Comment by David Greenberg

The new politics of Supreme Court appointments

In all probability, George Bush will soon fill a vacancy on the Supreme Court, and for all his rhetoric about bipartisanship, he is clearly spoiling for a fight. Not only has Bush pledged to appoint justices in the mold of the Court's most conservative jurists, but at the start of his second term he also renominated several controversial lower court judges whom Democrats had successfully opposed.

Senate Democrats also show no signs of backing down. Their opposition to Bush's appellate court nominees has hardly been as obstructionist as Republicans have claimed, but they did noisily contest several of his most ideologically extreme first-term choices, once resorting to a filibuster.[1] Their rare unity on the issue, coupled with Bush's resolve, all but guarantees a partisan brawl over a future Supreme Court nomination.

Should such a showdown occur, it seems likely that antagonists will staunchly – and implausibly – deny that the nominee's ideology is at issue. Despite the patently ideological nature of so many recent judicial appointment fights, the participants now routinely profess to be assessing the nominees solely on their professional merits. This phony premise goes largely unchallenged in the news media – seemingly in an effort to uphold an unwritten rule that nomination fights shouldn't be waged on ideological grounds, lest the judiciary, the branch of government that's supposed to stand above the fray of partisan politics, be politicized.

A fictive discourse of appointments has thus emerged: a nominee's advocates make his case in the ideologically neutral language of merit, as if the candidate's views had no bearing on his selection, while critics find extrapolitical reasons in which to root their objections – a reputed character flaw, the performance of some unsavory act way back when, or some alleged lack of credentials. These rhetorical sleights on both sides have solidified the fiction that ideological differences aren't the issue.

Yet for all the attention paid to recent nominations, little effort has been made to explain, historically, how this peculiar condition came to pass. In fact, at least five trends converged in the late twentieth century to forge the current dynamic: the expansion of presidential power and the resulting desire to restrain it; the growing frequency of divided gov-

1 During Bill Clinton's presidency, the parties' roles were reversed. Republicans regularly held up or fought liberal appellate court nominations. Clinton avoided Supreme Court nomination fights mainly because he vetted his candidates beforehand in the news media and privately with Republican leaders such as Senate Judiciary Committee Chairman Orrin Hatch. See Orrin Hatch, *Square Peg: Confessions of a Citizen Senator* (New York: Basic Books, 2002), 180.

David Greenberg was a Visiting Scholar at the American Academy in 2002 – 2003. Now a professor of journalism, media studies, and history at Rutgers University, he is the author of "Nixon's Shadow: The History of an Image" (2003).

ernment; the increased cultural cachet of professional experts; the rise of identity politics in a more pluralistic political sphere; and the culture of scandal that pervaded Washington after Watergate. Together, these trends created the situation in which politicians fight vigorously over high court appointments even as they deny ideology any rhetorical place in the debate.

The distinctiveness of the current moment stands in sharp relief next to earlier periods in American politics, when different norms obtained. Traditionally, the Senate was assumed to have a strong say in Court appointments. The Constitution gives the president the power to nominate justices only with the "advice and consent" of the Senate, placing no clear-cut bounds on that advice and consent. In its first century, the Senate was deeply involved in the appointment of judges and justices. Then as now, senators often objected to nominees for political reasons – between 1794 and 1894, twenty-two of eighty-one nominees failed to make it onto the high court – though unlike today, they didn't hesitate to say so.[2]

That regular combat surrounding Court appointments has been forgotten because a markedly different pattern of political behavior crystallized in the first two-thirds of the twentieth century. Despite controversy over a few appointments during this time (notably Woodrow Wilson's selection of Louis D. Brandeis in 1916 and Franklin D. Roosevelt's choice of Hugo Black in 1937), between 1894 and 1968 only one high court candidate failed to gain Senate approval: Herbert Hoover's nominee John J. Parker of North Carolina, whose candidacy foundered on his antilabor rulings as an appellate judge and on racist remarks he had made while running for governor of his home state a decade earlier. This seventy-four-year period coincided with an era of unparalleled growth in presidential power that augmented the mystique of the executive branch and muted congressional resistance to judicial appointments. In recent decades, by contrast, the Senate has again become assertive in its treatment of Supreme Court nominations.

