H. Bork, Jr., *The Media, Special Interests, and the Bork Nomination*, *in* MCGUIGAN & WEYRICH, *supra*, at 245–78; Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1061–65 (1994); Twentieth Century Fund Task Force on Judicial Selection, *Report of the Task Force*, *in* O'BRIEN, *supra*, at 3–11 [hereinafter Task Force].

II

Although the Constitution grants the president the power to nominate Supreme Court Justices "by and with the Advice and Consent of the Senate,"[2] the exact division of these roles and the scope of the Advice and Consent Clause have always been contested. According to Maltese, the vague dictates of the Constitution have demarcated only the broadest boundaries of a process that has, almost from the start, been fiercely contested and frequently bitter (pp. 12–35). Far from being the first nominee to suffer a long and partisan confirmation battle, Robert Bork was merely one of the most recent in a long series of nominees who have seen their formal qualifications eclipsed by ideological conflict over their personal record and judicial philosophy (p. 10).

Indeed, Maltese finds striking parallels to the Bork confirmation battle in the first failed Supreme Court nomination—the 1795 nomination of John Rutledge as Chief Justice (pp. 10–11, 26–31). Rutledge initially appeared to be a safe choice for Chief Justice. The Senate had unanimously made him an associate justice just six years earlier, and his credentials were widely considered to be impeccable. But on the eve of his nomination, Rutledge came under attack for his public critique of the Jay Treaty—then a subject of hot debate in the Senate. The partisan press attacked Rutledge as "a character not very far from mediocrity" (p. 29) and published accusations that he had failed to repay substantial debts (p. 30). Alexander Hamilton, a staunch supporter of the Treaty, even charged that Rutledge was insane. After his nomination was soundly rejected by the Senate, the humiliated Rutledge retired from the Court and returned to private practice in Charleston, where he was later rumored to have attempted suicide. Rutledge was not the only candidate to taste such bitter defeat. Maltese tells similar stories about the failed nominations of Stanley Matthews (1881) (pp. 36–44), John Parker (1930) (pp. 56–69), Abe Fortas (1968) (pp. 71–72, 131–32), Clement Haynsworth (1969) (pp. 70–85), and G. Harrold Carswell (1970) (pp. 12–17).[3]

Although debates over judicial nominations have long featured partisan conflict and personal scandal, the confirmation process has changed significantly since the early nineteenth century. Maltese argues that the principal historical trend has been toward greater openness and publicity. "[W]hat is different about today's appointment process," he argues, "is not its politicization but the range of players in the process and the techniques of

2. U.S. CONST. art. II, § 2, cl. 2.

3. Maltese is not the first to tell the stories of these nominations. For other accounts, see, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (3d ed. 1992) (reviewing all Supreme Court nominations from 1789 to 1992); JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990) (examining failed nominations of Abe Fortas, Clement Haynsworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg).

politicization they use" (p. 143). Until the early 1900s, the selection of Supreme Court nominees occurred almost entirely behind closed doors. Public hearings were not held in the Senate, and even Senate debates over nominees were conducted in secrecy. Presidents did little open lobbying and rarely spoke of their nominees in public. Press scrutiny and public attention were limited.

Maltese dates the opening up of the confirmation process to the period immediately after the Civil War. Social and technological change fueled by industrialization and the rise of monopoly capital promoted a massive expansion of the number of interest groups operating in American politics (pp. 36–37). National interest groups first actively lobbied against a presidential nominee to the Supreme Court in 1881, when the National Grange (a farm lobby) and the Anti-Monopoly League spoke out against the nomination of Stanley Matthews, a former senator with strong ties to railroad interests (pp. 36–41).

The Matthews battle notwithstanding, the full impact of interest group involvement in the confirmation process was not felt until two critical changes in Senate procedure stripped away the shroud of secrecy that had enveloped the process since its inception: the institution of direct Senate elections in 1913, and the opening of floor debate on nominees in 1929. Along with another innovation of this era—public hearings—these developments placed the confirmation process in the harsh glare of the public spotlight and, in the process, greatly increased the influence of interest groups and the public on Senate deliberations about Supreme Court nominees (pp. 36–37).

