

**THE TRIAL AND TRAGEDY OF NOMINATION:
CLEMENT F. HAYNSWORTH, JR.
AND THE SENATE CONFIRMATION PROCESS.**

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Perhaps the greatest honor a judge can receive is a nomination to the United States Supreme Court. A nomination is, of course, one step away from taking a seat on our nation's highest judicial council. That step can be formidable, though, because our Constitution provides that a nominee take a position only with, "...the advice and consent of the Senate."¹ This requirement and the whole confirmation process was born on a hot summer day during the 1787 Constitutional Convention. When the framers addressed presidential appointment of justices, they wanted a measure that would restrain, yet not limit presidential choice.

After many difficult debates, the delegates decided to leave the matter unresolved. Instead of making a clear statement as to the standards the Senate must use to pass or fail a candidate, the sages of Philadelphia chose the vague "advice and consent" clause as a compromise. In effect, Senate confirmation procedures would have to develop over time.² The nomination of Clement F. Haynsworth, Jr. was a truly significant turning point in the history of the process. His nomination also illustrates why sharp battles have erupted in recent years when the President sends a nominee to the Senate.

The primary difficulty that hinders any nomination is the total absence of a list of qualifications that the President or Senate has to consult when assessing a nominee. The founding fathers simply did not include any such guidelines in the Constitution. In *Federalist* 81, Alexander Hamilton wrote that men should be selected, "for their knowledge of the laws acquired by

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long and laborious study."³ In recent times, legal acumen and professionalism are automatically expected and today, the process has become largely politicized. The whole process is a test of the ideological fitness of the candidate rather than a limitation on the President or even an opportunity for the Senate to review the legal ability of the nominee.

A nominee's qualifications and ideology are first considered when the President selects a politically compatible person from a pool his staff gathers. Then acting on the advice of the attorney general, he selects and sends a candidate to the Senate. Simultaneously, the Senate Judiciary Committee, the Federal Bureau of Investigation, the American Bar Association, and increasingly, special interest groups examine every aspect of the candidate's public and private life. The Judiciary Committee always holds hearings and then recommends affirmation or denial.

Of the other players, the F.B.I. examines the individual's character and the American Bar Association rates him based on his written opinions. The Association's rating is usually free of partisanship and highly respected because it is based solely on legal merit.⁴ Most candidates, including Haynsworth, make it through these initial hurdles with no problems. It is the scrutiny of interest groups that really matters most. Special interests came into particular prominence during the middle of the 1960's. With the Civil Rights movement and other protests, the "power of the people" reached increasingly into the highest levels of government where aggressive lobbying can have a great impact.

The confirmation process can be very trying, as Clement Haynsworth found out. Unfortunately, his nomination mushroomed into an exacting battle of epic proportions. The fight was not entirely confined to the floor of the Senate. For the first time on a mass-media scale, special interest groups took the nomination to the whole country. Television, news magazines, and other information sources gave heavy coverage to the event. At the time, the political stakes were high because the court was shifting from its liberal leanings to a more conservative stance. Mr. Harold F. Eberle, an aide on capitol hill at the time, remembered that the "whole incident was one of sheer naked political power."⁵

President Richard Nixon made the fateful choice of Clement F. Haynsworth on August 18th, 1969.⁶ Haynsworth was then serving as Chief Judge of the United States Court of Appeals for the Fourth Circuit, an area encompassing five southeastern states.⁷ Judge Haynsworth came from a long line of lawyers and an affluent family in Greenville, South Carolina. He was an extremely well-qualified judge who had attended Harvard Law School.⁸ Professor Charles Alan Wright, a scholar of Constitutional law at the University of Texas, stated recently that Haynsworth wrote more important decisions that law school students read than most circuit court judges.⁹

Haynsworth was first appointed to the federal bench in 1957 by President Dwight D. Eisenhower. At the time of his Supreme Court nomination over ten years later, the London *Economist* magazine characterized his judicial outlook as, "...cautious, and slightly right of center."¹⁰ In a recent assessment of Haynsworth's judicial opinions, Robert P. Morris stated that "his record is one of principled conservatism" that did not cater to fashion or embrace political expediency.¹¹ President Nixon most assuredly chose Judge Haynsworth because he was conservative. The President hoped to stem the tide of judicial activism that the court had embodied in the past. Nixon felt that the liberalism of Chief Justice Earl Warren's court had been excessive. More than ever, the bench needed a moderating influence. The *Washington Star*, a conservative newspaper, heralded Nixon's feelings when it said that Judge Haynsworth was a logical choice, and one that "...would bring the court back to a central, balanced position."¹²