To understand this resurrection of serious, vibrant senatorial debate – and to appreciate the ironies of the present moment – it is useful to recall the events of 1968, when the Senate's long era of deference to presidential wishes came to a dramatic end. In 1968, the South's discontent with the liberalism of Lyndon Johnson and the Warren Court boiled over when Johnson sought to elevate his old friend Abe Fortas from associate justice to chief. Fortas's nomination – and not, as later commentators have suggested, that of Robert Bork in 1987 – ushered in the new era of contention.

It's frequently remembered that Fortas was forced off the bench in 1969 for his shady financial dealings. That memory, though accurate, obscures a battle a year earlier over his nomination to be chief justice. When on June 13, 1968, Earl Warren announced his intention to resign from the bench, Johnson chose Fortas almost immediately as Warren's succes-

2 The tally is based on Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Md.: Rowman and Littlefield, 1999), which is indispensable to any discussion of the history of Supreme Court appointments. A persuasive and influential argument that ideology played a role in confirmation battles is Laurence H. Tribe, *God Save this Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985). Tribe, however, does not write historically, instead furnishing examples from disparate eras to support his points.

sor. A distinguished lawyer and a liberal associate justice since 1965, Fortas also served as a close adviser to LBJ on all manner of politics and policies.[3]

But Johnson, having declared he wouldn't seek reelection, was a lame duck. Senate Republicans expected that their party's candidate, Richard Nixon, would win that November's presidential election, and Minority Leader Everett Dirksen ultimately joined forces with Georgia's Richard Russell, the leader of the Southern Democrats, to block Fortas's elevation. (Several Southerners waited until Nixon secured the Republican nomination before stating their hostility to Fortas.) But whereas a few years earlier, in 1959, Southerners had explicitly opposed the appointment of Potter Stewart because of Stewart's support for black civil rights, the reasons many senators gave for opposing Fortas weren't baldly ideological. Rather, they tried, if sometimes perfunctorily, to hide their political motives behind talk of ethics and merit.

Fortas, it emerged, had accepted fifteen thousand dollars to lead a university seminar, and his critics inflated this petty offense into a disqualifying crime. They also made much of the counsel Fortas gave to Johnson, although the practice of justices advising presidents was a long-standing, if waning, tradition.[4] The real bone of contention, everyone knew, was the liberal orientation of the Warren Court on subjects from racial integration to school prayer to the rights of the accused. Indeed, so controversial had the Court become that in 1964 its makeup loomed as a major issue in a presidential campaign for the first time since just after Franklin Roosevelt's failed 1937 Court-packing plan. In 1964, both Barry Goldwater and George Wallace railed against the Court's activism, and in 1968, Nixon followed suit.[5] Nominated at this ill-starred moment, Fortas became the lightning rod for pent-up rage toward the Warren Court's expansive rulings. Strom Thurmond denounced him for defending rapists, criticizing the decision *Mallory v. United States* (1957), which let a confessed rapist go free because police kept him in custody too long before his arraignment – and which also happened to have been decided before Fortas joined the bench. Thurmond also set up a film projector to show to interested lawmakers and reporters the pornographic movies that Fortas had supposedly deemed to be legal under the First Amendment.

Fortas won the Judiciary Committee's recommendation, but a coalition of Republicans and Southern Democrats carried the fight to the Senate floor. On September 25, these senators began a filibuster, during which they beat back a cloture motion. Acknowledging a rare defeat, Johnson, the erstwhile master of the Senate, withdrew the nomination. As a consequence, he also had to withdraw a second nomination, that of Homer Thornberry, a Texas judge (and another friend) whom he had picked to replace Fortas as associate justice. Not since John Parker's discomfiture in 1930 had a president failed to appoint his man; Johnson, in the space of a few days, failed twice.

The new politics of Supreme Court appointments

3 On the Fortas nomination, see Laura Kalman, *Abe Fortas: A Biography* (New Haven, Conn.: Yale University Press, 1990); and John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany: State University of New York Press, 1990), 32 – 77.

4 Fortas's plight may have helped make such relationships less acceptable.

5 William G. Ross, "The Role of Judicial Issues in Presidential Campaigns," *Santa Clara Law Review* 42 (2002): 391 – 482.

The Fortas debacle was a watershed. Not only did it mark the first defeat for a president in thirty-eight years, but it also certified a new willingness on the Senate's part to challenge presidential prerogative. This assertiveness was echoed in other challenges to political (particularly presidential) authority during this period – from the antiwar protests that brazenly derided government leaders to the new viciousness in satire, from the string of assassinations to the unprecedented back-to-back resignations of a vice president and president. Various segments of society felt an urgent need to restrain the imperial presidency, and nominations to the Court offered an occasion for senators to do so.

