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Joel L. Selig

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BOOK REVIEW

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, 153. $17.95.

Reviewed by Joel L. Selig*

Professor Tribe of Harvard, a prominent constitutional law scholar,[1] has written a short book for a general audience on the history and process of Supreme Court appointments. The most significant questions Tribe raises and discusses in detail concern the criteria that the Senate should apply in granting or withholding confirmation of a President's nominee. Tribe believes senators should not limit themselves to considerations of character and competence; they should also carefully investigate the nominee's substantive views and, in appropriate cases, be prepared to vote against the nominee for ideological reasons. Tribe makes a creditable effort to support this approach by a review of historical precedent. While the merits of his prescriptions, the manner in which he would apply them, and the strength of his historical case are all debatable, this book is consistently interesting, readable, and thought-provoking. The subject is of substantial contemporary relevance, which explains the volume's appearance at this time (*see* pp. ix-x). The issue of the proper role of senatorial advice and consent deserves the serious attention of all who care about the future of American federal jurisprudence. Tribe's book is an excellent introduction to this issue.

Tribe begins by pointing out that the present Supreme Court is the first ever with a majority of members over age seventy-six, and that absent a change in membership it will become the oldest Court in the nation's history on November 3, 1986 (p. xv). Since President Reagan's term extends through 1988, he may well have the opportunity to name a number of new justices. This is, of course, what makes the book so timely. In constructing the argument for searching senatorial scrutiny of Supreme Court nominees, Tribe devotes a chapter to each of eight basic points which may be described with syllogistic simplicity:

1. The Court has a far-reaching impact on the lives of all Americans because of the extensive power of judicial review that has become firmly established in our legal system (pp. 3-30).

2. One or two justices can have an important impact on the way the Court exercises its power, especially when, as now, the Court is closely divided both on overall judicial philosophy and on important constitutional issues (pp. 31-40).

3. In view of the broad generalities that comprise our constitutional document, the ideological proclivities of the justices inevitably play a

*Professor of Law, University of Wyoming; A.B., 1965, J.D., 1968, Harvard University.

1. *See, e.g,* L. TRIBE, CONSTITUTIONAL CHOICES (1985); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

significant role in their decision-making, and the model of the "strict constructionist" is a "myth" (pp. 41-49).[2]

4. Like the concept that the Court's decisions are or can be made by a process free of judicial choice between competing values, the idea that presidents have frequently been surprised by the philosophical direction adopted by the justices they have nominated is also a myth (pp. 50-76).

5. Similarly, the idea that the Senate should apply only minimal scrutiny to the substantive views of Supreme Court nominees is another myth unsupported by the historical record and untrue to the constitutional function of advice and consent (pp. 77-92).

6. Senators should police the outer limits of acceptable ideological inclinations by voting against any nominee whose judicial philosophy departs too radically from their own (pp. 93-105).

7. Senators should also vote against any nominee who, although acceptable on an individual basis, would alter the Court's overall balance to an unacceptable degree considering the historical and contemporary context in which the nomination should be evaluated (pp. 106-124).

8. Because the active role that the foregoing envisions for the Senate is justified as a matter of history and principle, the danger that senators might overplay their hand is not a sufficient argument for a more passive approach (pp. 125-137).

There can be no doubt that part of Professor Tribe's motivation here is to present a blueprint for moderate and progressive senators to block President Reagan's anticipated appointment of right-wing ideologues to the Court.[3] The underlying concerns are self-evident almost from the book's beginning, though they are articulated most unmistakably in the epilogue:

> Picking judges is too important a task to be left to any President: unless the Senate, acting as a continuing body accountable

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2. For the recent highly publicized interchange between the Attorney General of the United States and two United States Supreme Court Justices on the subject of a "jurisprudence of original intention," *compare* E. Meese, Address Before the American Bar Association (July 9, 1985) (copy on file at Land & Water Law Review office); E. Meese, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985) (copy on file at Land & Water Law Review office) *with* W. Brennan, The Constitution of the United States: Contemporary Ratification, Presentation at Text and Teaching Symposium, Georgetown University (October 12, 1985) (copy on file at Land & Water Law Review office); J. Stevens, Address at Luncheon Meeting of the Federal Bar Association (October 23, 1985) (copy on file at Land & Water Law Review office).

3. Senator Kennedy has already endorsed the blueprint. *See* Kennedy, *The Supreme Court and the Evolution of the Constitution*, 37 HARVARD LAW SCHOOL BULLETIN No. 2, at 39, 39-40 (1986) (copy on file at Land & Water Law Review office) (reviewing the book that is the subject of the present review) ("No matter how erudite and articulate nominees may be, if they do not place a high priority on the rights and liberties central to American democracy, if they are inclined to redistribute freedoms away from citizens and to the Government, if they regard Constitutional protection as subject to the bidding of the President or Congress, then Senators have an obligation . . . to keep such nominees as far from the Supreme Court as possible.").