Another important change that occurred during this period, Maltese observes, was the rise of the modern "institutional presidency" (pp. 116–20).[4] With the expansion of presidential resources and administrative support during the New Deal, presidents actively began to employ staff resources to screen, select, and secure the confirmation of Supreme Court nominees. Entire staff units emerged to manage the president's involvement in the confirmation process, and increasingly, presidents themselves began to campaign publicly for their nominees. At the same time, participation by nominees in their own confirmation hearings also became commonplace. Although nominees had occasionally spoken in hearings and to the press in the early 1900s, it was not until the 1950s that this became regular practice (pp. 92–109).[5]

Maltese closes his book by reflecting on the experiences of President Clinton's Supreme Court nominees, Ruth Bader Ginsburg and Stephen Breyer, both of whom were easily confirmed. He argues that the history of the confirmation process indicates that political struggle, personal scandal, and hard questions about ideology and judicial philosophy will always have the

4. The characteristics and origins of the "institutional presidency" are described in John P. Burke, *The Institutional Presidency*, *in* THE PRESIDENCY AND THE POLITICAL SYSTEM 383 (Michael Nelson ed., 1990).

5. This point has, of course, been noted by other scholars. *See, e.g.*, CARTER, *supra* note 1, at 65–66.

potential to play a prominent role in deliberations over Supreme Court nominees. Nonetheless, Maltese sees in the Ginsburg and Breyer nominations a route by which presidents can circumvent the recurring imbroglios of the past. Candidates who are highly qualified and ideologically moderate, he suggests, generally avoid bruising confirmation fights and are approved by a secure majority in the Senate (pp. 156–57).

III

The Selling of Supreme Court Nominees is engaging and brisk reading. The case studies—many of which are based on extensive historical research—provide new insights into past confirmation battles while placing the current debate over the confirmation process in historical perspective. Maltese offers a good descriptive account of the changes that have occurred in the confirmation process over the last two centuries. Yet his analysis of how and why the Supreme Court confirmation process has changed is ultimately unconvincing.

Maltese's core argument is that the confirmation process has always been political. From the Rutledge nomination to the present day, candidates have commonly faced intrusive inquiries into their personal lives and ideological beliefs. Yet this observation does not reveal all that much about the politics of Supreme Court nominations. The Supreme Court is, after all, an important political institution; the process and principles of legal interpretation have long been at the center of American politics. The process of selecting justices of the Supreme Court is therefore inherently "political." Contrary to Maltese's assertion, few critics of the confirmation process really believe that the consideration of potential justices ever was or ever will be devoid of politics. What many critics do claim, however, is that the qualifications of nominees, rather than their ideology, should be the focus of attention.[6] Maltese offers nothing to dispel their concerns. A close reading of his own historical accounts suggests that the highly ideological tenor of recent nomination hearings is a relatively new phenomenon.[7] Although conflict in the Senate over a nominee

6. *See, e.g., id.*; MCGUIGAN & WEYRICH, *supra* note 1; O'BRIEN, *supra* note 1; Bork, *supra* note 1; David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990); Davis, *supra* note 1, at 1063; Task Force, *supra* note 1.

7. *See also* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1175–76 (1988) (describing President Franklin Delano Roosevelt's effort to "pack" Court with justices who agreed with his New Deal policies); Danelski, *supra* note 6 (arguing that ideological opposition to Supreme Court nominations began at turn of twentieth century). *But see* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 92 (1985) (arguing that "the upper house of Congress has been scrutinizing Supreme Court nominees and rejecting them on the basis of their political, judicial, and economic philosophies ever since George Washington was President"). Of course, the ideology of Supreme Court nominees was not immaterial in earlier years. Presidents have always taken ideology into account when deciding whom to nominate to the Supreme Court. John Adams, for example, appointed the "Midnight Judges" in an effort to maintain the Federalist view of the Constitution into Jefferson's term, *see* HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 56 (1988).

because of partisan politics, the nominee's personal flaws, or the nominee's stance on a particular issue has always been a feature of confirmation debates, conflict over nominees because of their political and judicial views probably dates back only to the confirmation of Louis D. Brandeis in 1916, and did not result in the rejection of a nominee until John J. Parker in 1930.[8] Maltese briefly notes this shift during his discussion of the rise of interest groups,[9] yet he does not respond to those who argue that it is this change above all that has poisoned the confirmation process.[10]

