

PROLOGUE

Federal Judicial Selection in the New Millennium

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INTRODUCTION

Federal judicial selection, at least for the lower courts, has been a relatively invisible focal point for public interest until recent years. This has been so despite the fact that the federal judicial selection process represents a rare interface in American politics. Except for largely ceremonial occasions, such as the State of the Union Address, there are relatively few instances in American politics and governance when the public eye turns to all three branches at the same time.

The contemporary tensions between the executive and legislative branches that we witnessed during the Clinton administration between a Democratic president and a Republican Senate, and that we have seen between a Republican president and what is now a Democratic Senate, are not completely new phenomena. Indeed, debate at the Constitution's drafting demonstrates that the relative roles of the executive and legislative branches in choosing judges was an important point of contention among the Framers. The Virginia Plan called for congressional selection of judges, while the New Jersey Plan lodged that power in the executive. Ultimately, a compromise was reached, and the new constitutional language for "advice and consent" grew out of the language of the Special Committee on Postponed Matters.

Historically, choosing lower court federal judges, as distinct from Supreme Court Justices, has been a relatively routine activity of American presidents, who have accentuated patronage, but not necessarily "policy," in their appointment behavior. This has particularly been the case when those choices were initially suggested by, or at minimum received the clearance from, the senators from the president's party, if there were any, from the state in which the vacancy existed. This clearance would be obtained in two ways: (1) across institutions, through the "senatorial courtesy" exercised by the White House in conferring with the relevant home state senators; and (2) within the Senate itself, through the Judiciary Committee's "Blue Slip" system. The blue slip has worked to ensure that home state senators of both parties, not just the president's party, have some say when judges are being nominated from their state.

This is not to say that clear policy motivations never entered into the president's choices. One can look to the Roosevelt administration and its efforts to support the New Deal through lower court appointments for evidence of these considerations. For example, in late 1936, William Denman, a Ninth Circuit Roosevelt appointee, wrote bluntly to the

President, "The New Deal needs more federal judges."¹ In January 1937, three weeks before the unveiling of his court packing plan, Roosevelt asked his appointments secretary about the potential candidacy of Sidney Mize for a District Court judgeship: "I want more information on the man as to whether he is a liberal or a reactionary, what sort of fellow is he?"² Roosevelt received assurance from his assistant attorney general that he had "looked carefully into this matter. . . I am convinced that Mr. Mize is a man of liberal views. . . and would measure up in all respects to the expectations of the President."³

Still, however, prior to the Nixon administration, policy considerations and/or ideological ones did not often take primacy in the lower court selection process in either the president's nominations or in the Senate's exercise of advice and consent. Timely confirmation of virtually all presidential nominees was generally routine and somewhat pro forma. Obviously, a good deal has changed in recent years, and I will explore those changes in this Prologue.

I. FROM NIXON TO CARTER

The Nixon administration recognized the potential that judicial appointments, even those to the lower courts, could play in its policy agenda — an agenda that stressed "law and order" and "strict construction" of the Constitution. Perhaps the most historically interesting "smoking gun" of the policy implications of judicial selection is Nixon's endorsement of a seven-page memo written by his aide, Tom Charles Huston. Huston wrote:

Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench — not merely the Supreme Court, but to the Circuit and District benches as well. Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office.⁴

Huston concluded that if the President, "establishes *his* criteria and establishes *his* machinery for insuring that the criteria are met, the

¹ SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 32 (1997).

² *Id.* at 19-20.

³ *Id.*

⁴ *Id.* at 205-206.

appointments he makes will be *his*, in fact, as in theory.”⁵ After H.R. Haldeman and John Ehrlichman read Huston’s memo, it was sent directly to the President who, in turn, forwarded it to his Deputy Assistant Attorney General, Richard Kleindeinst, who handled judicial nominations. There was a handwritten presidential notation on the memo: “RN agrees. Have this analysis in mind in making judicial nominations.”⁶

Despite this memo, it is a bit too easy to point to the Nixon administration as the historical point in time where the most significant changes took place in the nature of federal judicial selection. The policy implications of judicial selection, which Huston spoke of, were not fully realized until the centralization of the judicial selection process during the Reagan years. More accurately, the modern era of contentious, politicized judicial selection politics can best be traced to the Carter administration.

