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HAYNSWORTH AND PARKER: HISTORY DOES LIVE AGAIN

JOEL B. GROSSMAN* and STEPHEN WASBY**

The recent defeats by the Senate of the nominations to the Supreme Court of Judge G. Harold Carswell and Judge Clement Haynsworth were only the second and third such defeats in the present century, and but the tenth and eleventh in the history of the Court.[1] Whether they will remain exceptions to the norm which permits the President to choose nominees to the Court relatively unhindered, or whether these cases augur a new era of confrontation between the President and the Senate remains to be seen. We have elsewhere sought to speculate on the broader meaning of these events.[2] In this paper we have chosen to focus on the Haynsworth case because it affords a fascinating parallel to the only other senatorial defeat of a Supreme Court nominee in the twentieth century, that of Judge John Parker in 1930.[3] A comparison of these two nominations provides a unique time perspective to view the process of Senate confirmation. Both Parker and Haynsworth were, at the time of their nominations, members of the Court of Appeals for the Fourth Circuit. Both were attacked by the NAACP and the labor unions on the ground that their decisions as appellate judges on race and labor relations questions were illiberal. In both cases the question arose of the proper role of an appellate court judge—to follow Supreme Court decisions to the letter, or to embark on their own in formulating policy responses.

There were, of course, differences as well. The margin of defeat of the Parker nomination was slim. The 39-41 vote might easily have gone the other way had Senator Hugo Black, himself later named to the

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1. We exclude from this category the 1968 nomination of Abe Fortas as Chief Justice. Although the nomination was, in effect, rejected by the Senate, it was technically never acted upon since Fortas withdrew his name in the wake of a projected filibuster.

2. J. Grossman and S. Wasby, The Senate and the Selection of Supreme Court Justices: Where Does the "Haynsworth" Affair Leave Us?, 1971 (manuscript in progress).

3. It is ironic to note that, in also searching for parallels, Senator Eastland (D. Miss.) invoked in behalf of Haynsworth the shade of Justice Brandeis, who, like Haynsworth, had been attacked for being "insensitive to appearances."

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Court, switched his vote to create a tie—presumably to be broken in Parker's favor by Vice-President Dawes. While there had also been speculation prior to the Haynsworth vote that Vice-President Agnew might have to break a tie in Haynsworth's favor, the defeat was more decisive, 45-55. Other differences existed. Parker's nomination had been adversely reported by the Judiciary Committee, 6-10, while Haynsworth's had been favorably reported.[4] Also, while Parker was a southerner chosen to replace another southerner who had retired (Justice Sanford), Haynsworth, a southern conservative, was nominated to replace a liberal Democrat who had been forced off the bench by Republican-conservative led opposition. Finally the biggest difference was that Haynsworth's nomination was contested not simply in terms of role and ideology, as had Parker's—but also on matters of judicial ethics as well.

An appraisal of the Parker and Haynsworth nomination fights affords us the opportunity to re-examine the role of the Senate in confirming judicial nominations. The constitutional prescription of "advice and consent" has long since been recognized as at least partially inaccurate. The Senate as a whole never *advises* a President on whom to nominate, and only rarely refuses to consent. Individual senators of the President's party wield substantial influence in the nomination of lower federal court judges, to the point of being able to block a nomination of which they disapprove and force a nomination they desire. For most senators, judgeships represent prime patronage opportunities. But Supreme Court nominations are widely accepted as a presidential prerogative and individual senators do not expect much consultation or influence in making an appointment.[5]

Once a nomination is made, however, the Senate's role is activated. But even here, tradition and the exigencies of practical politics serve as limiting factors. Most senators at least publicly subscribe to the notion that recruiting Supreme Court justices is a presidential prerogative, and that the confirmation role of the Senate is limited to reviewing the *fitness* of the nominee rather than his political

4. 72 CONG. REC. 8338 (1930).

