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# PICKING FEDERAL JUDGES: A MYSTERIOUS ALCHEMY

*Michael D. Schattman\**

PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN. By *Sheldon Goldman*. New Haven: Yale University Press. 1997. Pp. xv, 428. \$45.

Each filling of a judicial vacancy is a minidrama of individual ambitions, backstage maneuverings, mobilization of support, and occasional double-dealing, and is affected by the values of those involved in the process. There is human drama as political forces, events and personalities intersect. And the end result is the staffing of the third branch of government, which by its actions — or inactions — has a profound effect on American lives. [p. 365; footnote omitted]

With these words, Professor Goldman<sup>1</sup> concludes the lesson he began nine chapters earlier as he embarked on his exploration of the seldom-mapped territory where the American government sets about building that smallest part of itself that has the most day-to-day continual contact with the American people. But I would hope that the readers of this review and of this book would keep that simple lesson uppermost in mind as they consider Sheldon Goldman's unique contribution to our understanding of ourselves.

## INTRODUCTION

I have twice been nominated to the federal bench by President Clinton. The first nomination, in December 1995, lapsed at the end of the 104th Congress. I was renominated in March 1997. I have never had a hearing and never had a letter from the Senate Judiciary Committee requesting additional information. In 1995 and again in 1997 the White House precleared my nomination with my two home-state Republican senators. Originally, I was nominated before the scheduled retirement date of the judge I was named to replace, which gives knowledgeable readers an idea of the lack of controversy surrounding my appointment. I had strong bipartisan support. In July of 1997, however, almost two years to the day after

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1. Professor of Political Science, University of Massachusetts at Amherst.

I was first recommended to the President by the Texas congressional delegation, my affirmative blue slips were suddenly withdrawn by the Texas senators.<sup>2</sup>

For those readers who have no idea what withdrawal of blue slips means, I recommend perusing Sheldon Goldman's *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan*. It should be read by every lawyer who wants to be a federal judge as well as by those who practice in front of them. Much of its importance resonates in the current political atmosphere and can be seen in the increased attention given to presidential nominations, judicial or otherwise, in both the popular press and legal academia. This is due in part to the personal peccadilloes of the nominees — consider, for example, former Senator John Tower's lifestyle, which was so criticized by his fellow Republicans, or Zoë Baird's failure to pay social security on domestic help despite two large professional incomes. The nominee becomes a caricature of a social problem and an object lesson for the public.

It is also important to a growing understanding of the role these once-anonymous persons play in the life of the Republic and in the lives of each of us. This latter realization may account for the proliferation of scholarly articles devoted to the nomination process that have appeared in the last few years.<sup>3</sup> These articles, however, are not likely to be read widely even in legal circles. Goldman's book provides information to lawyers, judges, the press, and the general public in an anecdotal format and with an astounding

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2. See Neil A. Lewis, *Jilted Texas Judge Takes on His Foes in Partisan Congress*, N.Y. TIMES, Nov. 16, 1997, at 1; Henry Weinstein, *Drive Seeks to Block Clinton Judicial Nominees*, L.A. TIMES, Oct. 26, 1997, at A3. These articles discuss the political nature of the stall placed upon President Clinton's nominees and efforts by right-wing groups to involve Republican senators in their fundraising projects by linking them to blocking federal judicial nominations.

3. Some articles of interest include: Richard S. Arnold, *Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473 (1996); Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757 (1993); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435 (1996); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991); Orrin G. Hatch, *The Politics of Picking Judges*, 6 J.L. & POL. 35 (1989); Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995); R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 LOY. L.A. L. REV. 903 (1995); Wm. Bradford Reynolds, *The Confirmation Process: Too Much Advice and Too Little Consent*, 75 JUDICATURE 80 (1991); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111 (1994); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257; Oona A. Hathaway, *The Politics of the Confirmation Process*, 106 YALE L.J. 235 (1996) (book review); Orrin G. Hatch, *Making a Real Mess*, 1995 PUB. INTEREST L. REV. 139 (book review); Gary A. Hengstler, *At the Seat of Power*, A.B.A. J., Apr. 1995, at 70; Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (book review); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549 (1995) (book review).

amount of insider detail — including handwritten notes between presidents and their confidants.<sup>4</sup> He spends little time on well-covered Supreme Court nominations, concentrating as his subtitle says on lower court selection.

Goldman's book is a work of political science, and it is short on the historical context that would be useful to interpret the tables located throughout the text. In fact, it does not tell you nearly enough about blue slips.<sup>5</sup> But it certainly will allow you to refute the common misconception that the politicization of nominations started with Judge Bork.

I wish to settle that bit of historical inaccuracy first: politicization of the process of selecting federal judges has been around for a long time. Less than two years after Truman became president upon the death of Roosevelt, the Republicans gained control of the Congress. Wisconsin Senator Alexander Wiley headed the Senate Judiciary Committee. According to Goldman, Senator Wiley announced even before he assumed the chairmanship that the Senate would confirm no "leftists" (p. 81). Soon after, he stated he wanted a political balance in appointments—that is, more Republicans. Next, he proclaimed his opposition to any New Dealers. His committee held up nominations and the number of confirmations began to drop: sixteen in 1946 when the Democrats were in control, ten in 1947 under the party opposite the president, and in 1948, anticipating President Dewey, the total confirmed by the Republican-controlled Senate dropped to three (p. 81).

