

Politicization of the Confirmation Process

-- By Josh Drobnyk, Online NewsHour
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Within minutes of John Roberts Jr.'s nomination to the Supreme Court on the night of July 19, 2005, politicians and interest groups raced to weigh in on the decision.

For liberal and conservative organizations, it was the culmination of years of preparation and they quickly rattled off news releases with statements assessing the nominee. Senators held late-night news conferences to chime in on the choice.

The firestorm had begun, and its arrival came as little surprise.

The Supreme Court confirmation process, some historians say, has become more political than ever, with interest groups throwing hundreds of thousands of dollars behind or against a nominee, and legislators appearing to care much more about candidates' ideologies -- compared to their strict ability to do the job -- than in the past.

The perception appears to be widespread. Eight in 10 Americans think the confirmation process for Supreme Court nominees has become increasingly political, according to a spring 2005 poll conducted by the University of Pennsylvania's Annenberg Public Policy Center.

The same poll found that nearly half (46 percent) of 859 lawyers surveyed blamed the politicization on the political parties, with about a quarter (27 percent) saying interest groups are responsible, and almost a fifth (17 percent) placing the onus on the White House.

For many historians, two major events -- the social activism of the Warren Court of the 1950s and the bloody confirmation fight over Judge Robert Bork in 1987 -- are viewed as the moments that added to the politicization of the confirmation process.

The Warren court

Earl Warren's arrival as chief justice in 1954 coincided with the court's decision in the famous desegregation case *Brown v. Board of Education*. The court's ruling that segregation in public schools was illegal was the first of many landmark social cases the court would decide in the coming years that would quickly mark a change in its influence, and consequently, the public's interest in the justices making the decisions.

In a July 2005 interview with the NewsHour, University of New Hampshire history professor Ellen Fitzpatrick said that the Supreme Court has traditionally been a fairly conservative institution, rarely leading in advance of Congress or the president himself.

That changed with the Warren court, she said. "[In *Brown v. Board of Education*], the court actually took a step far beyond where either the president or the Congress was ready to go," she

said just days after Justice Sandra Day O'Connor announced that she was stepping down after 24 years on the high court.

The court's new, more proactive role continued with several other civil rights cases in the 1960s and even past Warren's retirement in 1969. His court's more active approach reached into the 1970s, with the seminal decision of *Roe v. Wade* in 1973, which made abortions legal.

The politicization of the confirmation process stems directly from the court taking on these hot-button issues, according to Dennis Hutchinson, professor at University of Chicago Law School and editor of the school's *Supreme Court Review*.

"It has more to do with the sort of issues that the Supreme Court is willing to decide on and the stakes the various groups see in that jurisdiction," he said. Organizations with interests in issues such as abortion, the death penalty and homosexuality started to turn their attention toward the court. Hutchinson said the first noticeable involvement of interest groups was in 1975, when women's rights groups opposed President Gerald Ford's nomination of John Paul Stevens. Stevens, now 85, is currently the oldest member of the court.

Organized groups looking to influence the confirmation process, Hutchinson said, is "a phenomenon of the last 30 years and is certainly one that has accelerated in the last 18 years," he said.

That gathering political storm broke in 1987, when Reagan nominated U.S. Circuit Judge Robert Bork, whose hearings many historians consider to be another major turning point in the Supreme Court confirmation process.

"[That was] the sea change with how nomination battles were fought," said Leonard Gross, professor of law at Southern Illinois University School of Law and co-author of the 1998 book *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations*. "We quickly saw that [with the Senate] just simply relying on ideology, the Bork nominee was breaking ground," he added.

Concerned Bork would roll back recent civil rights advances, Democratic senators and liberal interest groups rallied against the nominee, focusing on his perceived conservative bent. Within an hour of Bork's nomination, Sen. Edward Kennedy, D-Mass., blasted Reagan's choice on the Senate floor. "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, children could not be taught about evolution," he said.

Bork's hearings lasted longer than any previous confirmation scuffle, dragging on for 87 hours over 12 days, according to Gross. In the end, special interest groups played a major role in Bork's 58-42 defeat at the hands of the Senate.

Not only had liberal interest groups won the fight, organizations on both the left and the right raked in donations during the Bork battle, raising money for their political war chests, Gross' book notes.

Mark Tushnet, a professor at Georgetown University Law School, said such fundraising has increased with the growth of interest groups' involvement in politics. "Interest groups have figured out that the politics of nominations is a way of raising money and so in anticipation of a big fight they have accumulated these large war chests," said Tushnet, author of the 2005 book, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*. "It is not that the nomination process has gotten more political, it is just that the politics of nominations mirrors the general politics of the time ... In the 19th century you had patronage politics and a patronage nomination process. Now we have interest-group dominated politics and an interest-group dominated nomination process."

The hearings

The Bork battle also came on the heels of another change in the confirmation process: media interest.

Bork's hearings before the Senate Judiciary Committee were only the third to be televised nationally, an event that began with the airing of the O'Connor hearings in 1981. "The hearings have become sort of a show unto themselves," Gross said. "I think that's certainly enabled the public to get more energized by it."

For generations, nominees didn't even have to go before the Judiciary Committee, let alone face television cameras as they testified. No nominee appeared before the committee until 1925 and it did not become common practice until the mid-1950s, according to the University of Chicago's Hutchinson. Instead, nominees would typically rely on a senator from their home state to vouch for them, according to UNH's Fitzpatrick.

Another tradition that appears to have been thrown by the wayside in recent years is voice votes on nominees. If and when Roberts' nomination reaches the Senate floor, senators' votes, even in the case of a landslide, will be carefully scrutinized. Not since 1965, a period that includes votes on some 17 nominees, has the Senate used a voice vote to consider a nominee, even though four of those were unanimous votes. Before 1965, more than 60 percent of votes -- all of them confirming the nominee -- were taken with a voice vote. "That may just be an indication that [it has become] more formalized," Gross said. "It is a whole much more elaborate process from start to finish than it once was."

Roberts' confirmation

Roll call or voice vote, both Gross and the University of Chicago's Hutchinson, along with political commentators on either side of the aisle, said they expect Roberts to win confirmation.

"I think [he's] going to sail through," Hutchinson said, adding he expects fewer than 30 votes against.