5. The most comprehensive treatment of the Senate's role in judicial appointments is J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953). *See also* J. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION (1965); W. Burris, John J. Parker and Supreme Court Policy: A Case Study in Judicial Control, 1965 (Unpublished dissertation in University of North Carolina Library); A. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964).

desirability, his qualifications, or the wisdom of choosing him. Individual senators are not, of course, bound by these norms, and nominations are frequently challenged for reasons other than mere fitness. But the Senate as a whole, with the exception of the Parker case, has followed this norm. It should be added that there is bipartisan acceptance of this norm. Senators understand that all Presidents make most of their judicial appointments from the ranks of their own party, and there is little evidence of partisan opposition to most nominations. Where there is overt opposition along party lines, it tends to arise in support of another issue.[6]

With these facts in mind, let us attempt a more systematic appraisal. Our major concerns will be the political situation and political factors which surrounded the controversies, the question of judicial ethics, and, finally, the question of ideology and the proper role behavior of appellate court judges which became entangled in both cases. No attempt will be made to recount in detail the chronology of events, or to capture all dimensions of the respective nominations. The basic picture is available in newspapers and congressional documents.

POLITICAL FACTORS

Here we will consider the timing of the nominations, the nominating strategies of Presidents Hoover and Nixon, the patterns of support and opposition, and the crucial role in each case of liberal interest groups opposing confirmation.

The timing of both nominations appears significant. The Haynsworth nomination was Nixon's second and came early in his term of office. This is normally supposed to aid confirmation and therefore highlights the strength and effectiveness of the opposition. Hoover's nomination of Parker came later in the President's term, when the so-called "honeymoon" with Congress (if there had been one at all) had waned or concluded. Even more important, perhaps, is the relationship of a nomination to the one that preceded it. Parker's nomination took place shortly after the controversy over the

6. A. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964). *See also* H. Abraham & E. Goldberg, *A Note on the Appointment of Justices of The Supreme Court of The United States,* 46 A.B.A.J. 147-50, 219-22 (1960); J. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee,* 19 J. PUB. L. 371-402 (1970); C. Black Jr. *A Note on Senatorial Consideration of Supreme Court Nominees,* 79 YALE L.J. 657 (1970).

nomination of Charles Evans Hughes as Chief Justice.[7] Hughes was confirmed, 62-26, but there had been a strong minority opposition from Progressives led by Senator Norris of Nebraska. Hughes had been attacked as a tool of capitalism and for dragging the Court through the muck and mire of politics by resigning in 1916 to run for President. Thus, when Parker's name was sent to the Senate there was already controversy in the air as well as political opposition to the President over a judicial appointment. In the Haynsworth situation, the previous nomination of Warren Burger as Chief Justice had been confirmed with less protracted opposition. However, there had been significant liberal dissatisfaction with the Burger appointment, particularly over his views and past decisions on criminal procedure matters, and this dissatisfaction by liberals was only exacerbated by Haynsworth's selection. What appears to have polluted the atmosphere of the Haynsworth nomination most, however, was less the Burger nomination than the two battles over Abe Fortas—first over his nomination as Chief Justice (eventually withdrawn by President Johnson after the Senate failed to vote cloture against a filibuster), and then over the conflict-of-interest charges which led to Fortas' resignation in the spring of 1969. Thus, in both the Haynsworth and Parker cases, frustration by opposition senators over a previously lost fight against the confirmation of a preceding nominee seems to have increased nominees' vulnerability to attack.

There is little doubt that Haynsworth's nomination—like that of Judge Harold Carswell which followed Haynsworth's rejection—was part of President Nixon's "southern strategy"—a maneuver widely interpreted as a payoff for southern support in the 1968 election and a down payment for continued southern support for Nixon in 1972. In fact, two national columnists suggested that because of this strategy, Attorney General Mitchell twice refused Haynsworth's request that his name be withdrawn.[8] It is also possible that Parker's nomination

7. Hoover did not wait very long between the Hughes confirmation and Parker's nomination, perhaps at most enough time to find a name, perform a background check, and get proper clearance. Whether a delay, to let the cauldron's boil be calmed, would have helped Parker is unclear. Certainly Nixon's longer wait after the Burger confirmation before sending Haynsworth's name to the Senate did not perceptively aid the latter.