II. SELECTION UNDER CARTER

Under Carter, the Omnibus Judgeship Act of 1978 created 152 new Federal judgeships, the most ever handed at one time to a sitting president. Thirty-five of these new seats were at the coveted appeals court level. This unprecedented expansion of the judiciary did not go unnoticed by interested parties of every political stripe who recognized the policy role that these new judgeships would play well into the future.

Jimmy Carter took actions that struck at the heart of “business as usual”, the status quo in judicial selection politics and processes. For instance, Carter established a United States Circuit Judge Nominating Commission composed of thirteen distinct panels (one in each judicial circuit). The members of the Nominating Commission, appointed by the president, would prepare a confidential report for the president for each vacancy, recommending the five persons best qualified to fill the judgeship. While appeals court appointments have always been tied more directly to the president than to specific senators because judicial circuits cross multiple state boundaries, the traditions of state seats on the circuit courts certainly exist. Historically, the overwhelming majority of replacement appointments for appeals court vacancies have gone to appointees from the state in which the judge being replaced resided. Thus, senators often had a personal stake in Courts of Appeals

⁵ *Id.* at 206.

⁶ *Id.*

appointments and many senators viewed Carter's action as an unwarranted inroad on senatorial prerogatives.

Making matters worse, from the senatorial perspective, President Carter also attempted to intervene in District Court appointment processes. These processes were even more closely tied than circuit court nominations to the candidate choices of the home state senators of the president's party. Carter sent a personal longhand letter to every Democratic senator urging them to establish similar nominating commissions in their states for the selection of District Court judges. In response to the President's suggestion, Senator Lloyd Bentsen declared, "I am the merit commission for Texas." Clearly, the Carter administration stirred the pot of the selection process and raised critical tensions in the balance between executive and legislative power that continue today.

Equally as important as Carter's reforms in processes, the President's strong personal interest in judicial selection was tied to strong policy motivations and substantive concerns that women and minorities were underrepresented on the federal judiciary. Not until the Roosevelt administration was the first woman appointed to a lifetime position on the federal bench. Harry Truman appointed the first African American. Eisenhower did not name a single woman or Black to a lifetime judgeship during his eight years in office. Some increases in judicial diversity occurred during the Kennedy, Johnson, and Nixon years, but the changes in judicial selection outcomes were by no means dramatic.

Carter articulated his concerns about representation in two ways. First, in an Executive Order addressed to the Nominating Commission, the President stated that, "Each panel is encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees." This strong and unprecedented push for meaningful affirmative action in judicial selection, and concern for diversity among the President's nominees, was also anathema to many senators. Second, Carter again wrote to each Democratic senator urging that they recruit women and minorities for the new judgeships and other vacancies.

In addition to a call for affirmative action, President Carter also issued an Executive Order providing that nominating commissions ensure that a candidate "possesses and has demonstrated a commitment to equal justice under the law." Many conservative senators saw this as a euphemism for liberal judicial activism. As one senator on the Judiciary Committee told me at the time, "Fair minded, equal justice. Maybe we didn't pick up the secret code. I don't like what I think it means."

Ironically, the President's open avowal of a substantive preference in his nominees even created tension with some nominal "friends." For example, Ted Kennedy, who was the Chair of the Senate Judiciary Committee and a potential rival to Carter for the 1980 Democratic presidential nomination, authorized a Committee questionnaire for nominees in which they were asked, "In what specific ways have you demonstrated a commitment to equal justice during your career?"

Both sides of the political spectrum criticized President Carter for his judicial selection approach. The right opposed his substantive commitment in appointments; the left held his feet to the fire to ensure that he met those commitments or, at the very least, was embarrassed politically for not doing so. However, it should be noted that Carter's reform efforts did bear substantial fruit. When President Carter took office, six women had been appointed to lifetime federal judgeships in our nation's history. Carter appointed forty women in four years. Similarly, while thirty-three ethnic minorities (blacks, Hispanics, and Asians) had been appointed prior to the Carter administration, fifty-five ethnic minorities were seated during his four-year tenure.

