

SELECTING LOWER COURT FEDERAL JUDGES ON THE BASIS OF THEIR POLICY VIEWS

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TABLE OF CONTENTS

I. Introduction	729
II. When It Is Appropriate to Consider Policy Views	731
A. It Is Appropriate to Consider Policy Views When the Courts Are Using Their Judicial Discretion to Thwart a President's Economic and Social Welfare Policy Agenda	731
B. It Is Appropriate to Consider the Overall Policy Orientation of Judicial Candidates When Equally Qualified Candidates Are Under Consideration	736
III. When It Is Not Appropriate to Consider Policy Views.....	741
A. It Is Not Appropriate to Consider Policy Views in Such a Manner That Will Call into Question the Ability of Candidates to Administer Impartial Justice with Reference to Individual Civil Rights and Liberties	741
IV. Conclusion	750

I. INTRODUCTION

Selection of lower federal court judges is a subject of ongoing interest, certainly within the legal profession and among political scientists specializing in judicial politics.¹ Scholars of the lower federal courts

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1. See, e.g., DEBORAH J. BARROW ET AL., *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996); LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* (2002); HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); NEIL D. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* (1987); DAVID M.

recognize that lower federal court judges have the opportunity to exercise judicial discretion and, in the process, make policy.² Advocacy groups at both extremes of the ideological spectrum have become actively involved in the judicial selection process over the past twenty years, seeking the appointments of those sharing their policy views or opposing those who are seen to have conflicting agendas.³ Underlying this interest and activity is the understanding that, particularly with the U.S. Courts of Appeals, these courts—for the overwhelming majority of cases—are the end of the legal line, given that the U.S. Supreme Court reviews only a relative handful of appeals.⁴ Thus, appointments to the lower federal courts—in particular, the federal appeals courts—have recently come to be seen as having policy consequences that can and have politically resonated, often in presidential election years.⁵ The question I would like to address is whether and under

O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION (1988); NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005); see also Symposium, *Federal Judicial Selection*, 39 U. RICH. L. REV. 793 (2005); Symposium, *Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 583 (2003).

2. See, e.g., VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006); J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996); DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000). There are also numerous journal articles demonstrating lower court judicial policymaking. See, e.g., Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 AM. POL. SCI. REV. 374 (1966); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975).

3. See, e.g., BELL, *supra* note 1, at 67–99; SCHERER, *supra* note 1, at 108–32.

4. See ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 47–48 (7th ed. 2007) (discussing the workload of the federal courts).

5. The 2004 Republican Party platform included a section called “Supporting Judges Who Uphold the Law” that contained the following:

In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that these judges threaten America’s dearest institutions and our very way of life. In some states, activist judges are redefining the institution of marriage. The Pledge of Allegiance has already been invalidated by courts once, and the Supreme Court’s ruling has left the Pledge in danger of being struck down again—not because the American people have rejected it and the values that it embodies, but because a handful of activist judges threaten to overturn commonsense

what circumstances it is appropriate for the policy views of lower court and, in particular, appeals court judicial candidates to drive the selection process.

II. WHEN IT IS APPROPRIATE TO CONSIDER POLICY VIEWS

A. *It Is Appropriate to Consider Policy Views When the Courts Are Using Their Judicial Discretion to Thwart a President's Economic and Social Welfare Policy Agenda*

The presidency of Franklin D. Roosevelt is the prime example of when it is appropriate to use the policy views of judicial candidates. The Great Depression was arguably the country's most severe economic crisis. When Franklin D. Roosevelt was elected President in 1932, along with an overwhelmingly Democratic Congress, he offered the country a "new deal." His legislative agenda aimed to restore public confidence in the economy, relieve the misery of Americans brought on by the Depression, and provide fundamental economic and social welfare reform. But many federal court decisions in the 1930s sought to thwart the President's and Congress's policies.

During 1935 and 1936, more than one-third of the lower-court federal judiciary issued approximately sixteen hundred injunctions to prevent the

and tradition. And while the vast majority of Americans support a ban on partial birth abortion, this brutal and violent practice will likely continue by judicial fiat. . . . President Bush has established a solid record of nominating only judges who have demonstrated respect for the Constitution and the democratic processes of our republic, and Republicans in the Senate have strongly supported those nominees. We call upon obstructionist Democrats in the Senate to abandon their unprecedented and highly irresponsible filibuster of President Bush's highly qualified judicial nominees, and to allow the Republican Party to restore respect for the law to America's courts.