8. Rowland Evans and Robert Novak, *Haynsworth Court Affair: Did It Hurt Mitchell's Stock,* WISCONSIN STATE JOURNAL, November 25, 1969. Judge Haynsworth subsequently denied that he had made such a request.

resulted from the "southern strategy" of a Republican President. While Hoover's Attorney General, also named Mitchell, in a memorandum to the Senate Judiciary Committee did indicate that the fact that the Fourth Circuit had not been represented on the Supreme Court in many years played a part in Parker's selection,[9] he claimed that a search for nominees had been made in several circuits, not all of them southern. However, there subsequently was found in the Justice Department's file on Parker a letter from a Department of the Interior official, urging a seat for Parker in order to reward North Carolina and the South for their electoral support of Hoover.[10] While we have no way of knowing whether the earlier Attorney General Mitchell saw this letter or gave it any weight, it is certainly not implausible to think that, certainly the idea, if not the letter itself, carried weight in Hoover's mind. Hoover himself, in his *Memoirs*, not only insisted that his Attorney General had "zealously" demanded "quality and character on the bench," but after noting that there was no Justice from the South indicated that "regional distribution of justices had always been regarded as of some importance."[11]

The degree to which a President is willing to fight for a nomination is a crucial, though not necessarily conclusive, factor. Wilson's support of Brandeis, the third most controversial nomination of the century, may have been crucial in winning a close vote, while Lyndon Johnson's support of Fortas as Chief Justice proved insufficient, and, in the context of the charge of "cronyism" leveled against Fortas, positively embarrassing. Hoover's Attorney General did support the Parker nomination strongly, but Hoover himself appeared to maintain a "low profile" during the controversy. On the other hand, Nixon, to whom a "low profile" is often attributed, supported both the Haynsworth and the later Carswell nominations actively. In both cases he was alleged to have applied considerable pressures on wavering Republican senators to support the leader of their party.[12]

9. 72 CONG. REC. 8341, 42 (1930).

10. Letter from Joseph Dixon to Walter Newton, *Id.* at 8040.

11. 2 THE MEMOIRS OF HERBERT HOOVER 268 (Macmillan, 1952). We are indebted to Mr. Donald Gregory for calling this to our attention. It has recently been suggested to us that there has not been a Justice from the "Atlantic South" since Peter Daniel.

12. There is evidence in both cases that this pressure may have backfired or proved counter-productive. There was considerable resentment against the tactics used in the Haynsworth case. In pushing for support of Carswell, President Nixon sent a letter to Senator Saxbe, a wavering Republican, indicating Nixon's belief that in refusing to

Both Parker and Haynsworth were endorsed by the American Bar Association, although the issue of judicial ethics caused some division of lawyers generally over the Haynsworth nomination. In both cases, sitting judges on other Courts were involved in supporting the nominees.[13] Parker was recommended by the district judges in his circuit. The involvement of other judges in the Haynsworth case was greater and more important. The ethical issue which later proved his undoing (and which will be described subsequently) was first uncovered several years before the nomination. An investigation by Chief Judge Sobeloff at the behest of Attorney General Robert Kennedy cleared Haynsworth of unethical conduct in the *Darlington Mills* case.[14] Judge Winter testified in Haynsworth's behalf, but conceded under questioning that he might have handled differently the acquisition of stock in a company whose case before his Court had already been decided. The other members of Haynsworth's court sent a telegram of endorsement to the Senate.