Nixon's nomination of Judge Haynsworth might also be seen as an attempt to shore up a "...solid political base in the South."¹³ By choosing a Southerner, Nixon rewarded a section of the country that gave him, and could give him again, a victory in the presidential election. Many of Nixon's opponents recognized the political advantages in nominating Haynsworth. The Democrats even feared that the President's choice was part of the Republican party's "Southern Strategy" which sought to convert Southern Democrats into Republicans. Therefore, when the nomination was announced, many interests objected simply because

Haynsworth was from the South. The media even created a distorted image of the judge as a stereotypical Southerner who did not embrace national liberal concerns.¹⁴ The sociologist John Shelton Reed argues that Nixon lost the confirmation battle partly because he chose a Southerner at a time when anti-Southern fervor flared.¹⁵

Some of Haynsworth's most vocal opponents were civil rights activists who felt Nixon's choice was not good considering racial tensions at the time. The liberal publication, *Commonweal*, claimed that Judge Haynsworth possessed an "ideology from the year 1922," in effect, calling him a racist.¹⁶ Dean G. W. Foster of the University of Wisconsin law school, an expert on civil rights and the judiciary, quickly countered the charges saying they were completely wrong.¹⁷ Many groups, including the National Association for the Advancement of Colored People (NAACP), then looked at the judge's legal opinions on desegregation and criticized them for not being progressive enough. Haynsworth responded saying, "they're condemning opinions written when none of us were writing as we are now."¹⁸ Indeed, the South and its legal system had undergone many rapid changes by the late 1960's.

The confirmation process heated up when the NAACP charged that Judge Haynsworth was too conservative in his rulings on desegregation. The NAACP pointed out that the Supreme Court had reversed some of the judge's decisions. Haynsworth's supporters deflected these assertions by saying with accuracy that his opinions were, "...an accurate reflection of the Supreme Court's position at the time he made them."¹⁹ In point of fact, no one could prove that Haynsworth ever, "...evaded or obstructed school desegregation."²⁰ Nevertheless, many Senators who were conscious of popular sentiment voted against him because civil rights advocates opposed him.

In his 1991 book, *Clement Haynsworth, the Senate, and the Supreme Court*, John P. Frank identifies The American Federation of Labor - Congress of Industrial Organizations (AFL-CIO) as the other major interest group hostile to the nomination.²¹ The labor unions nursed a grudge dating back to the late 1930's when the

Haynsworth firm represented textile corporations against the unionizing efforts of the Textile Worker's Organizing Committee.²² With this past conflict in mind, the unions also rallied in 1969 because they believed Haynsworth had made anti-labor decisions while on the Fourth Circuit of Appeals bench. In one instance they cited, Haynsworth had ruled in favor of Deering Milliken when that company shut down its Darlington, South Carolina plant rather than let it unionize.²³ The unions pointed out that the Supreme Court had later overturned Haynsworth's decision.

At the hearings broadcast nationwide, George Meany, President of the AFL-CIO, vigorously contended that Haynsworth's record did not merit an appointment. Other labor leaders agreed, and they all lobbied heavily against the nominee. As a result of the AFL-CIO's focus on the Deering Milliken case, a deep investigation was begun on that and other labor cases in which Haynsworth wrote opinions. Ultimately, the investigations brought up a host of conflict-of-interest charges. Of all the factors, these ethics charges, no matter how true or false, stand as the main reasons for the defeat of the nomination.

Of course, these charges must be seen in context. The Haynsworth nomination came less than a year after the great scandal and resignation of Supreme Court Justice Abe Fortas. Fortas had been charged with unethical practices. A series of investigations that lasted from late 1968 into early 1969 finally proved that he had acted unethically. After this affair, the public's confidence in judges became jaded. Therefore, when questions arose about Judge Haynsworth's conduct, the scrutiny they received by the public, the media, and Senators was greater than usual.