I cannot say, for this is not a history book, whether this strategy led to the appellation "do-nothing Congress" and the triumph of Harry Truman. It was, however, nearly fifty years before the country chose again to have a Democratic President paired with a Republican Senate. It is somewhat surprising, given the previous results, that the Republican leadership would resurrect Senator

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4. In filling a vacancy on the Third Circuit, Roosevelt wrote at the bottom of a memo recommending one candidate named Jones, "Guffey backing MM," indicating Senator Guffey's endorsement of a different candidate, Musmanno. Roosevelt then turned around and, after applying personal charm and pressure, appointed a third man who did not want the judgeship but who was the President's choice. P. 28.

5. The blue slip was the extra-constitutional administrative convenience adopted early in the Eisenhower presidency as a way for home-state senators to indicate their support of or opposition to a nomination. It gives the committee chair a way to be advised in a nonpublic manner of the private views of a colleague. The blue slip only has the force the committee chair is willing to give to it, although there have been attempts to give it greater effect by resolutions of party conferences in the Senate. It is not to be confused with a "hold," which is a sort of secret club blackball that allows any senator to block a vote on a nominee from any state for any office for any reason or no reason by simply advising the majority leader that s/he desires to hold the nomination. Both practices have been criticized. *See, e.g.*, HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 23-24 (6th ed. 1993); GEORGE C. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* (4th ed. 1997).

Wiley's old playbook. Yet here we are today, hearing almost the same words and watching the same damming up of the process.

Contrast this approach to Goldman's account of the Democratic-controlled Senate's approach to President Nixon's judicial nominees as impeachment and resignation loomed. As August 1974 began, only one of Nixon's judicial appointees remained pending. Then, on August 8, his last full day in office, Richard Nixon nominated three more judges. All four of his final nominees were confirmed (p. 226).

As Professor Goldman makes obvious to the diligent reader, there is no need for Wiley-like behavior.<sup>6</sup> This system designed by our Founding Fathers is so evenly balanced that by 1961, after twenty years of Roosevelt-Truman followed by only eight years of Eisenhower, the federal judiciary was evenly split between Democrat and Republican office holders (p. 157). This is despite the fact that the Senate had a Democratic majority for twenty-two of those twenty-eight years, including the final four opposite Eisenhower. It is an excellent example of letting the political market take its course without deliberate interference. Individual candidates should be reviewed on the merits. That is what the Constitution demands and expects. Those who would deliberately interfere with the process in order to limit the *total* output are selfish and reckless. They are selfish because deliberate interference is a bullying tactic adopted by sore losers that says in effect: you won but you can't have the prize. They are reckless on two bases. On a narrow basis, this strategy led the Republicans to defeat in 1948. On a wider basis, it interferes with the natural pendulum swing of free ideas which has protected our nation from the upheavals so common in other democracies.

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6. We are experiencing this mindless partisan resistance once again and it is hurting the selection process and crippling the courts. In his year-end report, Chief Justice William Rehnquist noted how these partisan divisions and the Senate's inordinate delay in acting on nominations were leaving the judiciary shorthanded. WILLIAM H. REHNQUIST, 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan. 1, 1998). The news media has responded to the harm caused by this delay and focused on the federal courts' productivity as at no other time. One article noted that in 1990, retired judges handled 3049, or 14.6% of the 20,836 federal trials. By 1997, the total number of trials was down to 17,266 yet trials presided over by the senior federal judges had risen to 3524 (or 20.4%). Pekkanen & Gill, *Judicial Vacancies Force Delays Create Case Backlog*, THE DETROIT NEWS, Feb. 8, 1998, at A5. In the U.S. Senate, Vermont Senator Patrick Leahy (D) has responded by introducing the "Judicial Emergency Responsibility Act," which would prevent lengthy Senate recesses and require the Senate to act on judicial nominations within 60 days during any declared judicial emergency. S. 1906, 105th Cong. (1998).

A state without the means of some change is without the means of its conservation.

— Edmund Burke<sup>7</sup>

### PERSPECTIVE

The best way to approach this book is to use the same roadmap as Professor Goldman — the successive presidential administrations that have introduced judicial nominees to the Senate and the people. He does so in nine chapters, with the first giving a general overview from 1789 to 1933. Seven chapters follow analyzing the selection process and criteria by each administration from Roosevelt to Reagan (Kennedy and Johnson are considered in one chapter, as are Nixon and Ford). The final chapter reprises what has gone before and then, for scholars or the incurably curious, a concise note on the sources available to most anyone, and finally forty-two pages of excellent detailed notes. I shall follow the same route and take the chapters and presidents in order.

While the opening chapter in Goldman's book is entitled "Judicial Selection in Theoretical and Historical Perspective," it is really more a description of his personal framework for reading a president's mind. He describes three presidential agendas: policy, partisan, and personal (p. 3). The policy agenda is "the substantive policy goals of an administration." The partisan agenda is Goldman's shorthand for the use of power "to shore up political support for the president or for the party." Finally, the chief executive's personal agenda is not surprisingly defined as his use of "discretion to favor a personal friend or associate." From time to time in later passages the author reminds the reader of these concepts as he discusses the making or unmaking of a particular nomination or how one agenda was served by another. The problem with the agenda concept is that some presidents delegated this job almost completely. Furthermore, the relative value Goldman places on these distinctions is apparently low since there is no chart referencing or cross-referencing this information. It appears sporadically in the text and not in the final summations.