What the nominees did or did not do in their own behalf may also be a relevant factor. Parker had been attacked for a statement he had made in response to Democratic charges while Republican candidate for Governor of North Carolina in 1920, a statement saying that neither party wanted blacks to vote. Unlike Judge Carswell's television disavowal of a youthful statement of racial supremacy, Parker made no public disclaimers. He did, however, send a letter, read into the Senate debate, in which he avowed that as a judge he would be fair to all, regardless of race. A personal appearance before the Judiciary Committee might have helped remove any doubts about his views on the race issue, but such was not the custom at the time and Parker did not appear. Haynsworth was not faced with an off-the-court political statement being used against him, but he appeared before the Judiciary Committee personally in line with current custom. Whether

confirm Carswell after having also defeated Haynsworth, the Senate was denying the President his prerogative to "appoint" members of the Supreme Court. Aside from the fact, later admitted, that the President's position was constitutionally unsupportable, it altered the debate from one on Carswell's qualifications to the prerogatives of the Senate as an institution—and provoked costly Senate opposition to the nomination. The letter is reprinted in 116 CONG. REC. 4937 (Daily ed., Apr. 2, 1970).

13. What little is known about the role of sitting judges in fostering or blocking judicial appointments indicates that it may be of some importance. *See* J. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION, 39-42 (1965).

14. Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963), *Rev'd* 380 U.S. 263 (1965).

Haynsworth's appearances affected the votes of any senators on the Committee is unclear, although it is probable that a refusal to meet charges of unethical conduct—as opposed to charges of mere political oratory—might well have been damaging.

GROUP PRESSURE AND IDEOLOGICAL OPPOSITION

The coalition of groups opposing both Parker and Haynsworth, and the ideological policy basis for their opposition, provides perhaps the strongest parallel between the two rejections. The principal components of the coalition were the NAACP and organized labor, joined in both cases by liberal progressive Republicans, and in the Haynsworth case as well by conservative Republicans. In both instances there was an element of political hostility toward the nominating President which was difficult to separate from opposition to the nominees themselves.

Both the NAACP and labor based their opposition to Parker on single events—the former on Parker's aforementioned campaign statement, the latter on a single decision known as the *Red Jacket* case.[15] In this case, Parker had sustained an injunction against the Mine Workers Union, thus affirming the validity of the so-called "yellow dog" contract, in which a worker was forced to agree not to join a union as a condition of employment. Neither Walter White of the NAACP nor William Green of the American Federation of Labor appeared to know more about Parker than these single events to which they objected, nor had they known about Parker prior to his nomination. In fact, the North Carolina labor group had first endorsed Parker, either without knowing of, or in spite, of, the *Red Jacket* case.

In the Haynsworth case, labor seemed again to be basing its opposition to the nominee on a single case, *Darlington Mills,* in which Haynsworth's opinion upheld the right of the textile company embroiled in a labor dispute to close its mill. The NAACP's opposition to Haynsworth was somewhat more complicated; essentially it was that he had not carried out the spirit of the *Brown* decision of 1954,[16] but had approved a variety of school desegregation plans designed to avoid rather than promote integration. Again, we find some attorneys from

15. United Mine Workers v. Red Jacket Consol. Coal and Coke Co., 18 F.2d 839 (4th Cir. 1927).

16. Brown v. Board of Educ., 347 U.S. 483 (1954).

labor unions and the NAACP in South Carolina saying, that Haynsworth was a fair and honest judge.[17]

In both the Parker and Haynsworth cases, there were underlying reasons for NAACP and labor opposition which went beyond the particular instances described. Indeed, opposition may have been as much related to political circumstances in which these organizations found themselves as to the nominees themselves. At the time of the Parker nomination, both the NAACP and labor were far weaker than they would become in subsequent decades, or than they are today. 1930 was still five years away from the Wagner Act and two years before the Norris-LaGuardia anti-injunction statute, and labor may have felt the need to demonstrate publicly its growing political clout. Likewise, the NAACP was still a fledgling organization in 1930, dependent largely on white liberals, under attack from the Communist Party as being too conservative and too establishment oriented. Its great legal victories were still to come. Blocking the nomination of Parker was a major symbolic victory for both groups and may help explain the effort they put into the fight. The fight against Parker must also be seen as a continuation of the liberal attack on a Court which had, in the 1920s, if anything become more conservative and rigid on both economic and racial issues.

