

THE JEFFERSON JOURNAL

...a commentary from

THE THOMAS JEFFERSON INSTITUTE FOR PUBLIC POLICY

Time to Call A Truce

By Chris Braunlich

3/31/2017 -- As an undergraduate political science major, the grounds upon which a Supreme Court Justice should be considered was made clear to me in my Constitutional Law course: Integrity, experience, temperament, and intelligence. One thing not to be judged was politics. Not to be asked were “How would you rule if ...” questions. Those types of queries would politicize an independent judiciary.

Then came Robert Bork.

Opposition attacks on Bork began within 45 minutes after his nomination when Senator Ted Kennedy took to the Senate floor to claim Bork would force women “into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids ...” Fact checkers have long since demonstrated that none of it was true, and *New York Times* reporter Ethan Bronner has declared “Kennedy’s was an altogether startling statement. He had shamelessly twisted Bork’s world view ...”

Writing in *The Washington Post*, retired U.S. district judge James Robertson recently noted that three decades ago he had led a team of young lawyers opposing Bork’s nomination, doing what might be called “opposition research.”

Today, Robertson says, “I regret my part in what I now regard as a terrible political mistake.... the treatment of Bork touched off a Thirty Years’ War on judicial appointments. We have politicized the judicial confirmation process far beyond historical norms and undermined public confidence in the judiciary.”

Indeed. And it has gotten worse with every passing year. It ratcheted up when then Senate Minority Leader Harry Reid argued that “Nowhere does it say the Senate has a duty to give presidential nominees a vote,” following it up (along with then-Senator Barack Obama) with an attempted filibuster of Justice Samuel Alito. And it happened again when Republicans took Reid at his word and refused to consider Obama’s nomination of Merrick Garland.

Now, Senate Minority Leader Chuck Schumer, responding to overtly political pressure from his liberal base, has promised a filibuster against Gorsuch. If necessary, Republicans will celebrate the 100th anniversary of cloture by ending it and the requirement for a three-fifths majority for Supreme Court nominees, moving on to approve Gorsuch.

But at what cost?

Of Gorsuch, Robertson notes “Judge Neil Gorsuch is superbly well-prepared and well-qualified to serve as an associate justice of the Supreme court. There is no real dispute about that. ... Does his record support the label ‘extremist’? Certainly not. ‘Ideologue’? No. ‘Conservative’? Yes, of course – but elections do have consequences.”

But these are exactly the words used by Gorsuch opponents. Senator Diane Feinstein calls Gorsuch an “extremist.” Senator Al Franken called his opinions “absurd.” Other liberal leaders use the words “dangerous”, “ideologue” and “radical.” In other words, deploy every political distortion and smear available as if negative TV ads were being devised.

Where once we demanded Supreme Court Justices exercise intelligent analysis of the facts, Senate liberals oppose Gorsuch because he refuses to say how he would vote on hypothetical cases – before the facts are even known.

The effect of all this is devastating in the long run: Lower court Judges will increasingly decide cases not on the evidence, precedent, and law but on the politics. Those who trim to the political winds will be rewarded. And an increasing politicization of the Supreme Court will lower even further public belief that the Court decides objectively.

Lloyd Cutler, White House counsel to President Clinton made the same point to the Senate Judiciary Committee when he testified “to make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken the public confidence in the courts.”

Fifteen years ago, an attorney in private practice noted this degradation of the judicial confirmation process when he wrote, “Politicians and pressure groups on both sides declare that they will not support nominees unless they hew to their own partisan creeds,” he continued. “When a favored candidate is voted down for lack of sufficient political sympathy to those in control, grudges are held for years, and retaliation is guaranteed.”

The author? Neil Gorsuch, who now must bear the weight of those grudges ... and the retaliations.

Elected officials love to proclaim their actions as non-partisan. Virginia Senator Tim Kaine has already announced he'll oppose Gorsuch, but Senator Mark Warner now has an opportunity to back up those claims with actions. He can play a major role in reversing this trend of judicial confirmation partisanship. Regardless of his vote on Gorsuch himself, he can claim the mantle of non-partisanship by voting for cloture and allowing a vote on the merits.

They can be among the first to call a truce to the War on judicial appointments.