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> to the nation as a whole, plays an active and thoughtful part—something we have seen it do through much of our history—the way we and our children live and die will be shaped more powerfully by a single official's vision than any electoral mandate on any Tuesday in November could possibly justify.
>
> Especially in periods when a Chief Executive is likely, given the ages of the sitting Justices, to be making *several* appointments to our highest court, each name the President sends to the Senate deserves and demands the closest scrutiny—not only to assess *whether* the nominee is, in some minimal sense, "fit" to serve, but also to evaluate *where* the nominee's service would be likely to lead the Court. (P. 141) (emphasis in original).

Tribe does not add that special vigilance is necessary when, as now, the President and Attorney General are firmly committed to one end of the ideological spectrum. He does, however, explicitly identify the contemporary focus of his thinking:

> When the President is elected on such a constitutionally extraneous platform as prosperity, patriotism, and personality, the electorate has not given the President a blank check to redirect the Supreme Court, because the campaign did not draw on that particular account. (P. 134).

Of course, Tribe's argument should be judged on its merits, regardless of its political motivation. The first four of his eight basic points[4] are persuasively argued and documented. However, even from this reviewer's perspective, which is far closer to Tribe's than to that of our present national executive leadership, there are serious problems with the second four points and the suggested degree of senatorial scrutiny of a nominee's judicial philosophy.

There is no question that the Senate is endowed with the unreviewable constitutional power to reject judicial nominees on any basis it sees fit. The question is, how should that power be exercised? Tribe argues that "[t]he fact that the Constitution puts the power of appointment jointly into the hands of both the President and the Senate . . . suggests that each political branch ought to act as a balance for the pull asserted by the other" (p. 110). He points out that "the Senate has rejected a higher proportion of presidential nominations for Supreme Court Justice than for any other national office. Almost *one out of every five nominees* to the Court has failed to gain the Senate's 'consent' " (p. 78) (emphasis in original). However, although a large number of Supreme Court nominees have failed to win confirmation, Tribe identifies only nine who were denied a seat, and two others who were not confirmed the first time they were nominated, as a result of objections to their philosophical views (pp. 79-80, 86-91, 126-27). Eight of these eleven nominees experienced their difficulties during the period from 1795 to 1881. The other three were John J. Parker,

4. *See supra* text accompanying notes 2-3.

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Clement F. Haynsworth and G. Harrold Carswell, rejected in 1930, 1969 and 1970, respectively. In each of these three twentieth century rejections, the nominee's negative views on racial issues contributed significantly to his defeat, although in each case other considerations were involved as well (pp. 88-91). This seems an insufficient number of examples to make a compelling historical case for intense senatorial scrutiny of the ideology of Supreme Court nominees. Rather, this evidence suggests that rejections on the basis of political, economic or judicial philosophy have been relatively unusual. Since 1881, all such rejections involved *inter alia* the issue of racial justice, which occupies a uniquely central position in our constitutional history.

If Tribe is on shaky ground in basing his argument on historical precedent, he is nevertheless correct in suggesting that philosophical considerations in the judicial selection process should not be the sole preserve of the President. The difficulty arises in defining, both in theory and in practice, what the limits of philosophical acceptability ought to be.[5] Tribe's effort to define the limits in terms of neutral principles is both commendable and necessary. It is questionable, however, whether the effort is successful.[6] Tribe's attempt to apply his facially neutral principles to specific issues raises further doubts. The practical question is whether the Senate's adoption of Tribe's approach would serve only to provide an aura of theoretical respectability to an excessive politicization of the confirmation process. The political precedent thus set would, of course, be a double-edged sword, and its potential impact on the quality and ideology of future justices would not be readily predictable.