While, by the time of the Haynsworth nomination, both groups were stronger than they had been in 1930, both may have felt it necessary to block his nomination to protect interests against which they thought he would vote as a justice. Both labor and the NAACP are groups with considerable influence in Democratic party circles, but little with the Republicans under normal circumstances. Both may have felt compelled to strike at least a symbolic blow against the judicial fruits of Nixon's southern strategy. Frankly, to both groups the prospect of a Republican President and a lot of old or sick justices likely to retire or expire may have raised the spectre of the Supreme Court, long the most liberal branch of government, moving substantially toward the right and sabotaging the hard-won victories of two generations. Unlike the Parker case, where opposition was motivated in part by a desire to radically *alter* the conservative policies of the Court, in the Haynsworth case it was a desperate effort to save the Court's prevailing liberal policies from destruction.

17. Lawyers from the Textile Workers Union and Longshoremen's Union appeared in behalf of Haynsworth. *See* 115 CONG. REC. 14548-49, 14763 (daily ed. Nov. 17, 1969).

JUDICAL ETHICS

The issue which raised the largest questions in the Haynsworth battle was that which had driven Justice Fortas from the bench—the financial relationships of a judge with corporations and individuals involved in past or possible future litigation before him. Perhaps this simply reflected a change in the times between 1930 and 1969. At the time of Parker's nomination, the *New York Times*[18] reported that a question was likely to be raised concerning Parker's investments in utility securities, but there appears to have been no follow-up on this matter. Perhaps Parker was involved in some of the same sort of business activity as was Haynsworth, with the issue not raised or pursued because standards of judicial ethics were less strict thirty years ago. Certainly, standards—for judges withdrawing from participation in cases in which they may have any personal interest to the extent they exist—have tightened in the intervening years, but the judge himself remains the sole judge of the propriety of withdrawal in a particular case. Unquestionably because of the recent controversy over the business connections of Justice Fortas, Haynsworth's alleged lapses in ethics loomed much larger than would normally have been the case. No comparable scandal had preceded the Parker nomination. Charles Evans Hughes had been accused of serving and being connected with rich people's interests. To some this may have been prima facie evidence of corruption or dishonesty; for most it was a different issue entirely.

Assessing the precise role of the ethics controversy in the defeat of Judge Haynsworth is difficult, if not impossible. There is no question that initial opposition to Haynsworth had been partisan and ideological. If left at that level Haynsworth would unquestionably have been confirmed. But as in the case of Justice Fortas, those who sought to block the nomination for political reasons began to uncover evidence of a different sort, evidence which was much more damaging and which converted many to opposition who had originally been expected to support the nomination. Historically, few senators have articulated the position that their function was to confirm a Supreme Court nomination only if it was the best qualified man available. Most senators have accepted the prerogative of the President in such matters and have limited their opposition to those cases where it appeared the

18. *The New York Times*, March 22, 1930, at 18.

nominee was *completely* unqualified, or where voting for the nominee constituted a grave political risk. In the Haynsworth case, most senators who announced and voted against the nomination publicly attributed their opposition to the ethics issue. But it is a reasonably fair speculation, in the absence of hard evidence to the contrary, that many were using this as a convenient cover for ideological or political opposition.

THE ROLE OF THE APPELLATE JUDGE

The matter of the role of a federal appellate judge became crucial in both the Parker and Haynsworth nominations. In both cases, the reader will remember, there were allegations that Parker and Haynsworth were too conservative; defenders of Parker argued that the controversial decisions did not indicate Parker's conservatism, but only that he was following the law set down by the Supreme Court; defenders of Haynsworth argued that he had not tried to obstruct or evade compliance with the *Brown* decision, and that his key decisions in school segregation cases, though later reversed, were an accurate interpretation of Supreme Court policy at the time they were made.