In the following years, senators began to boldly oppose presidential appointments. Yet the arguments used to defeat two of Nixon's high court nominees – Clement Haynsworth in 1969 and G. Harrold Carswell in 1970 – also confirmed the reluctance of critics to ground their opposition in plainly political terms. The search for more salable rationales for striking down nominees, introduced with the opposition to Fortas, took root with the fights against Haynsworth and Carswell. A comparison of votes on the nominations of Fortas and Haynsworth (who as an appellate judge had twice failed to recuse himself in cases involving companies in which he owned stock) proved what seems intuitively obvious: most senators' invocations of ethical concerns were, if not wholly insincere, highly expedient. Fortas's opponents, ostensibly offended in the summer of 1968 by his honoraria, supported Haynsworth the next year despite his ethics violations – their purported high moral standards conveniently vanishing. Conversely, Fortas supporters, who overlooked his infractions in 1968, waxed indignant about Haynsworth's misdeeds and voted against the Nixon nominee. Of the seventy-eight senators who voted in both cases, only eight followed a consistent pattern of support or opposition. Ethics, in short, was typically offered as the reason for a no vote, but ideology predicted how the votes went.[6] Here, then, was the real beginning of the fictional discourse that would thereafter surround nomination fights.

This reluctance to invoke ideology was not, of course, entirely new. Politicians have always avoided needlessly antagonizing one ideological faction or another, and taking the high road of endorsing a well-qualified nominee despite some differences can even give a senator an aura of statesmanship. But that truism begs the question of why an aura of nobility first came to grace politicians who appear to be above partisanship.

One answer lies in the century-long rise in respect for expertise. Progressive Era reformers helped establish professional authority as a basis for making judgments about governance, in matters of jurisprudence as elsewhere. By 1945, the American Bar Association (ABA) had founded the Standing Committee on Federal Judiciary to help choose nominees to the lower court,[7] and the committee's role was seen as a natural extension of the Progressive vision of government by experts. Dwight Eisenhower augmented the ABA's importance, telling Attorney General Herbert Brownell that he would not appoint anyone who didn't earn the body's approval. Starting in 1956, the attorney general's letter to

6 Massaro, *Supremely Political*, 1 – 24.

7 Abraham, *Justices, Presidents, and Senators*, 23; Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan* (New Haven, Conn.: Yale University Press, 1997), 86.

the president recommending a nominee began to include that candidate's ABA rating.[8]

But the sword of expertise cut both ways. In time, senators found that impugning a candidate's fitness for the bench could substitute for criticism of his ideology. Carswell, for example, was widely derided as mediocre. To this line of attack, his defenders struggled to reply. ("So what if he is mediocre?" Nebraska Senator Roman Hruska said of Carswell, to much laughter. "There are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they?") After the Senate rejected Carswell, Nixon, who initially had spurned the ABA, believing it to be run by liberals, asked it to consider and approve his nominees before he even nominated them. The depleted president realized that the august body's imprimatur could help him ease future nominations through a truculent Senate.

No one would argue that excellence shouldn't count in selecting justices. Neither, however, should the obvious need for skilled jurists obscure the problems of the fetishization of 'expertise' that took hold after the Carswell affair. For the consensus over the paramountcy of expertise inadvertently helped drive considerations of ideology further underground. A nominee's strong résumé – a long stint as an appellate judge, an appointment at a prestigious law school – could be wielded to intimidate senators from opposing him, even though that opposition might be warranted on other grounds.[9] Talk about qualifications became a largely phony discourse deployed for strategic reasons, not a genuine effort to assess the relative merits of potential justices.

The new politics of Supreme Court appointments

If expertise or merit emerged as one false discourse used to discredit opposition to a nominee, references to his or her identity represented a second. During the years of the new contentiousness in Court appointments, multiculturalism swept across American society. With the proliferation of ethnic, racial, and gender consciousness in the late 1960s and afterward, politicians considered the potential electoral gains in making appointments from key constituencies. Confident that the tide of public opinion had turned against white supremacy, Johnson sought acclaim for naming Thurgood Marshall as the first African American justice. Nixon's deliberations, as his Oval Office tapes reveal, were consumed by questions about how the gender, religion, and ethnicity of prospective nominees would play politically.[10]

Ronald Reagan similarly understood the advantages to be gained from playing identity politics. In his 1980 campaign for president, Reagan polled better among men than women, partly because he opposed the Equal Rights Amendment. In an effort to close the gender gap, Reagan first said he would probably name a woman to the Supreme Court, then all but promised to.[11] Then,

8 Goldman, *Picking Federal Judges*, 115.

9 Many liberals, for example, harbored concerns about Judge Antonin Scalia's views when President Ronald Reagan nominated him to the Supreme Court in 1986 but found it hard to oppose him given his strong résumé. See, for example, Anthony Lewis, "The Court: Rehnquist," *The New York Times*, June 23, 1986, A15.

