

Dissent Over High Court

ALTHOUGH THE BULK of the work of the Supreme Court is only marginally political, that body can play a crucial role in determinations of public policy. After all, the Warren Court singlehandedly brought down gerrymandering and segregation.

In other words, American constitutional law is far more than a juridical exercise; it is a body-contact sport.

THE PRESIDENT knows this and so does the Senate. And it is hardly a new and frightening deviation from the "American way."

In 1795, President George Washington named John Rutledge to be Chief Justice of the United States on an interim basis (the Senate was not in session) and he took the oath and served on the court awaiting Senate confirmation.

In the intervening period, Rutledge gave a speech in Charleston, S.C., attacking the Jay Treaty with Britain. The Federalists were infuriated and no sooner did the Senate convene than Rutledge's nomination was rejected, 14-10.

One senator happily wrote a friend: "The conduct of the Senate will, I hope, teach demagogues that the road to preferment in this enlightened country is not to revile and calumniate government and excite mobs in opposition to their measures." Jefferson commented: "The rejection of Rutledge by the Senate is a bold thing, for they can not pretend any objection to him but his disapprobation of the treaty."

Thus the President can try to fill the court for his own political ends, and the

Senate can try to block his appointments on the same ground.

Naturally enough, this process will be camouflaged in high theory. If worse comes to worst, you can always fall back on the law professors and complain that nominees are inadequately educated or lack judicial expertise. The problem with this is that few justices ever edited law reviews or were notable for their legal knowledge.

Which brings us back to President Nixon and the two vacancies. The President, with perfect legitimacy, wants a conservative court. The Senate, hopefully, wants a liberal court.

Having learned a lot from his experience with the Haynsworth and Carswell nominations, Mr. Nixon seems to have devised a game plan. Recall that after all the in-fighting that went into blocking Haynsworth and Carswell, the Senate almost wept with joy at the chance to approve Justice Blackmun — who is probably just as conservative a judge as either of the two southerners!

NOW THE SAME PROCESS of attrition has been brought into play. Congressman Poff has gone down in smoke, Senator Robert Byrd put the Senate Democrats at each other's throats, and five other wooden ducks were set afloat — all before any formal nomination came from the White House. Then, with characteristic aplomb, the President went on TV and pulled two new names from his hat: Lewis F. Powell Jr. and William Rehnquist. Will they whisk through the exhausted Senate like Blackmun to provide two more conservative votes?