Tribe suggests that the "outer limits [of acceptable philosophical views] need to be set considerably short of the absurd" (p. 94). If so, where is the line to be drawn? The guidelines Tribe articulates are sufficiently neutral, but how much guidance do they really provide? For example, we are told that senators should assess a nominee's "basic outlook and ideas about the law" and his "institutional views of what role the Supreme Court should play" (p. 93) to assure themselves that his "scale of constitutional values, on the full range of questions likely to come to the Court in the foreseeable future, represents a principled version of the value system en-

5. For example, Tribe attributes to Senator Biden the following description of the proper inquiry: "Does the nominee have the intellectual capacity, competence, and temperament to be a Supreme Court Justice? Is the nominee of good moral character and free of conflicts of interest? Will the nominee faithfully uphold the Constitution of the United States?" (P. 92). *See also, e.g.*, Wash. Post, Nov. 14, 1985, at A22, col. 1 (editorial) ("The President has the right to choose judges with whom he is philosophically compatible, and they should not be denied confirmation for this reason. But the Senate has the responsibility to reject nominees who are unqualified, dishonest or ideologically so extreme as to be unable to apply the laws and the constitution fairly."). Professor Tribe seems to contemplate a significantly more restrictive delineation of the limits of acceptable judicial philosophy than either of these sources.

6. I have recently attempted to articulate my objections to certain Reagan administration actions in terms of neutral law enforcement principles. *See* Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785 (1986). My readers, like Professor Tribe's, will want to judge for themselves whether the analysis based on neutral principles is valid even though the author is not himself ideologically neutral.

visioned by the Constitution" (p. 100). In addition, "[p]erhaps the most important qualification for being a Supreme Court Justice is the possession of an open mind" (p. 103). Interpreted broadly, such prescriptions are unexceptionable, but they also present no obstacle except to the unlikely nominee whose views are so far from the mainstream that they are markedly eccentric or fanatical. On the other hand, some illustrations Tribe gives of the application of his prescriptions suggest that he interprets them less broadly and less neutrally than the terms in which they are phrased might imply.

For example, Tribe states that "any judicial nominee who favored overturning the legislative apportionment cases and who denounced any role at all for the federal judiciary in preserving the fundamental democratic principle of 'one person, one vote' would now be . . . unsuitable as a Supreme Court Justice . . ." (p. 96). This sentence is carefully crafted, adding to the position of disagreement with the apportionment cases an extreme formulation of one basis for such disagreement, and referring to overruling the cases rather than merely disagreeing with or attempting to limit them. Nevertheless, it seems fair to infer the suggestion that at this stage in our constitutional history, disagreement with *Reynolds v. Sims*[7] would be beyond the bounds of acceptable judicial philosophy. If so, would Justice Harlan, who dissented in that case,[8] be considered unworthy if he were nominated today and if he adhered to the view he held in 1964?

Similarly, Tribe asserts that any nominee who would overrule the abortion decisions "because the Bill of Rights does not *explicitly* set forth a woman's substantive right to control her own body, should not receive a confirmation vote from any Senator who has regard for the Constitution as preserving a public system of private rights" (pp. 98-99) (emphasis in original). Tribe is certainly not making *Roe v. Wade*[9] a "liberal" litmus test any more than he would make it a "conservative" litmus test (*see* p. 98),[10] but he is asserting that some bases for disagreeing with *Roe* are beyond the pale. Yet the basis just cited is the very one on which Justice Black dissented in *Griswold v. Connecticut*[11] (a dissenting position which Tribe also appears to consider beyond the pale (*see* p. 99)).

I happen to think, as a matter of constitutional law, that Justice Harlan was incorrect in *Reynolds v. Sims* and that Justice Black was correct in *Griswold v. Connecticut.* Others no doubt think the opposite. But I cannot believe that either Justice Black or Justice Harlan would be disqualified in 1986 if he adhered to his dissenting view, whatever one thinks

7. 377 U.S. 533 (1964).
8. *Id.* at 589 (Harlan, J., dissenting).
9. 410 U.S. 113 (1973).
10. On the question of litmus tests, *see also* Mikva, *Judge Picking*, 10 DISTRICT LAWYER No. 1, at 37, 40 (1985) (copy on file at Land & Water Law Review office) (arguing against litmus tests to determine the political leanings of potential judges) ("The litmus test . . . of a good appointment and confirmation procedure is restraint. There ought to be executive restraint . . . . There ought to be senatorial restraint.").
11. 381 U.S. 479 (1965) (statute forbidding use of contraceptives unconstitutional); *id.* at 507, 508-10, 520-21, 527 (Black, J., dissenting).

of the correctness or the current degree of acceptance of the majority position in either of these cases.[12]

As these examples suggest, Tribe's advocacy of searching senatorial scrutiny of a nominee's substantive views may provide a theoretical underpinning for taking a good thing too far. The boundaries of mainstream constitutional thinking are both shifting and intrinsically ill-defined. I am as concerned as Tribe is with the prospect that President Reagan may have the opportunity to appoint several members of the Court. But I am less convinced that those nominees can be denied confirmation on the basis of the kind of neutral principles that Tribe recommends. If, on the other hand, they are rejected by an unabashed exercise of political power, the precedent thus set may be quite inconvenient when the political orientation of the executive branch is more to Tribe's liking. Another danger is that the Supreme Court may become the preserve of bland philosophical mediocrity, unable to play the role it could when populated with intellectual giants such as Douglas and moral giants such as Warren—each of whom conceivably could have been denied confirmation under Tribe's criteria.[13] Indeed, a historical case might perhaps be made that adherents of a progressive constitutional philosophy have been the primary beneficiaries of the Senate's generally non-ideological approach to Supreme Court nominees in the twentieth century. A number of progressive nominees may have been philosophically ahead of the country, or at least the Senate, at the time of their confirmation.