10 See, for example, John W. Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (New York: Free Press, 2001).

11 Douglas E. Kneeland, "Reagan Pledges Women on Court; Carter Challenges Foe on Economy," *The New York Times*, October 15, 1980, A1.

in the spring of Reagan's first term, Justice Potter Stewart retired, precisely at a moment when polls were showing that the administration's belligerent El Salvador policy was eroding Reagan's female support. By nominating the conservative Sandra Day O'Connor to replace Stewart, Reagan fused the apparatus of public opinion polling to the selection of high court nominees. "It was done to help us with the woman problem," said Reagan's Chief of Staff James A. Baker, "and to keep a campaign pledge."[12] Similar calculations, of course, lay behind George H. W. Bush's decision to nominate Clarence Thomas to replace Thurgood Marshall in 1991; although most black civil rights leaders opposed the choice, Democrats were still hard put to oppose an African American nominee.[13] This logic also underpins the current administration's inclination to appoint a conservative Hispanic, such as Attorney General Alberto Gonzales, when a vacancy next arises on the Court.[14]

The readiness of Nixon, Reagan, and Bush Senior to pick justices from traditionally excluded groups spoke to the extent to which 'diversity,' in the age of multiculturalism, had come to be seen as a social good with broad public support; even politicians who opposed affirmative action and related policies for redressing racial and gender imbalances engaged unofficially in such practices. But the conservative use of race, gender, and ethnicity in the appointments process also contained a cynical element. Like expertise, identity constituted a sort of immunity talisman with which presidents outfitted nominees whom they feared might otherwise falter. Indeed, by the time of the current Bush administration, one occasionally heard conservatives leveling at liberals the charge of racial or religious discrimination when they opposed right-wing nominees.[15] It seems unlikely that anyone – even those making the charges – took them seriously. But within the boundaries of the new fictive discourse, in which ideology was pushed underground, the ease with which such absurd charges were proffered revealed the confident assessment, even by those historically most opposed to the sharing of power by Protestants, whites, and men, that, to borrow a phrase from the sociologist Nathan Glazer, we are all multiculturalists now.

The lone apparent exception to the emerging rule of euphemistic cynicism in senatorial jousting over Supreme Court nominations was the frankly ideological debate over Reagan's nomination of Robert Bork in 1987 to replace the retiring Lewis F. Powell. But even this

12 Sidney Blumenthal, "Marketing the President," *The New York Times Magazine*, September 13, 1981, 43ff.

13 Initially, those who opposed Thomas, including seven of the eight Democrats on the Senate Judiciary Committee, rested their opposition on what they characterized as a lack of experience – little more than a year as an appellate judge. Eventually, they would seize on allegations that he sexually harassed women who worked for him.

14 See, for example, Elisabeth Bumiller and Neil A. Lewis, "Choice of Gonzales May Blaze a Trail For the High Court," *The New York Times*, November 12, 2004, A1.

15 The charge was used in 2002 in the case of William Pryor, a Catholic nominated for the appellate court, and more recently in the general charge that Democrats oppose "people of faith." See "Washington in Brief," *The Washington Post*, April 11, 2002, A9; Robin Toner, "Washington Talk: Accusation of Bias Angers Democrats," *The New York Times*, July 27, 2003, 18. For a more recent use of the tactic, see David D. Kirkpatrick, "In Telecast, Frist Defends His Efforts to Stop Filibusters," *The New York Times*, April 25, 2005, A5.

apparent exception to the unspoken ban on invoking ideology ultimately served to reinforce it. Bork's liberal critics, after all, chose not to label him 'too conservative'; they depicted him, rather, as a wild-eyed, bushy-bearded zealot holding radical views alien to most Americans. As the Senate Judiciary Committee put it in its report, "Judge Bork's philosophy is outside the mainstream of such great judicial conservatives as Justices Harlan, Frankfurter and Black, as well as such recent conservatives as Justices Stewart, Powell, O'Connor and Chief Justice Burger."[16]