While digging into the Deering Milliken case, researchers found that Haynsworth owned stock in a company that conducted business with the firm. So when Judge Haynsworth ruled for the company, he might have benefited from his own decision. Judge Haynsworth responded to these allegations stating that he did not know the company he owned stock in did business so heavily with Deering Milliken. In all fairness, his invest-

ment was so inconsequential that any notions of misconduct were certainly brought up just to harm him. William H. Rehnquist, Assistant Attorney General, even testified that the judge had acted properly by hearing the case.²⁴ Rehnquist's statements and Haynsworth's explanations were, however, unsuccessful in dispelling the force of the accusations. His opposition also dug deeper to find more charges that might further cloud the debate.

The new information that was unearthed came from what Senator Fritz Hollings, the main sponsor of Haynsworth, called, "record reading with a fine tooth comb."²⁵ Intense searching revealed the case *Brunswick v. Long* (1968) where Judge Haynsworth had ruled in favor of a company and then bought its stock before the decision was announced. The purchase price came close to \$17,000.²⁶ Many critics felt that such a substantial transaction looked deliberate. One problem with accepting this conclusion is the fact that Haynsworth owned stock in many companies and ruled in hundreds of cases each year.²⁷ Did he intentionally take advantage of the ruling or did he make an honest mistake? Haynsworth responded saying, "that he had simply forgotten that the decision had not been announced [When he bought the stock], and he was very sorry."²⁸ Despite this response indicating that he had merely erred, many Senators thought it politically safer to reject a nominee who they thought had questionable ethics.

In addition to the ethics charges, one of the elementary factors that helped the opposition was that the Democrats, the enemies of President Nixon, controlled the Senate. The Democratic Senator, Birch Bayh of Indiana, led the fight against Haynsworth. With the help of an extensive staff, Bayh masterminded the opposition. He went over Haynsworth's finances and came up with a "bill of particulars" that outlined twenty reasons why the nomination should be rejected. The opponents were also indirectly aided by the strong-arm tactics of the White House. Nixon's high-pressure strategy caused resentment among the undecided Senators. Clark R. Mollenhoff, a key aide, lobbied with, "a hot temper and heavy foot that did contribute negatively to the effort to get Haynsworth appointed."²⁹ Senator Robert Dole expressed pub-

licly many supporters' contempt for the aides when he referred to them as, "...those idiots downtown."³⁰

After much controversy on and off the floor, the full Senate voted on November 21st, 1969. The total was 55-45 against Judge Haynsworth.³¹ The vote was not as close as many observers expected. The lobbying efforts of the NAACP, AFL-CIO, and Democratic forces were instrumental in forcing intense scrutiny of the candidate. The resulting ethics charges led to the downfall of Judge Haynsworth. The accusations that were dredged up placed doubt in the minds of many Senators, and this unmeasurable entity was all that it took to defeat the candidate in this new microscopic era of reviewing nominees.

At the most basic level, the defeat illustrated how a historical event like the Civil Rights movement could affect the outcome of the highest operations of American government. Looking out for their own interests, civil rights groups felt that Haynsworth would not be their ally. William Gibson, a native of Greenville, South Carolina and recently the National Chairman of the NAACP said that, "he opposed Haynsworth's nomination [in 1969] because the decisions the Judge made in the 1960's were not in the best interests of the Civil Rights movement."³² Since that fall of 1969, judges have undergone extensive scrutiny by special interest groups and the media on a scale not previously known. Within the last five years, the ordeals of Judges Robert Bork and Clarence Thomas have illustrated that the Haynsworth nomination was an important precedent in American court history.

In one of the last private interviews before his death, Judge Haynsworth discussed some of the factors that contributed to his ultimate defeat.³³ Overall, he said that the defeat was, "a combination of many things." He specifically pointed out that, "The unions had found fault with some of the opinions [he] had written." However, he thought that the reactions of the unions and other groups were "inspired reactions." To illustrate this point, Judge Haynsworth said that the NAACP in Washington, "digested all of his decisions having to do with race relations, and found that he was an impartial, fair judge." However, before the

NAACP in Washington could announce its findings, "a decision [to oppose Haynsworth] had already been made by the [national] NAACP in New York. Judge Haynsworth believed that some outside people who really knew nothing about him or his opinions were making generalizations.

Perhaps the greatest generalization was the connection some Senators made between Haynsworth and the "Southern Strategy." Judge Haynsworth explained the situation best:

...then you had a great many people who, in the Senate, ..had genuine concern that my appointment was part of the Southern Strategy. Since I came from South Carolina, the same state as Strom Thurmond who was the author of the Southern Strategy, Senators of the East, West, and Midwest were genuinely disturbed that this was why I was selected. This [concern] produced a political reaction. They [the Senators] were just concerned that I was not selected on merit, but selected because I was a Southerner.