Goldman uses historical perspective to mean a summary of the period between the Constitutional Convention and Herbert Hoover — that is, the time prior to the start of Goldman's research. Perhaps because I majored in history and have made it a lifelong passion, I craved historical perspective. It is difficult to determine what any president was thinking, policy versus party interests, if you cannot put decisions into the context of the issues of the times and

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7. THE OXFORD DICTIONARY OF QUOTATIONS 111 (3d ed. 1979).

the place. If this book is ever updated it ought to be coauthored by a historian.

#### ROOSEVELT

Franklin Roosevelt's meticulous attention to the slightest detail and his apparent delight in manipulating the pieces on the chessboard are the hallmarks of his selection of judges for the federal bench. If the author's agenda analysis is helpful at all, it is perhaps most helpful here in appreciating Roosevelt's understanding of how the three tracks can be used all the time. FDR was quick to see that the old men on the Supreme Court could prevent the reforms he had conceived to rescue the nation from depression and revolution. He was quick to see a solution and to push it despite the cautions from his close advisers. When public opposition forced the Congress to reject his court-packing plan, Roosevelt quickly adapted. The natural attrition of death and retirement soon allowed his nominees to become members of the Nine. In turn he directed his attention to the lower courts and their impact on his policies.

Although the author does not discuss the question, it may be that FDR's experience as a governor of a state with a judiciary that was entirely elected helped to inform his approach to picking judges. He understood the nuances of filling vacancies and satisfying the patronage needs of an individual senator from his New York experience. But here on the larger stage he saw a broader picture and sought nominees who would help fill out the canvas. Consequently, as Goldman makes clear, he took an active role in looking for and screening the nominees sent to him. FDR understood that senators had both partisan and personal agendas that he could use to his advantage. Still, he was cautious. While he attempted to meet the needs of specific New Deal constituencies such as minorities and women, he did not act so precipitately that he alienated another part of the coalition, whether southern senators or city bosses, on a specific nomination. Numerically, he succeeded in placing the first woman on a federal court of general jurisdiction — Florence Allen on the Sixth Circuit — and the first black on a federal district bench — William Hastie in the Virgin Islands (pp. 51-57). Roosevelt found that his discretion was circumscribed by the Senate as well as by his own desire to achieve his other broader policy goals.

#### TRUMAN

Coming into the presidency as he did, Harry Truman carried on where Roosevelt left off. This is true of his judicial appointments as well. If there was a honeymoon for the man who found himself facing Stalin at Potsdam and making the decision to drop the

atomic bomb, it was not in the area of picking judges. In office for a week, he was visited by the senators from North Carolina to discuss judgeships in that state (p. 68).

More a political figure than a national one like Roosevelt, the former senator was more deferential to the wants and desires of senators — even Republican senators — than his predecessor. Yet he came to understand the prerogatives of his new office and to guard them stubbornly if need be. Like Roosevelt, Truman worked through his Attorney General and the Democratic National Committee chair on judicial appointments. Unlike Roosevelt, Truman was more of a hands-off president and rarely attempted to micromanage the process of finding, selecting, vetting, appointing, and confirming his judges (p. 69). He did pay close attention to what happened in his home state of Missouri even as its political leaders and its senators worked names through the system.

Truman's appreciation for patronage and party building seems to have smoothed much of his appointment road, but there were some exceptions. In Georgia, Truman elevated the brother of Senator Russell to the Fifth Circuit, but then he and the Senator disagreed over the brother's successor. Finally, after a long fight the two men met and Truman agreed to Russell's choice (pp. 71-72). In Vermont, Truman fought and won a behind-the-scenes battle with the Vermont Democratic Party leadership to name a Republican and former senator to a federal district court in that state (p. 69). The Vermont Democrats were focusing on party building and Truman on naming a man he knew and respected, regardless of party.

An intra-party fight among California's Democrats illustrates the problem of state-by-state selection that drove President Carter years later to try to rationalize and systematize the process on a national basis. Party factions in California were at loggerheads on potential nominees for two district court vacancies. The party organization had its choices and the state's senior senator had his own. Stalemate set in for over a year and each attempt by Truman to make peace ended in failure, if not renewed acrimony. Finally, illness forced the senator's retirement and Truman was able to make his own choice — one from each faction (pp. 72-73).

With the Republican victory in the 1946 congressional elections, Truman faced a hostile Senate and a Republican majority confident that the president was irrelevant. The result was the program of Senator Wiley mentioned above — no leftists, no New Dealers, more Republicans and in the end almost no confirmations (p. 81). Determined to block the appointment of women and blacks, Senator Wiley brought the American Bar Association into the process to screen and give its evaluation of nominees — previously the func-



tion of the Justice Department and the FBI (pp. 86-88). Wiley's plan worked. Even after Truman's victory in 1948, the ABA's participation ensured that by the end of his term he had named only one woman, Burnita Matthews of Mississippi backed by Senators Eastland and Stennis, to the federal district court. He also elevated William Hastie to the Court of Appeals for the Third Circuit (pp. 96-97, 100-01).