To be sure, Maltese describes some of the most important changes in the confirmation process. His explanations of these developments are cursory, however, and other critical changes in the process are overlooked altogether. For example, Maltese documents the increased involvement of interest groups in confirmation battles in the twentieth century. But he never asks why, if all institutional impediments to interest-group involvement were lifted as early as 1929 (p. 89), interest groups did not become fully involved in the confirmation process until the 1960s. In discussing the changes in the confirmation process, Maltese notes that Supreme Court nominees have testified before the Judiciary Committee on a regular basis only since 1955 (p. 93). Yet he never explains why nominees refused to speak on their own behalf until the Harlan Fiske Stone nomination in 1925 (p. 99), and why it then took another thirty years for nominees to participate in hearings on their nominations on a regular basis. Similarly, Maltese observes that the rise of the "institutional presidency" during the New Deal allowed presidents to advocate much more actively on behalf of their nominees, but he does not explain why presidents rarely even mentioned their nominees in public before Reagan took office (p. 113).

Maltese's failure to explain the historical transformation of the confirmation process leads him to overlook an important and obvious factor that may lie behind many of the changes in the confirmation process—namely, the historical evolution of the role of the Supreme Court. It should come as no surprise in some respects that the Haynsworth, Carswell, and Bork nominations provoked greater scrutiny and public fervor than nominations of the nineteenth century, for in the twentieth century the role of the Court fundamentally

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8. *See* Danelski, *supra* note 6, at 920.

9. "[I]nterest groups have played an active, although irregular, role in the Supreme Court confirmation process since 1881 . . . . The Matthews nominations are a milestone because of that. Prior to Matthews, Senate opposition blocked seventeen Supreme Court nominations, but each was a result of partisan politics, sectional rivalries, senatorial courtesy, or lack of qualifications" (p. 36).

10. Maltese similarly fails to comment on a broader pattern that is clearly apparent in his own historical data: the significant increase in the confirmation rate of Supreme Court nominees in the last century. According to Maltese, there were 20 failed nominations to the Supreme Court in the nineteenth century whereas there were only 6 failed nominations in the twentieth century. When only nominations on which a formal confirmation vote was held are included in the analysis, the number of rejections in the twentieth century (4) is still half that of the nineteenth century (8) (p. 3, tbl. 1). Conversely, the number of successful nominees was roughly the same in the two periods: 46 nominees were confirmed in the nineteenth century and 54 in the twentieth century. *See* TRIBE, *supra* note 7, at 142–51.

changed. After a century and a half of cautious challenges to federal laws, the Supreme Court was thrust into the center of national political debate during the 1930s, when it struck down central elements of President Roosevelt's New Deal.[11] With rulings ranging from civil rights to marital privacy to criminal law, the Court again entered the center of national political debate in the 1950s. Not only did the Court stake out controversial positions on matters of national importance, but it also became much more active in striking down laws passed by the Congress.[12] In the wake of this transformation, no Supreme Court nominee could pass through the confirmation process without being scrutinized for his or her orientation toward the burning issues of the day. Little wonder, then, that the nomination of Bork—arguably the most prominent critic of the post-New Deal constitutional order ever to be nominated to the Court—provoked a political response of a very different character than had been seen in the nineteenth century.

Maltese's failure to acknowledge the vastly increased scope and impact of the Supreme Court's rulings undercuts his proposal for improving the confirmation process. Having canvassed the entire history of the confirmation process, Maltese does little more at the close of his book than encourage presidents to choose uncontroversial nominees and spend more time screening them (pp. 156–57). This might be good advice if presidents only sought to secure easy confirmation of their nominees. But as a proposal for reform, it is inadequate. Presidents are well aware of the risks inherent in the confirmation process. They do not choose controversial Supreme Court nominees to risk political disaster but because the appointment of justices is a powerful means by which they shape the direction of national policy.[13] And that, like the political nature of the confirmation process, is unlikely to change.

—Oona A. Hathaway

11. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 161–69 (1960).

12. From 1960 to 1990, the Supreme Court struck down federal laws at the rate of approximately two per year, more than twice the rate of the preceding 60 years and four times the rate since the founding of the country. David Adamany, *The Supreme Court*, *in* THE AMERICAN COURTS 5, 23 (John B. Gates & Charles A. Johnson eds., 1991).

13. *See* Ackerman, *supra* note 7.