Although the open discussion of Bork's views on abortion, affirmative action, and other issues made the debate, in some undeniable sense, about ideology, the focus on the eccentric aspects of Bork's personality and his mind allowed his opponents to maintain they were not applying narrow litmus tests in rejecting him. "I supported Justices O'Connor and Scalia as well as Chief Justice Rehnquist," said Senator David Pryor of Arkansas. "But the question of Robert Bork is not an issue of a person being conservative or liberal, Republican or Democrat. It is a larger question of temperament and understanding." Bork's critics convinced the public that they were concerned about his character and even something like his sanity – aspects of a nominee that, unlike ideology, everyone agreed merited serious attention in the choice of a justice.

The ideologically charged Bork case, ironically, solidified the taboo on opposing a nomination on ideological grounds. When Douglas Ginsburg, the Reagan administration's next choice to fill Powell's seat, turned out to have smoked marijuana as a law professor, participants in the confirmation fracas retreated from the precipice of invoking ideology that they had approached with Bork, heading back to the safer terrain of 'scandal' and 'character.' But the failure of the successive nominations (the administration withdrew Ginsburg's name once the news of his drug use surfaced) gave rise to a round of public soul-searching and blue-ribbon panels, with various solutions put forward to try to lower the temperature.

The most commonly heard prescription held that the appointments process had to be 'depoliticized.' A post-Bork task force convened by the Twentieth Century Fund, comprising nine leading lawyers, professors, and retired politicians, urged that candidates no longer testify at their own Senate confirmation hearings (a process that began in 1925, well before the current dynamic took hold). If nominees did testify, the task force added, they should not be asked about how they would rule on cases before the Court.[17] Such prescriptions went nowhere. The public, understandably, held to its demand that its representatives vet lifetime appointees to a body increasingly distrusted for its unaccountability, even in the face of dismay at hearings that often seemed staged or circuslike. For presidents or senators to have returned to the dynamic that held sway in the early twentieth century would have been to turn back the tide of history.

More recently, another proposal has come from the other direction. Law professor Randall Kennedy of Harvard, Senator Charles Schumer of New York, and others have called for participants in the confirmation process to admit that ide-

16 Senate Committee on the Judiciary, *Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court*, 100th Cong., 1st sess., October 13, 1987, p. 13.

17 Twentieth Century Fund Task Force on Judicial Selection, *Judicial Roulette* (New York: Priority Press Publications, 1988).

ology inevitably plays a role and to bring it out of the shadows. "Many people sneer at the notion of litmus tests for purposes of judicial selection or confirmation – even as they unknowingly conduct such tests themselves," Kennedy wrote early in the current Bush administration. But litmus tests, Kennedy added, were actually commonly accepted ways of sizing up a nominee's views. The real problem, as he saw it, was that the taboo on discussing ideology led to a search for scandal. "A transparent process in which ideological objections to judicial candidates are candidly voiced," he concluded, "is a much-needed antidote to the murky 'politics of personal destruction.'"[18]

Of the two prescriptions, Kennedy's seems more likely to offer a way out of the thicket, for at least it strives toward transparency. But where those favoring depoliticization fail to reckon with half of the current dynamic – the ineradicability of politics – those favoring greater candor neglect the other half: the tenacity of the fictive discourse that has emerged over thirty-five years. Indeed, though it seems counterintuitive, it may well be the very frequency of the nomination fights that has made senators eager to reassure themselves that they're not putting parochial preference above national comity. Every so often, a high-stakes congressional vote, such as on whether to go to war, leads politicians to talk about 'a vote of conscience' – implying that conscience plays little role in ordinary votes. Just so, the chance to oppose or confirm a nominee in language that affirms a dedication to the common good affords politicians a measure of absolution for all those other occasions on which they fail to do precisely that.

– April 26, 2005

18 Randall Kennedy, "The Case for Borking," *The American Prospect*, July 2 – 16, 2001, 26. Schumer, a member of the Judiciary Committee, made a similar argument: "The taboo [on invoking ideology] has led senators who oppose a nominee for ideological reasons to justify their opposition by finding non-ideological factors, like small financial improprieties from long ago. This 'gotcha' politics has warped the confirmation process and harmed the Senate's reputation." From Charles E. Schumer, "Judging by Ideology," *The New York Times*, June 26, 2001, A19.