On the public policy front, Truman carried to completion the legislative programs of the New Deal and began civil rights initiatives, but this seems unconnected to his judicial appointments, where he focused on accommodating individual senators. Or was it unconnected? Truman's number of appointments of Catholics and Jews to the federal judiciary was many times that of Roosevelt, reflecting their importance in the ruling Democratic coalition (pp. 107-08). The picture emerges of a president more conscious than his predecessor of the impact judicial appointments have on other policy choices made by the legislative branch, but more confident of his ability to understand and influence those choices without micromanagement that would cost him both legislative support and his nominees.

#### EISENHOWER

Not surprisingly, the management style of a president who had grown up in the electoral rough-and-tumble of western Missouri politics was different from that of his successor. Dwight Eisenhower had spent a lifetime in the command structure of a professional army and was noted for understanding the impact of logistics on victory. Both Harry and Ike got along well with subordinates — few other presidents radiate that comfortable feeling of first-name familiarity — and were students of persons and personalities. But each demonstrated an approach to picking judges that resembled his own management style. Truman's sit-down-and-deal gave way to Eisenhower's by-the-book. But Eisenhower understood that there was both a governmental and political purpose to this exercise.

When Eisenhower took office after twenty years of Roosevelt and Truman, the judiciary was 77.5% Democratic appointees (p. 112). This level of imbalance would not be matched until Clinton succeeded twelve years of Presidents Reagan and Bush.<sup>8</sup> A former military man, at first the new president liked judicial nominations to go through channels. But realizing their dual governmental and political purpose, he soon directed that judicial nominations be cleared through the Republican National Committee. As time went

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8. Goldman, *supra* note 3, at 299.

on and he learned more about the process, he instructed the Attorney General to put him in the decisionmaking loop (p. 113). But Eisenhower became dissatisfied with even this approach as he felt that he needed to be involved before the final decision was made. He called for closer consultation with the Justice Department earlier in the process. Goldman does not say it, but you come away with the feeling that Eisenhower was impelled to have the same influence on who moved up in the judiciary as senior commanders have on the development of the officer corps. It also seems clear that he wanted some flexibility so that he could deal with the Senate.

These suppositions may account for how the use of the ABA became institutionalized under Eisenhower (p. 137). What better way to build in the firmness of command structure, yet preserve for the commander the option of selecting a candidate not of a senator's choosing, than to bring in an institution akin to the Army's personnel boards? Eisenhower, having directed an Allied coalition, had an understanding of coalition politics. While the Senate was Republican during his first two years, Eisenhower then had to deal with a coalition of southern Democrats and Republicans from 1954 until 1958, when an economic downturn prompted the election of seventeen new Democratic senators, including many liberals (p. 110). Eisenhower's Justice Department was aggressive in giving its commander-in-chief the flexibility of choice he desired even if it meant stepping on the toes of GOP Senators. Republican minority leader Everett Dirksen held up and even killed Eisenhower nominations if he felt that Republican senators were not given their due. Democratic majority leader Johnson once briefly held up all action on nominations until the Republican National Committee included one candidate desired by Johnson on the list of nominees.<sup>9</sup>

Goldman misses some opportunities in this section. Although he notes Ike's interest in appointing Catholics as tied to party-building (p. 116) he does not consider that side of Eisenhower's persona as a master of coalition management that made this a natural decision for the military man now come to politics.<sup>10</sup> While the appointment of William Brennan is presented with some context and detail, the appointment of California Governor Earl Warren as Chief Justice just nine months into Eisenhower's term is just stated and passed over without discussion (p. 109-10). There is no consideration of the political motives or how it impacted Eisenhower's relation to the Senate in making selections for the lower courts.

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9. Pp. 133-34. Contrast this to Senator Wiley's demand for half the benches in 1946, discussed above.

10. This may account for his appointment of William Brennan to the Supreme Court. •P. 152.

This may have been outside the author's scope, but it is something to pause and think about. Finally, although the "blue slip" was invented in the Eisenhower era, there is no mention of it in this chapter.<sup>11</sup>

In May 1958, after five years in office, Eisenhower expressed uncertainty about the proper role of courts in a democracy. He sent Attorney General William Rogers a lengthy memo asking probing questions about the courts, legislation by the courts versus decision making, the federal-state relationship, and the limits to Congress's control over the courts (p. 125). Rogers responded with a comprehensive seven-page, single-spaced letter explaining the proper role of the courts in reviewing legislation, the use of phrases such as "due process" and "equal protection" in our constitutional framework, the use of judicial legislating both as an accurate and as an oversimplified criticism, and the need for the judiciary, despite the occasional error, to be independent so that the integrity of the decisional process could be maintained (pp. 125-26). This remarkable exchange reflects well on both Eisenhower and Rogers as they tried to come to a common understanding so that the man who led the free world would know what one third of his government was about.

This same concern led Eisenhower to inquire about the propriety of a recess appointment.<sup>12</sup> Upon being assured by his Attorney General that the power could be properly exercised, he did so with dispatch (pp. 119-20). In choosing his judges Eisenhower displayed a remarkable lack of ideology. One of his appointees, Judge John Minor Wisdom, described Eisenhower's style in recruiting and screening judges as follows: "There is no cataloguing of biases or prejudices . . . . Instead, what is of concern is whether the man is a qualified lawyer, knowledgeable, has community standing and judicial temperament" (p. 124).

