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The Judicial Appointment Process

Senator John Tunney*

The federal judicial appointment process is highly political and rarely does a judge get confirmed by the United States Senate without experiencing an intense exposure to the reality of party politics in both the Congress and the White House. It would be nice to believe that the federal judiciary is made up of men and women who are chosen principally on the basis of their legal skills, judicial temperament and experience. Although many very talented people end up on the federal bench, the process by which they are nominated, investigated and confirmed is driven by politics.

Matt Byrne was a perfect exemplar of how a person can combine the native intelligence of a first class lawyer with the savvy of a superb, instinctive politician and still be denied confirmation to the court because he was caught in the random back wash of politics. Later his political luck changed and he won confirmation without objection.

When I first met Matt I was in the House of Representatives and Matt was a young lawyer seeking to become the U.S. Attorney from the then Southern District of California. The year was 1965. I had received a telephone call earlier in the week from the former heavy weight boxing champion, Jack Dempsey, who was a good family friend and who had joined his erstwhile opponent, Gene Tunney (my father), to campaign for me in my successful election to the Congress eight months earlier. I heard Jack's voice as I picked up the receiver:

John, a young man named Matt Byrne wants to see you about a political appointment. His father is Judge Byrne from Los Angeles and he is a friend of mine. Judge Byrne was a boxer back when your Dad and I were in the ring. He left the ring early and became a lawyer and a judge. He is a great guy and from what I hear his son is terrific. Would you see him?

* Former Senator John Tunney was elected in 1970 to the United States Senate representing California for a six-year term. He served six years on the Senate Judiciary Committee.

There was no way that I could say “no” to Jack. When Matt called the office for an appointment my scheduling secretary made sure he got in right away.

As Matt came in I was struck by how young he looked. Matt was thirty-three years old at the time. I had not yet seen my thirty-first birthday. Matt said that he was interested in being appointed U.S. Attorney by President Lyndon Johnson and he was making the rounds of the California Democratic House of Representatives Delegation to win political support. There were two Republican U.S. Senators at the time so the House Delegation was the important political clearing house for the appointment.

After a few minutes of conversation with Matt, I realized he was filled with self-assurance and that he had already become a world traveler with many hunting and fishing trips to South America, Africa and Canada under his belt. Having traveled some myself, I was immediately drawn to him as a marvelous raconteur, witty in his observations and magnetic in personality. Somewhat pompously, trying to show that I was a person who was conducting the interview for the job that he wanted, I said, “Aren’t you a little young to be the U.S. Attorney in Los Angeles?” He snapped back without a second of hesitation, “Aren’t you a little young to be a Congressman and asking such a silly question?” It was not only an appropriate putdown of pomposity; it was the beginning of forty years of close friendship.

I mentioned that politics plays an important role in judicial selection. To understand why Matt was slighted it is necessary to explain the factors that make up this process. First, there has been an enormous expansion of the body of federal law in the last hundred years and much of the Congressional legislation dealing with politically sensitive issues is drafted with purposefully vague language to assure its passage in the House and Senate and its approval by the President. This means that it is up to the courts to interpret Congressional meaning on many highly charged, fractious political issues. Therefore, the political philosophy of judges can play an enormous role in interpreting Congress’s intent. It follows that the selection of judges has become subject to various political litmus tests, the fairness of which depends on the philosophy of who is doing the proposing and who is responsible for the disposing of the nominations.

Second, the process itself is embedded in politics. The President sends his nominations of federal judges to the Senate under the “advice and consent” clause of the Constitution.² The nominations are referred to the Senate Judiciary Committee for investigation of qualifications, including public hearings, and finally a Committee vote to determine if a majority of members are in favor of sending the candidate’s name to the Senate floor for a confirmation vote. If a majority of Judiciary Committee members are opposed to moving the candidate’s nomination to the floor, it represents a

1. U.S. CONST. art. II, § 2, cl. 2.

rejection of the candidacy. If the vote is positive in Committee, there is still an unlikely but possible chance that a majority of Senators will reject the nominee on the floor vote. Generally, the President will only send the names of candidates for judgeships that have been thoroughly vetted by the Justice Department and the White House political staff. This means that almost all judges nominated are of the same political party as the President and share, in a general sense, the political philosophy of the President.

Third, in the Senate a policy has developed over the years that if one of the two Senators from the state where the District Court is located is opposed to the candidate on the basis of personal privilege, the Senator can “blue slip” the candidate with the Chairman of the Judiciary Committee and effectively kill the nomination.³ The Chairman extends courtesy to the Senator in a “blue slip” situation by not holding hearings on the nominee’s qualifications. This is an undemocratic, but effective, way of preventing a person from becoming a judge.