Whether it is simply the job of an appellate judge to follow the Supreme Court's ruling to the letter, or whether he should anticipate or precede the Court to new doctrines is often debated. Because many argue that a Court of Appeals judge is merely following the Supreme Court, they would say one cannot determine his personal views from such decisions. Others would argue that a lower court judge should—and often does—disagree with the Court when his personal values differ from those embodied in a controlling decision, and that following a precedent to the letter is as often as not indicative of substantive agreement with that precedent. Precedents, of course, are not always clear, and a Court of Appeals judge is frequently "damned if he does and damned if he doesn't."

When the Supreme Court precedents applying to a case before lower federal judges are clear, those judges can know what is expected of them. Whether they will follow the precedents may be another matter. But what is not clear is what they should do regardless of the clarity of the precedents, when it appears that the Supreme Court might change its mind on a subject. In other words, lower federal judges must face the question, "Should we anticipate what the Supreme Court might do?" A noted judge, Calvert Magruder, has argued that, even

though the lower court may be overruled for doing so, it should follow clear precedent. But where no controlling precedent exists, matters are less clear. Magruder suggests that judges can examine earlier Supreme Court cases to see what their logical consequences might be, and can utilize dicta in earlier cases in an effort to divine what the Supreme Court would have done or would do in dealing with the problem.[19] On the other hand, the lower court judges can assume that the Supreme Court would find it more useful to have the lower court deal with the case fully, to provide the Supreme Court with the benefit of its thinking, regardless of past Supreme Court dicta. But there is no rule to tell a lower court judge which strategy to use.

There is also the question of the Supreme Court opinion which lower court judges feel to be unhelpful. Magruder speaks of situations where Courts of Appeals have devoted much time to writing an opinion, only to be reversed "in an opinion that strikes us as superficial and hastily prepared."[20] This the lower court judges would be less inclined to follow, even if they would despite their awareness of the pressures under which the Supreme Court operates. Similarly, when the Supreme Court reverses without opinion after the lower courts have devoted much thought to a subject, the judge may be tempted to act as if the reversal hadn't occurred.

Serving to point up the effects of these situations is Paul Sanders' comment that "[i]f the edict itself is uncertain, or if there is a question as to whether the high court would itself now follow it, the possibility of variation and flexibility in lower court action is multiplied tremendously."[21] To Sanders' comment, Martin Shapiro adds, in explaining differences in interpretation which arise between lower court judges dealing with the same Supreme Court opinion: "The less clear and direct the policy communication from the Supreme Court the more likely are the resisting circuit judges to 'misunderstand' it and continue along their own path." And he goes on to say, reinforcing earlier discussion of the effects of ambiguity: "The clearer the message, the higher the cost in ignoring or misunderstanding it."[22]

19. Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L. REV. 7 (1968).

20. *Id.*

21. Sanders, *The Warren Court and the Lower Federal Courts*, in CONSTITUTIONAL LAW IN THE POLITICAL PROCESS 426-427 (J. Schmidhauser ed. 1963).

22. M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 171 (1968).

As this may suggest, the Supreme Court's rulings are only *part* of the "generalized tensions" felt by the lower court judge, not the whole directing force behind his work. The rulings create pressure in one direction, but "much more specific pressure" may derive from the emotions of the area to be affected by a decision. The federal judge is open to those pressures because he is a resident of the district or circuit; responsive to the social, economic and political values of the area, and very likely a product in part of the local political party machinery (even if not active in the party, his selection involved the party). While the Supreme Court "represents" a national constituency, the federal judges in the aftermath of *Brown* also shows that while "Judges will do what they are told by the United States Supreme Court . . . none of them . . . are particularly anxious to attack strongly entrenched local institutions," and that "the ambiguity of the Supreme Court's instructions has been resolved to conform to the dominant political forces of the South."[23]