Eisenhower's record of appointments differed significantly from his predecessors. Over 70% of Ike's first-term judges came from private practice compared to 26% for Truman. In his second term, Eisenhower chose 56% from private practice. One third of the first group and one-half of the second came from medium-to-large firms, including many prominent firms. By contrast, none of Truman's first-term appointees came from such firms. Ike appointed no law professors and, unlike Truman and Roosevelt, no sitting member of Congress. About 60% of his judges had records of prominent party activism (p. 151). However, perhaps because of the criteria men-

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11. See ABRAHAM, *supra* note 5, at 23-24; EDWARDS & WAYNE, *supra* note 5, at 348.

12. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3.

tioned by Judge Wisdom, none of Eisenhower's nominees was rejected by a vote of the full Senate (p. 152).

#### KENNEDY

While John Kennedy undoubtedly had an interest in judicial selection there are no memos or notes that document his involvement (p. 158). It appears matters were handled by phone or at lunch with his brother, the Attorney General, and others with whom he had close ties. Robert Kennedy said that the President became actively involved only in about a half-dozen situations where members of Congress wanted someone other than the prospective nominee (p. 159). Like Truman before him and Johnson afterward, Kennedy came from the Senate and *senators of the President's party* therefore exerted great influence over the selection process (p. 173). Professor Goldman states that no mention of a role for the DNC in judicial selection is found in Kennedy's papers (p. 174). Kennedy continued to utilize the ABA in screening as had Eisenhower. However, when the ABA lobbied for bipartisan (half-and-half) selection, Robert Kennedy thanked it for its evaluative role and stated that Republicans would be appointed but in no particular percentage (pp. 177-78).

Although Kennedy faced a Congress dominated by conservative southern Democrats, he was just as cognizant as Truman and Eisenhower that one hand washes the other. Kennedy therefore appointed some Republicans, including three recess appointments left over from Eisenhower.<sup>13</sup> His approach was to arrange packages with Democratic and Republican nominees to gain support across party lines. A total of eleven Republicans were named in the three years of the Kennedy Administration (p. 190). In comparison, only nine Democrats were named in Eisenhower's eight years (p. 148) and these were often southern "Eisenhower" Democrats (p. 151).

Shortly after Kennedy took office, seventy-three new judgeships were created. In a presidential first, Kennedy pledged to appoint "[m]en and women of unquestioned ability."<sup>14</sup> The majority of these appointees came from private law practice. Many were from large firms. Only 1.7% of Kennedy and Johnson nominees were solo practitioners although during those years 35% of the nation's lawyers practiced solo (p. 193). Kennedy strove for quality appointments and largely succeeded (p. 196). In only one instance did Kennedy knowingly appoint a segregationist to a circuit court, and

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13. Two of these recess appointees were confirmed. The one not confirmed was JFK's only nominee to be defeated (p. 187 & n.11) and he was subsequently nominated by Nixon and confirmed by a still-Democratic Senate (pp. 174-75).

14. However, he only appointed one woman, Sarah Hughes of Texas. P. 180.

this was after a two-and-one-half-year fight over an Arkansas seat on the Eighth Circuit (p. 168). He did, however, appoint persons with public records of racist statements to district courts (p. 167). Overall ideological orientation was less important than whether segregationist positions would be taken from the bench (p. 170).

Goldman's account of Kennedy's administration is weak in his treatment of Kennedy's use of recess appointments, which he used to put Thurgood Marshall on the Second Circuit Court of Appeals. The device of a recess appointment apparently was intended to give some political cover to Judiciary Committee Chairman James Eastland of Mississippi, who, according to Robert Kennedy, delayed appointments but never caused any trouble (p. 183). There is a lot that is not said in this nonstatement of noninterference. The Kennedys and Eastland were not strangers to politics. If, as chairman, Senator Eastland was not causing trouble for a more diverse class of nominees, then what were the considerations given him in exchange? Goldman does not explore the subject. Given the Kennedy penchant for packaging nominees, it is just as easy to package other commodities — a dam or an air base or a highway bill for a judge. How these nonjudicial matters fit into the selection process should not be discounted.

#### JOHNSON

Like his mentor Roosevelt, former Senate majority leader Lyndon Johnson micromanaged judicial selection (p. 160). He appointed more law professors (five) than Truman, Eisenhower and Kennedy combined (p. 194). However, Goldman does not explore the reason behind this statistic. Was it a reflection of a Rooseveltian streak in LBJ, or his own career as a teacher, or attachments between these academics and Democratic politicians? We are left to wonder at its meaning.

But we do not have to wonder at the meaning of one of Goldman's other observations. After the passage of civil rights legislation, LBJ insisted on knowing the civil rights views of candidates for the judiciary (p. 170). Purely personal views were not a bar to appointment, however. Several judges were nominated over the objections of civil rights leaders (pp. 170-71). Local ABA committees frequently found these nominees to be well-qualified, and the backing of powerful southern senators whose votes were needed on other matters led to the usual dealmaking. On June 13, 1967, Johnson named Solicitor General Thurgood Marshall to the Supreme Court (p. 171 n.v). For the nation's black leaders this more than made up for his acceding to the requests of southern senators on other appointments.

In 1966, forty-five new judgeships were created and in 1968, nine new appeals court positions were established (p. 180). The judiciary was expanding as the federal government's role in the life of the nation expanded and as the Congress put more responsibility on the courts in sustaining that role. This expansion gave the former Senate majority leader in the White House more pieces with which to play. He accommodated senators where he could on nominations and expected assistance in return on needed legislation.<sup>15</sup> Using this approach, Johnson named nine more Republicans to the federal courts for a total of twenty in the Kennedy-Johnson era. This was more than twice the number of Democrats named in Eisenhower's two terms (p. 195) and reflects how the two senator-presidents grasped the relationship between cooperation and legislation.