I also have doubts about the historical precedent for and the practical implications of Tribe's other major point that preserving an overall balance of ideology on the Court is a neutral principle which may justify denying confirmation to nominees who would change the balance or exacerbate an existing imbalance:

> This shift in focus may mean that nominees who fall *within* the President's and a given Senator's circles of acceptability, when considered on their own merits, will fall *outside* the tighter circle drawn by a Senator when considering the context of the nominee's appointment. This is the way it has, at times, been—and the way it should be. (P. 106) (emphasis in original).

Tribe provides only one example of a nominee actually denied confirmation partly on this basis (pp. 90-91). Franklin D. Roosevelt shifted the balance of the Court on economic issues, and Richard M. Nixon shifted the balance on issues of constitutional criminal procedure. Of course, in those instances the Senate was not politically disposed to prevent a shift

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12. I *would* consider to be disqualifying a nominee's disagreement in 1986 with Brown v. Board of Educ., 347 U.S. 483 (1954) ("separate but equal" racially segregated schooling unconstitutional), but I regard that issue as *sui generis*. In any event, we will not soon see a Supreme Court nominee who—regardless of his opposition to "busing" or "affirmative action"—will admit to disagreeing with *Brown*.

13. Would Douglas' ideas, if fully known or anticipated, have been considered too radical? Did Warren, at the time of his nomination, "have opinions and convictions on the full range of topics of constitutional importance" (p. 101)?

on those issues. If it had been, would such a disposition have been based on neutral principles? If so, then should we conclude that the Senates that approved FDR's and Nixon's appointees were not operating on the basis of appropriate neutral principles?

If the Senate is presented with further Reagan nominations to the Supreme Court, I believe the issue it will confront is one of the prudent exercise of power to influence policy, rather than one of neutral principles. If the Senate believes that the President has transcended the normal boundaries in his politicization of the judicial nomination process, it may wish to exceed the usual limits in its politicization of the confirmation process. In the present historical and political context, this President's nominees may well deserve to be scrutinized with particular care, and it may well be desirable to reject some of them on ideological grounds. But if the Senate adopts this course, it had best recognize the true nature of what it is doing, and make a thoughtful judgment whether its actions are wise from a long-term as well as a short-term perspective. In this connection, the Senate should consider whether it is prepared to live with the precedent it is adopting, or, alternatively, whether it will be able to bury the precedent when that becomes desirable. The issue is how the appointment and confirmation powers are to be exercised: should the President make the basic philosophical or ideological choices within the limits of a broad discretion, or should the Senate play something closer to a co-equal role in the process? This is the fundamental question that Professor Tribe raises, and his book is well worth reading whether or not one is persuaded by its effort to analyze the question in terms of neutral principles.

I would guess that the Senate's actions will depend in large measure on the nature of the nominees with whom it is presented. If the President is well-advised (and he has not always been well-advised on legal issues), he will not succumb to temptations to name to the Supreme Court individuals who are subject to attack on grounds of incompetence, cronyism, shabby ethics, racism, or a record in office of disregard for the rule of law. The Senate will then be confronted with nominees of the caliber of Justice Rehnquist, such as Judge (and former Solicitor General) Bork of the Court of Appeals for the District of Columbia Circuit, or Judge Posner of the Seventh Circuit: highly intelligent, capable, and respected individuals with a very conservative (or radical, depending on one's viewpoint) philosophical agenda. Such nominees, if confirmed, would be the most dangerous from the progressive perspective, because of the influence they would have on their colleagues and on the law's development. It seems questionable whether such nominees could be defeated by a neutral application of Professor Tribe's criteria. Perhaps his criteria were not developed with the defeat of such nominees in mind. But it would probably be unnecessary to resort to those criteria to defeat the Carswells of the world, or even the Meeses. Under the more likely scenario, the political task the Senate confronts will be one of excruciating difficulty. Professor Tribe's book has performed a great service in helping us all begin to think about the central issue, but it alone will not resolve the issue for us.