In addition to the "Southern Strategy," Haynsworth pointed to the Fortas affair as a damaging element. He said that he found out that seventeen Democratic Senators had gone down to the wire supporting Fortas. One of those seventeen told him that they were resolved to do everything in their power to beat up whoever came to succeed Fortas to restore credit to their reputations. "Of course, this was before they ever heard of me," Haynsworth said with a wily grin.

In the interview, Judge Haynsworth also spoke about the Deering Milliken case. He thought the conflict of interest charges were unfounded, and the case was merely something that his opponents could put their hands on to use against him. He believed that most Senators knew that the case did not implicate him in any wrong doing. It was a stumbling block only because of all the attention the media gave it. Interestingly enough, Judge Haynsworth found no fault in the confirmation process. Towards the end of our discussion, he looked into the air slightly above eye level, and remarked that his defeat was, "...just one of those things that happens."

On November 22, 1989 twenty years and one day after his

rejection by the Senate, Judge Haynsworth died. He was praised as a distinguished judge, and Senator Strom Thurmond called his passing, "a great loss to the State [of South Carolina] and the nation."¹⁴ History will remember the Haynsworth nomination as a turning point in the Senate confirmation process. Most nominees today have to undergo a tremendous amount of inspection. Haynsworth endured it all over twenty years ago, and he did so against interest groups who cared more for their own agendas than the great legal ability of the nominee. A remedy to the current dilemmas of the nomination process would be to fix what was left undone at Philadelphia through a Constitutional amendment or guidelines written into law. Somehow, these solutions will likely fall victim to political expediency. Many good efforts often do.

Endnotes

¹ Constitution, Art. II, Sec. 2.

² John B. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures* New York: Holt, Rinehart, and Winston, 1960.

³ Hamilton, *The Federalist* 81 (New York: Tudor Publishing, 1947), 121. [1788]

⁴ Schmidhauser, 12.

⁵ Harold F. Eberle to the author December 19, 1989.

⁶ John L. Steele, "Haynsworth v. the U.S. Senate," *Fortune* (March 1970), 91.

⁷ Robert P. Morris, "Richard Nixon, the Supreme Court and the Southern Strategy: the Haynsworth Nomination," (M.A. Thesis Louisiana State University, 1987), 1.

⁸ *Greenville Piedmont*, November 22, 1989, 1.

⁹ *Greenville News*, November 23, 1989, 16.

¹⁰ "Judicial Bent," *The Economist* August 23, 1969, 43.

¹¹ Morris, 39.

¹² Elder Witt, *Congressional Quarterly's Guide to the United States Supreme Court* 1990 edition, 719.

¹³ "Haynsworth," *Nation* September 1, 1969, 163.

¹⁴ Morris, 114.

¹⁵ John Shelton Reed, *Southerners: The Social Psychology of Sectionalism* (University of North Carolina Press, 1983), 76.

¹⁶ "The 'Sharpie' Judge" *Commonweal* October 3, 1969, 4.

¹⁷ United States Senate, *Clement F. Haynsworth, Jr. Hearings Before the Com-*

mittee on the Judiciary (Washington: Government Printing Office, 1969), 38.

¹⁸ "Haynsworth," *Nation*, 162.

¹⁹ Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* (New York: Holt, Rinehart, and Winston, 1978), 96.

²⁰ *Ibid.*

²¹ John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (University of Virginia Press, 1991), 19-20.

²² Yancy S. Gilkerson to the author February 9, 1992.

²³ Steele, 92.

²⁴ United States, *Hearings*, 194.

²⁵ *Ibid.*, 36.

²⁶ Frank, 43.

²⁷ *Ibid.*

²⁸ "Haynsworth's Worth," *Economist* October 4, 1969, 50.

²⁹ Steele, 92.

³⁰ Richard Harris, *Decision* (New York: E. P. Dutton Co., 1971), 100.

³¹ Witt, 711.

³² *Greenville News*, November 23, 1989, 16.

³³ Interview with Clement F. Haynsworth, March 29, 1988. All of Haynsworth's remarks below come from this meeting.

³⁴ *Greenville Piedmont*, November 22, 1989, 1.