Several runners-up for judgeships in the Kennedy-Johnson years were subsequently nominated by Nixon. Johnson had four nominations lapse at the end of his last Congress. He renominated all four after Nixon was elected in November in the belief that Nixon would defer to him in the same way that JFK deferred to Eisenhower. Nixon, however, withdrew the nominations. Nevertheless, of the four, one was again nominated by Nixon, another by Ford, and a third by Carter, and all were confirmed (pp. 187 n.hh).

## NIXON

Richard Nixon, the first attorney to serve as President since Franklin Roosevelt, faced a Democratic Senate during his entire presidency. In 1968, opposed by Humphrey on the left and Wallace on the right, Nixon made a campaign promise to name strict constructionists to the courts (p. 198). Within a short time after his election he was able to replace Earl Warren with Warren Burger and to stage-manage the resignation of Abe Fortas from the Supreme Court (p. 198). Although the Fortas issue is barely touched in this book, the Fortas-Haynsworth-Carswell confirmation battles placed the Supreme Court nomination selection process squarely on the front burner of American politics, where it remains to this day.

While Nixon seemed intensely interested in the political ramifications of Supreme Court appointments, he took little or no cognizance of the lower federal courts and the impact that individual nominees would have on either the law or politics. Nixon was more concerned with issues of grand strategy in both global and domestic affairs and was bored by the details of implementation (p. 200).

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15. This approach can be readily seen in Johnson's working with Republican leader Senator Everett Dirksen to name judges Dirksen desired. P. 173.

Nominations for the lower federal courts were left up to the Attorney General John Mitchell, the Justice Department and more particularly to John Ehrlichman, assistant to the President for domestic affairs (pp. 202-03). At the outset of his term Nixon gave the ABA a de facto veto over nominations by agreeing that no one would be nominated whom the ABA rated "not qualified" (p. 231). Goldman infers that Nixon and Mitchell — with their Wall Street experience — believed that the ABA shared their conservative Republican values (pp. 214-15).

There are two interesting aspects of Nixon's lower court selections. The first is that he named six African Americans to federal district court benches. While the politics involved in each individual nomination is fascinating, it is even more interesting to follow the memos of White House aides as they discuss how to broaden their appeal to blacks without damaging the Nixon "southern strategy" (pp. 222-25).

The second remarkable feature of Nixon's appointments is the lack of any concerted Democratic effort in the Senate to frustrate them. This could be seen most clearly as Nixon's presidency drew to its close. The House was readying to vote on articles of impeachment and the Senate was preparing for the trial that would follow. Yet, as August 1974 opened, only one of Nixon's judicial appointees was awaiting action in the Senate Judiciary Committee. On August 8, 1974, Richard Nixon nominated three more federal judges. The next day he resigned. All four of his remaining nominees (two district judges and two appellate judges) were confirmed by a Democrat-dominated Senate (p. 226).

#### FORD

Perhaps because of the brevity of Ford's presidency, Goldman discusses his judicial nominations in tandem with Nixon's. This approach makes some sense. The demographics, personal background, and ABA and RNC involvement are similar. But it is appropriate to think of Ford's choices separately. From the beginning, Ford attempted to make a break from the style and substance of Nixon's approach by changing the type of persons who made the screening and vetting decisions at the Justice Department. He tried to restore public faith in a department once headed by the disgraced Mitchell and Kleindienst by bringing in Edward Levi of the University of Chicago as Attorney General and U.S. District Judge Harold Tyler as his deputy (p. 204). This difference in the leadership at Justice may account for the fact that there was no change in the demographic background from Nixon to Ford appointees, but that there was a change in professional experience and party affiliation. Ford relied much more heavily than Nixon on appointees who

came with previous judicial experience or from prosecutorial ranks. Likewise, and perhaps because of his legislative leadership experience, he was more open to the appointment of persons identified as Democrats than Nixon had been (pp. 204-05, 226-29). A number of the Democrats came with strong Republican senatorial support or as part of a package that included Republican nominees (p. 213).

Nevertheless, Ford worked closely with party leaders on lower court nominations. Besides consulting with any affected Republican senators, he routinely submitted names to the Republican National Committee for clearance. Where there were no GOP senators, he consulted with the state party leaders and elected officials before acting on nominations (p. 212). His term was too brief for anyone to venture a guess as to Ford's management or personnel style with regard to judicial nominees. At the end of the Nixon-Ford years, however, a judiciary consisting of 70% Democratic nominees in 1969 was more than half Republican when Jimmy Carter came to town (p. 235).