Lest we leave the opinion that all pressures are centrifugal and lead the lower court judge away from the Supreme Court's rulings, and that, other things being equal, lower court judges will NOT follow the high court's rulings, we should make clear that this is not the case. We find that many judges have in fact followed Supreme Court precedents religiously. A recent study of Parker showed that in 64 of 72 cases, Parker was consistent with the Supreme Court.[24] In the eight cases where he was not, seven had no controlling Supreme Court precedent, leaving only *one* case of 72 in which he conflicted with the high court. In his situation, compliance had high costs, because the decision for which the labor unions attacked him, the *Red Jacket* case, was one in which Parker had ruled on the authority of the Supreme Court's holding in *Hitchman Coal & Coke v. Mitchell.*[25] Whether the matter was simply reliance on a single case is not clear. Senator Borah, in arguing against Parker's confirmation, not only said that the *Red Jacket* injunction was too broad (e.g., that Parker had gone beyond what precedent required of him), but claimed that Parker had ignored a Supreme Court decision which came after, and limited, *Hitchman Coal.*[26] This decision, *American Steel Foundries v. Tri-City Central*

23. J. PELTASON, FIFTY-EIGHT LONELY MEN 246 (1961).

24. W. Burris, John J. Parker and Supreme Court Policy: A Case Study in Judicial Control, 1965 (Unpublished dissertation in University of North Carolina Library).

25. 245 U.S. 229 (1918).

26. 72 CONG. REC. 7937-38, 8037 *passim* (1930).

Trades Council,[27] was not mentioned at all by Parker in his *Red Jacket* opinion. It can also be argued—in favor of the position that Parker was anti-union and not simply an obedient lower court judge—that Parker ignored the *Clayton Act,* passed after *Hitchman Coal* and limiting it, although it should be remembered that the Supreme Court severely limited the labor protection provided in that statute.[28]

With Haynsworth, there was controversy in the areas of labor relations and desegregation. The issue in the former rested on Haynsworth's decision in *Darlington Mills.* Sen. Hollings (D-S.C.) argued that Haynsworth's vote in favor of the company followed existing Supreme Court doctrine *at the time,* although the Supreme Court changed the rules in reversing Haynsworth when the latter's decision was appealed.[29] Pressing the attack on Haynsworth as an anti-union judge, Sen. Metcalf (D-Mont.) argued that when the Supreme Court reversed Haynsworth in labor-management cases, it did so unanimously in all cases but one.[30] While we do not have comparable data for Parker, the difference in the situation of the two nominees—presuming for the moment that both were equally anti-labor—may be that Parker was dealing with a conservative Supreme Court, while the Supreme Court to which Haynsworth's decisions were appealed was clearly liberal in the area of labor law. On this basis, Parker should have had an easier time following the Supreme Court's doctrine. However, Burris' figures, which deal with a wide range of subjects, not just labor relations cases, reinforce the position that Parker was an obedient follower of the Court and not necessarily more conservative.

The problem of a fast-moving Supreme Court most clearly affected Haynsworth in the area of race relations. He was operating, along with all his brethren in the Fifth, Sixth, and Eighth Circuits, in an area where the Supreme Court finally—fed up with slow response to its ambiguous "with all deliberate speed" order of *Brown II*—had begun to move quickly in the late 1960's. This means that the Supreme Court found some of the rulings from the Fourth Circuit (as well as from the other Circuits) to be defective, and overruled them. Whether this made Haynsworth a "heel-dragging" segregationist is another

27. 257 U.S. 184 (1922).
28. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
29. 115 CONG. REC. 14540 (daily ed. Nov. 17, 1969).
30. *Id.* at 14468.

matter.[31] If one compares his position with that of his judicial brethren at the time he made his particular decisions, rather than with the Supreme Court's reversals *at a later date*, one finds Haynsworth not notably out of line, and certainly not lagging behind what the Supreme Court appeared to be saying, which was, on a number of the issues involved, very little.