III. POLICY CONSIDERATIONS AFTER CARTER

Once the genie of openly avowed policy considerations in judicial selection had been let out of the bottle, and once the White House's political role in judicial selection increased, it would be difficult to return to the old ways. In the wake of the Carter years, during the two-term presidency of Ronald Reagan, the policy agenda of the president and centralized White House control of judicial selection was a major facet of selection processes. Indeed, the Republican platform of 1980 pledged to award judgeships to those sharing conservative values. In the words of the platform:

We pledge. . .the appointment of women and men. . .whose judicial philosophy. . .is consistent with the belief in the decentralization of the federal system and efforts to return decision making power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.

More recently, in the Clinton years, we have witnessed the added tensions in executive/legislative relationships that divided government can induce. For example, Clinton's nominees met with unparalleled delay in the Republican controlled Senate with an unprecedented number of nominees not even being given a Judiciary Committee

hearing or a subsequent floor vote on their nominations. Ironically, while Clinton's nominees often were treated as ideological zealots, their behavior on the bench has demonstrated that they are the most "conservative" appointees of any Democratic president sitting on the bench today.

Indeed, it is fair to say that many Democrats were somewhat frustrated with the decidedly non-ideological nature of the Clinton appointees and the processes that produced them. Nevertheless, President Clinton experienced unprecedented difficulties in getting his nominees confirmed because of ongoing tensions with the Senate majority about the appropriate balance of power in appointment politics and, perhaps, doubts about the President's legitimacy and right to govern. Again, this remains a particular irony since there is little evidence, unlike in the Reagan years, of President Clinton seizing on judicial appointments as a major component of his policy agenda.

IV. THE PATH AHEAD

It is this crisis in lower federal court judicial selection, and I think it is fair to label it a crisis, that serves as the basis and justification for this symposium. We are at a crossroads in lower federal court judicial selection processes. At the time of this writing, more than one and a half very atypical years into the Bush administration and a few months before a Senate election cycle that could create further turmoil in selection politics, the shoe is now on the other foot: a Republican president and a Democratic Senate. Appointment relationships are still in the process of being resolved and large questions are still being addressed about what the appropriate and relative roles of the president and the Senate, in particular its Judiciary Committee, should be in these appointment processes. It is in the continuing and emerging answers to these questions during the second half of the Bush administration that we will find out whether the Clinton years were simply an anomaly in executive/legislative relations, or whether an era of contentiousness and gridlock has become the newly institutionalized model of selection processes.

I believe there are two alternative paths that could define the road ahead. One is premised on the lessons we learned in our earliest Political Science classes — "What goes around, comes around." The other, we learned from our mothers — "Two wrongs don't make a right." Despite a good deal of rhetoric from every political stripe over the past months, I'm not sure we know which path will be followed. President Bush's tenure in office, to date, has been so very different.

There were some predictable “givens” at the very beginning. For example, the process inherited the legacy of the mistreatment of Clinton’s nominees. There was the reality of John Ashcroft, a lightning rod for partisan bickering, heading up the Justice Department. There was the legacy of *Bush v. Gore* and what some would argue was a tainted electoral victory. And, there was, at first, the specter of an evenly divided Senate.

A situation that seemed like it couldn’t become more fraught with difficulty for the President, did. First, the Democrats took control of the Senate and all legislative work stopped as the struggle for organizing the body took center stage. The tragedy of 9/11 struck and judicial selection matters took a back seat at the Judiciary Committee to matters dealing with national security and terrorism. The presence of anthrax closed down a Senate office building. In this context, the actual record of judicial confirmations in President Bush’s first eighteen months in office is difficult to characterize. For some, it has been a glass half empty and, for others, half full. Both sides can offer ample evidence that they are “right.”