#### CARTER

For a nonlawyer, President Jimmy Carter displayed a remarkable interest and involvement in judicial selection. It may have been his passion for reform and his engineer-driven desire for regular order or his tenure in the Georgia Senate and Statehouse. An opponent of patronage, Carter pledged himself to the selection of judges based solely on professional qualifications (p. 238). Carter's interest lay in the process of selection more than the individuals selected. Carter was serious about removing patronage and to that end established a Circuit Judge Nominating Commission by executive order barely four weeks into his term (p. 238). The commission had a panel from each circuit. The panels had mixed membership of race and gender and were evenly divided between lawyers and nonlawyers. The order charged the panels with the task of giving the president the names of five qualified persons for a court of appeals seat within sixty days of being notified of a vacancy. The President-elect and Attorney General-designate Griffin Bell had met with Senate Judiciary Committee Chairman James O. Eastland in December to discuss changes in judicial selection. Eastland had tried to hold firm on senatorial prerogatives but had agreed to help Carter persuade senators to establish merit selection commissions in their states for district court appointments. He agreed to a nominating commission for the courts of appeal. Before this time only two states had such nominating commissions. By 1980 there would be thirty.<sup>16</sup>

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16. Pp. 244, 283. In the Reagan years the nominating commission was disbanded. Pp. 290-91.



Carter's approach dramatically opened the process to scrutiny and eventually produced a broader spectrum of judges to include women and minorities and reduced the institutional influence of the ABA, while at the same time professionalizing the federal judiciary without undermining the quality of nominees by emphasizing nominees with proven judicial experience (pp. 276-81). Carter took a real interest in how the names came to his desk. The memos from White House counsel to the President and from the Attorney General to the President are annotated with handwritten comments by Carter. Some approve an arrangement. Others make subtle but significant changes in the order of the process, with the most significant ones providing that names being considered will come to the President before going out for ABA and FBI checks (pp. 244-45).

The most intriguing reading in the Carter chapter concerns the war between the White House staff and Attorney General Griffin Bell over who would control selection (pp. 246-49, 254-59). Bell fought unsuccessfully to keep that control entirely within his hands. Finally, an uneasy truce was made in which control was shared. Bell insisted, however, that only the White House counsel himself would have input and not his assistants. It would probably have been less contentious had the Attorney General recognized the very high priority the President had given to recruiting qualified women and minorities and had taken steps himself to implement that goal in the early months of the administration. When names of qualified minority and women nominees did not appear in the first year, Carter was heavily criticized in the press and by supporters. His staff reacted by wresting control from the Attorney General, whose performance they felt had subjected their chief to attack.

Carter's great opportunity both to reform the process and to transform the makeup of the courts came from the Omnibus Judgeship Act of 1978 (pp. 241-44). Reflecting the increasing federal court docket and the federalization of much of the criminal law, Congress created 117 new federal trial judges and thirty-five new appellate judges. The numbers alone meant that there would be room both for senators and representatives to try to accommodate patronage needs and for the President to put minorities and women on the federal bench.

Carter largely achieved his process-oriented objectives. True to his word on patronage, for example, he did not appoint any close friends to the bench. Goldman observes that Carter had no personal agenda and there is no evidence that he even suggested a possible judicial candidate for any vacancy (p. 260). As to party considerations, the Attorney General stopped references to a nominee's political affiliations in April 1978 and Carter himself never submitted any of his nominations to the Democratic National Com-

mittee for clearance (p. 264). This measure of openness was reflected in the Senate where, beginning in 1979 with Senator Kennedy assuming the Judiciary Committee chairmanship, blue slips could no longer be used to block action on a nomination. Every nomination would be considered, and a home-state senator's dissatisfaction was now just another factor for the committee to consider (p. 263). Candidate Ronald Reagan promised to continue Carter's progress and to seek out women for appointment to the federal courts to achieve "a better balance" (p. 284).

### REAGAN

Ronald Reagan, like Carter a former governor, was as detached from the selection process as Carter had been involved. But the Reagan Administration came to Washington with a firm grasp on its political ideology and its underlying belief system. This ideology would guide judicial appointments. Unlike the Carter administration, implementation under Reagan was not overseen by the President, but by Attorney General William French Smith, presidential counselor Edwin Meese III, and White House counsel Fred Fielding (pp. 286-91). They abolished the commission approach of the Carter years but insisted that three to five names be submitted to the White House for each vacancy to give them more flexibility (p. 290). An Office of Legal Policy was created at the Justice Department, headed by an Assistant Attorney General. The office became the clearinghouse for judicial nominations. A special counsel for judicial selection was also created. These officers, the AG, and the White House officials became the "Working Group on Appointments" chaired by Fielding. They institutionalized a formal and active role for the White House in the process (pp. 291-92). As in every administration before and since, they set about to appoint judges of like mind with the chief executive.

Reagan's process differed from Carter's approach in two marked respects. First, otherwise qualified persons would not be considered unless they shared the administration's *judicial* philosophy (p. 290). Second, the Reagan Administration abandoned the merit selection vehicles put in place, which were ironically similar to those Reagan himself had used as California's governor (pp. 287, 289).

The importance of the Working Group and its interview process (pp. 303-05) cannot be overemphasized. To a degree not seen before, Reagan turned the selection process over to these subordinates and particularly to his longtime friend Ed Meese (pp. 291, 299-302). The Working Group made judicial appointments a part of the president's domestic policy. Reagan made phone calls to those who were selected asking them to serve — a technique that

was not only flattering, but certain to reinforce to the appointee that he was a Reagan appointee (p. 294).