Again, how one evaluates this performance depends on whether one expects a lower court judge to anticipate the Supreme Court and to move in advance of it or not. Haynsworth was not notably reluctant to lead the court in other areas of the law; his innovative decision on the right of prisoners to have convictions reviewed on *habeas corpus* was upheld by the Supreme Court in *Peyton v. Rowe*.[32] Those supporting him also pointed to his order desegregating the North Carolina Dental Society[33] as an instance of "judicial statesmanship." One might easily conclude that Haynsworth's reluctance to anticipate pro-school integration decisions of the Supreme Court reflected his personal policy preferences rather than his desire to be an obedient judge. His record is devoid of any evidence of outright disobedience to the *Brown* decision, but it is also devoid of evidence of real acceptance of the principle or spirit of that decision. In his favor it must be said that it took the Supreme Court 14 years to decide—without using the word, considered inflammatory by some—that the *Brown* decision required positive results of *integration*, rather than a mere dismantling of the legal barriers to integration,[34] and 15 years to require school districts to proceed in this direction without further "deliberate speed."[35]

There is a last interesting irony which ties the Parker and Haynsworth nominations—and rejections—together. Judge Parker remained on the Fourth Circuit Court of Appeals long after his rejection for the Supreme Court, and became Chief Judge of the Circuit. He was a member of the special three-judge Court which heard

31. —or, in the words of Senator Clifford Case, one who showed "persistent reluctance to accept, and considerable legal ingenuity to avoid" the mandate of *Brown* and other similar cases. 115 CONG. REC. 14,768 (daily ed. Nov. 20, 1969). For a more sympathetic view of Haynsworth's handling of school desegregation cases, see the statement by Professor G.W. Foster, architect of the "HEW Guidelines," to the Senate Judiciary Committee, reprinted in 115 CONG. REC. 14,493-97 (daily ed. Nov. 17, 1969).

32. 383 F.2d 709 (4th Cir. 1967), *affirmed*, 391 U.S. 54 (1968).

33. *See* Hawkins v. North Carolina Dental Society, 355 F.2d 718 (4th Cir. 1966).

34. Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

35. Alexander v. Holmes County Board of Educ., 396 U.S. 19 (1969).

the case of *Briggs v. Elliott*.[36] Parker cast the deciding vote rejecting the contention of the NAACP that exclusion of Negroes from the white schools violated the 14th amendment *per se*, and in any case did not meet the constitutional standard of "separate-but-equal."[37] His decision was technically in compliance with existing law, but clearly a "foot-dragging" operation which ignored the thrust of *Sweat v. Painter*,[38] decided in 1950, which foreshadowed the repudiation of *Plessy v. Ferguson*[39] in the *Brown* decision. *Briggs v. Elliott* was one of the quintet of cases decided under the label of *Brown*, and the decision was reversed and remanded to the Fourth Circuit. Interpreting the *Brown* decision as strictly as possible, Parker wrote in the remand of the *Briggs* case, "The Constitution . . . does not require integration. It merely forbids discrimination."[40] While Parker did not live long enough to qualify the thrust of that statement, which long hung over the Circuit,[41] it was Judge Haynsworth who finally put the restrictive reading of *Brown* to rest.[42]

36. 98 F. Supp. 529 (E.D.S.C. 1951).

37. When the suit was commenced, the inferiority of the Negro schools was so obvious that attorneys for the school board conceded the point. They based their defense on the contention that a program had already begun to bring the Negro schools up to the prevailing standards of the white schools. In 1951, Negroes constituted nearly 75% of the population, and also of the school population of the county, but Negro schools received only 40% of the school expenditures. The average expenditure per Negro child was $43, and for each white child, $166. But the NAACP's contention went beyond seeking equalization of facilities. The objective was to show that segregated schools were *per se* inferior and psychologically damaging to the Negro children. The three judge federal court split, 2-1. Parker and Judge Timmerman held that efforts to bring the Negro schools up to the white standard satisfied constitutional requirements. Judge Waring argued in dissent that segregation was inconsistent with equality and that it was unconstitutional.

38. 339 U.S. 629 (1950).

39. 163 U.S. 537 (1896).

40. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

41. On this point *see* Judge Sobeloff's concurrence in Bowman v. County School Board of Charles County, Virginia, 382 F.2d 326, 330 (4th Cir. 1967).

42. Green v. County School Board of New Kent, 382 F.2d 338 (4th Cir. 1967).