The Bush administration bemoans the fact that, while the numbers may be good regarding District Court confirmations, such has not been the case at the Courts of Appeals level. There, thirteen circuit court judges have been confirmed, while twenty-eight additional vacancies exist with seventeen nominees pending, fourteen of whom had not had hearings. Among those Courts of Appeals nominees for whom Judiciary Committee hearings have not been held at the time of this writing are a number of controversial and now celebrated nominees who were among the very first slate of candidates put forward by the President on May 9, 2001. This group includes John Roberts and Miguel Estrada, nominated for the D.C. Circuit, Terrence Boyle chosen for the Fourth Circuit, Deborah Cook and Jeff Sutton, designated for the Sixth Circuit, and Michael McConnell, nominated for the Tenth Circuit. Most egregious, perhaps, in the Administration’s view, is the Sixth Circuit where eight nominations have been made for a 16-member court operating at half strength, with only one judge confirmed thus far and only one other having enjoyed a hearing.

In response to these charges, Judiciary Committee Chairman Patrick Leahy counters that, “. . .more than two-thirds of the Federal court vacancies continue to be on the district courts. . .the administration has been slow to make nominations to the vacancies in these trial courts.”⁷

⁷ 148 CONG. REC. S117 (daily ed. Jan. 25, 2002) (statement of Sen. Leahy).

As for the relative balance in moving District and Appeals Court nominees, Senator Leahy added, "Following longstanding committee practice, each hearing typically will involve several nominees — a circuit court nominee and — a number of district court nominees."⁸ Regarding the Sixth Circuit, "special" circumstances exist inasmuch as both of Michigan's Democratic Senators, Carl Levin and Debbie Stabenow, have argued strongly that no Bush nominees for the Sixth Circuit should be confirmed until President Bush renominates two Michigan-based Clinton nominees for that court (Helene White and Kathleen McCree Lewis), who never received confirmation hearings during Republican control of the Senate. This argument holds particular sway with regard to the President's nomination of three Michiganders to the court since, in each instance, Levin and Stabenow have not returned the Judiciary Committee's blue slip forms on which their views on these nominees were solicited. Generally, when home state senators do not return the blue slip forms, under the Judiciary Committee's long-standing practice, hearings will not be held on the nominees.

More broadly, while there were 110 vacancies on the federal bench when Patrick Leahy assumed the chairmanship of the Senate's Judiciary Committee, at the time of this writing that number has been reduced to 79, a vacancy rate under 10%, which is a level that has not been reached in quite some time. Hearings on judicial nominees have been held at a regular and steady pace, including during summer recesses and at incredibly difficult times, such as during September 2001 in the wake of 9/11 and even during the period when a Senate office building was shut down because of the anthrax threat. All District Court nominees in 2001 received hearings and, to date, over two-thirds of all federal judgeship nominees have had hearings. And, as the Obstruction and Delay index developed by Sheldon Goldman and utilized in his contribution to this symposium collection portrays, there has been considerable improvement in the rate of confirmation processes at the District Court level from Bill Clinton's last two years in office. There has even been some small improvement in the handling of Courts of Appeals nominations from the unprecedented acrimony and inaction prevailing during that same time period. Indeed, on January 25, 2002, Chairman Patrick Leahy stated on the Senate floor that:

We will include hearings for a number of controversial nominees who do not have a blue slip problem. We will convene a

⁸ *Id.*

hearing...on the nomination of Charles W. Pickering...I fully expect — we will also have hearings on other nominations for which consensus will be difficult, including such nominees as Judge Priscilla Owen, Professor Michael McConnell, and Miguel Estrada.⁹

CONCLUSION

To date, both Pickering and Owen have had such hearings with their nominations ending in defeat through a party line vote of the Judiciary Committee. It remains to be seen whether such votes will have political repercussions for Democrats in the congressional elections in November, 2002, particularly in hotly contested races in states such as Mississippi, Tennessee, and Texas. However, it is important to point out that similarly controversial Clinton nominees, in most instances, did not enjoy the opportunity for a hearing and/or a Judiciary Committee vote. Further, hearings for two of the most controversial pending nominees (McConnell and Estrada) now have been scheduled.

Clearly, there remains much more to be said and written about where we are today and where we are heading. The contributions of the distinguished participants in this symposium will certainly serve as useful food for thought in the discussions that are bound to follow.

⁹ *Id.*