There were several bumps on this road to staffing the courts. The most notable concerned the conflict between Reagan's campaign commitment to appoint women and the desire of the conservatives for ideological purity. Female appointees were automatically suspect because of equal rights and abortion issues. This conflict came to a head with the recommendation to appoint the general counsel of Hallmark, Judith Whittaker, as a federal judge in Missouri (pp. 299, 320, 330-33). Whittaker had taken no position on abortion or other political issues, but she was thought to support the Equal Rights Amendment. Despite high marks from the ABA, the support of prominent Missouri Republicans, and her own GOP bona fides, her perceived support for the ERA was enough to foment a right-wing attack. Iowa Lieutenant Governor Terry Branstad and party activist and fundraiser Richard Viguerie labeled her a Democrat and pro-abortionist. The power of unfounded smears by attackers who did not know their victim was quickly apparent. Meese led the Working Group to conclude that the Whittaker nomination should be dropped because she lacked, as a perplexed deputy attorney general explained, "broad-based support" (p. 333).

Even with the Senate firmly in Republican hands, not all Reagan nominees were confirmed. Jefferson Sessions III was named to a federal bench in Alabama, but ran into trouble on civil rights issues; even after four hearings, the nomination could not be saved.<sup>17</sup>

When Reagan's administration encountered opposition to a nomination it truly desired, it was willing to push. Two examples are the eventually successful fights to confirm Dan Manion to the Seventh Circuit and Alex Kozinski to the Ninth (pp. 309-14). In another unusual confirmation struggle with a Republican senator in a Republican-controlled Senate, the administration found its choice for the Eighth Circuit blocked by South Dakota's James Abdnor. Senator Abdnor was trying to end a twenty-two-year drought for his state on that court. Unable to persuade Abdnor, the Republican leadership changed the rules in midsession so that a senator could no longer place a "hold" on a judicial nominee from another state (pp. 321-22). That change occurred in 1983. Today, the Republican-controlled Senate has gone back to its old custom allowing cross-state blockage.

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17. Pp. 308-09. He is now a United States Senator and a member of the committee that rejected him. The author does not tell us if this is a first, but in today's climate it may become an increasingly attractive option for unsuccessful nominees.

Reagan's efforts were remarkably successful in aiding him to reshape the lower federal courts. He appointed a record seventy-eight appellate and 290 district judges. Like Carter he was helped by a judgeship bill that created eighty-five new judges and by a Senate that was in friendly hands for six of his eight years. Also like Carter he kept the ABA at arm's length and like Roosevelt he tried to make his judicial appointments an extension of his domestic policy. He was aided by a staff who understood this purpose and enthusiastically backed its implementation. Reagan, like FDR, wanted to reshape the courts not to reflect his vision but to share it and, like his onetime hero, he did it. But, like every president from Washington to Clinton and beyond, Reagan's success waxed and waned. Not simply because other presidents and Senates come after him, but because the thing that he leaves as a legacy — an independent judiciary — will itself change as the issues of each new day come before it and seek answers to questions previously unasked.

### CONCLUSION

This is an eye-opening book about a process that has been in place virtually out of sight since the beginning of the Republic and which, on balance, has worked rather well. There seems to be a natural ebb and flow with the checks-and-balances-system of the framers preventing any party, no matter how long it dominates the executive or the legislative branches, from dominating the third branch. This will comfort those in either party who have feared otherwise.

The system has worked well in modern times except for the breakdown in the Truman years and the analogous situation today to which Goldman alludes in his summing up (pp. 364-65). Both political reality and pressure from a citizenry that rejects the notion that the courts are merely another political branch have served to protect the judiciary from ideologues of the left and the right. The historical overview of the process also demonstrates the wisdom of a cardinal rule of practical politics, "Never create or assert an official prerogative that could not be safely entrusted to your adversaries."<sup>18</sup>

Goldman has produced a comprehensive, well-organized and crisply written research work with excellent tables for any scholar or student of the American judiciary. It ends in 1988 and leaves the reader eager to know how Presidents Bush and Clinton handled

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18. Bruce Fein, *The Chief Justice vs. Hatch*, WASH. TIMES, Jan. 6, 1998, at A12. Bruce Fein was assistant attorney general in the Reagan administration.

judicial selection. I hope I will have the opportunity to review the sequel.

I can just imagine how the book will start. Professor Goldman will refer to his previous book and the fact that it covered a span of fifty-five years and seven presidents. He will remark on the smooth transitions that occurred when two of these presidents died and a third resigned, each to be replaced by a man very different than the president the country had elected. He will say that for nearly two hundred years the process worked reasonably well.

And then he must begin to write about the unprecedented crisis that we are only now beginning to understand. He will write about a group of men who, having had the unfettered power to select federal judges during the Reagan years, tried to cling to that power during the Bush years. Further frustrated by the election of Clinton, they viewed the 1994 election of the Republican senate as their private restoration to presidential power. In what may one day prove to be the biggest constitutional scandal of the Clinton era, this unprecedented shadow government of former Republican officials appears to have conspired with current officeholders to disrupt the entire judicial nomination process. In short, they were captured for posterity on their own videotape trading blackballs for contributions.<sup>19</sup>

The book may have a footnote about the nominee who exposed the shocking tape. It will be interesting to learn what became of him.

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19. See Judicial Selection Monitoring Project, videotape and prospectus accompanying letter from Robert H. Bork, Sept. 9, 1997 (on file with author)(representing contributions to JSMP as tax-deductible); Judicial Selection Monitoring Project, Memorandum of Commitment to Paul Weyrich (same) (on file with author). See also Weinstein, *supra* note 2.