Matt Byrne was nominated to the bench by President Lyndon Johnson in 1968 after serving a couple of years as U.S. Attorney in Los Angeles. In that year, there were two sitting Republican Senators, Thomas Kuchel and George Murphy. During the spring of 1968 after almost being defeated in a February New Hampshire primary by Senator Eugene McCarthy, President Johnson announced that he would not be a candidate for reelection. George Murphy responded by putting a “blue slip” on all California nominees to the District Court in California. Apparently, his thought was that if the Republicans won the Presidential election in November, 1968, it would give the new Republican President more Republican judges to appoint. The strategy turned out to be successful when Richard Nixon was elected President. President Nixon withdrew Matt Byrne’s name from consideration along with other pending Democratic nominees the following January, 1969.

In November of 1970 I was elected to the United States Senate and was put on the Judiciary Committee in January, 1971. Long before I formally took my seat in the Senate, I had been advised of George Murphy’s action in “blue slipping” Matt and how Matt had thereby lost his opportunity to be confirmed by the Senate to the federal bench. I knew that Matt desperately wanted to join his father on the bench and was perfectly willing to give up a potentially lucrative law practice to follow his dad’s inspired career. I was also aware that his failure to be confirmed was purely the result of partisan

2. Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1131, 1135-36 (2003) (discussing the history of the blue slip).

politics. Matt's stature in the legal community of Los Angeles was extremely high and his reputation as U.S. Attorney was excellent.

In early 1971, after thinking about how I could rectify the injustice that had been done to Matt and how to politically redress the actions of Senator Murphy, I called the Deputy Attorney General of the United States, Richard Kleindienst, and asked for a meeting in his office in Washington, D.C., to which Mr. Kleindienst readily agreed. When we met, I reminded him that the Nixon Administration had withdrawn all the California federal judicial nominations after the President took office two years earlier. I pointed out that Matt Byrne had not had a chance to have a Senate hearing because of the action of Senator George Murphy. I said that now California had two Democratic Senators, myself and Alan Cranston. I noted that I had just recently been appointed to the Judiciary Committee and I suggested that I could cause no end of grief to the Nixon Administration if I started holding up judicial nominations on a whim. I concluded by saying that I wanted one third of all the District Court nominations from California for as long as President Nixon and I were in our respective offices. I said that obviously my nominees had to be found qualified by the American Bar Association, but that I did not want them to be disqualified by the Justice Department or the White House because of their political affiliation. Mr. Kleindienst said that he had to talk this proposal over with the Attorney General, John Mitchell. He said he would be in touch with me in a few days.

A week later, Kleindienst called and said he wanted to visit me in my office. I agreed and when he came in he wore a big smile. He said that the Attorney General and the President had agreed to my request. He also said he had two questions. First, he wanted to be assured that I would not object to any of the President's nominations on purely partisan political grounds. I readily agreed to this condition. Second, he wanted to know who my first judicial nominee would be. I said, "Matt Byrne . . . the man that you withdrew from consideration when you took office two years ago." Kleindienst's face lit up and he said, "Matt Byrne will be a great judge. I am all for him." I could not have been more surprised. I asked him why he had withdrawn Matt's name two years earlier if he felt that way. He laughed and said:

You know politics, Senator. Matt is a Democrat. We are a Republican Administration. We want to appoint loyal Republicans and we certainly did not want one of Johnson's appointees to be confirmed. The only reason that we are agreeing to it now is because you have the power to make life complicated for us. Matt is a great person and smart as hell. I know what he accomplished as Counsel on the Kerner Commission investigating civil unrest in America and I know he was a tough but fair prosecutor when he was U.S. Attorney. He is the best choice that you could have made.

Thus, Matt Byrne was nominated to the court by the same Nixon Administration that had unceremoniously dumped him two years earlier. Matt sailed through the confirmation process in the Senate in a few weeks. He remained on the federal bench for over thirty years and his career was marked by many significant accomplishments. Like his father, he became Senior Judge and for his entire career he was one of the most respected federal trial judges in the country. He represented the United States Department of State on many occasions, traveling worldwide to describe to judges, legal associations and foreign government officials the system of justice in the United States. He lectured in dozens of countries, including totalitarian nations like China and the Soviet Union. The candid and intellectual approach he demonstrated in his lectures won him praise and honors from both the State Department and some foreign governments who abhorred the justice system he was describing. It was a case of disliking the system being presented but respecting the presenter. The insouciance displayed in his manner of delivery as well as the substance of his lectures on the American judicial system created good will for our country wherever he visited.

It can be said that sometimes, but not always, the syncretism between politics and the judicial appointment process works and when it does, the results can be powerful. Matt's career on the bench demonstrates that he understood the meaning of the conundrum suggested by Heraclitus, "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."⁴ Matt found the proper formula to mix principles of law with liberty and thereby enhanced the ethical values and the quality of judicial judgment within the legal system he loyally served for so many years.

3. Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 *CARDOZO J. INT'L & COMP. L.* 1, 1 (2004).