REPUBLICAN NAT'L PLATFORM COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 76-77 (2004), <http://www.gop.com/media/2004platform.pdf>. In another section of the Republican platform there is an implicit recognition of the policy consequences of judicial appointments: "We support the appointment of judges who respect traditional family values and the sanctity of innocent human life." *Id.* at 84.

The 2004 Democratic Party platform was brief in its recognition of the importance of the selection of judges: "We support the appointment of judges who will uphold our laws and constitutional rights, not their own narrow agendas." DEMOCRATIC NAT'L COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 37 (2004), <http://www.democrats.org/pdfs/2004platform.pdf>.

enforcement of various New Deal measures.⁶ Opponents of the New Deal were primarily Republicans, and Roosevelt became increasingly aware of this. For example, Roosevelt kept in his files a short newspaper editorial sent to him in September 1935 that noted two recent appeals court decisions from the First and Sixth Circuits striking down New Deal programs by votes of two to one, with only the judges who were Democrats supporting the programs.⁷

There is evidence in the Roosevelt papers of concern for and interest in both district and appeals court candidates' compatibility with Roosevelt's economic and social welfare policy agenda. For example, in late 1936, Ninth Circuit Judge William Denman, a Roosevelt appointee, wrote to the President emphasizing the importance of naming district and circuit judges sympathetic to the New Deal.⁸ Denman put the point bluntly: "The New Deal needs more Federal judges."⁹ Roosevelt forwarded the letter to the attorney general with the notation, "Speak to me about this when I get back."¹⁰

Roosevelt was, on occasion, informed of the pro-New Deal decisions of his appointees. For example, in a 1937 memo from Secretary of Agriculture Henry Wallace, the Secretary told Roosevelt that John W. Holland, whom Roosevelt had appointed the previous year to a district court in Florida, had found the marketing provisions of the Agricultural Adjustment Act constitutional, while Holland's colleague, a Republican Hoover appointee, had voted to strike down the provisions.¹¹

Policy views of candidates for the appeals courts were considered in a number of instances. For example, in 1934 the administration was

6. 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 447-48 (1960).

7. Letter from Democratic Nat'l Comm. to President Franklin D. Roosevelt (Sept. 10, 1935) (accompanying an editorial clipping regarding two recent court of appeals decisions) (on file with The Franklin D. Roosevelt Presidential Library, Sixth Circuit 1934-1938, OF 209-f).

8. Letter from Judge William Denman, United States Court of Appeals for the Ninth Circuit, to President Franklin D. Roosevelt (Nov. 7, 1936) (on file with the Franklin D. Roosevelt Presidential Library, U.S. District Judgeships 1933-1945, OF 208).

9. *Id.*

10. *Id.*

11. Letter from Henry Wallace, Sec'y of Agric., to President Franklin D. Roosevelt (Mar. 30, 1937) (on file with the Franklin D. Roosevelt Presidential Library, Florida 1933-1939, OF 208-o, Box 8).

considering the elevation of Missouri federal district Judge Charles B. Faris to the Eighth Circuit. Faris was strongly backed by Missouri Senator Bennett Champ Clark, who emphasized Faris's pro-New Deal record in a letter to the President, which accompanied a copy of a Faris judicial opinion upholding New Deal legislation.¹²

Another example concerns the filling of two vacancies on the Court of Appeals for the Ninth Circuit in 1937. A Justice Department lawyer from Montana, Walter L. Pope, was supported by Montana Senator James Murray, who wrote to Roosevelt praising Pope as "an able and aggressive 'New Dealer.'" ¹³ James Roosevelt, serving as an assistant to his father, subsequently wrote to him in a memo: "Just a note to let you know this [Ninth Circuit nomination document] is still being held up at your request. You wanted to get some additional information about a man named Pope."¹⁴ Pope, however, did not get one of the positions; they went to candidates from Idaho and California. But, two months later, Pope thought he had a chance at a judgeship on the Court of Appeals for the District of Columbia and wrote to Senator Murray:

I know that the Administration would want a liberal on this court which passes on so much New Deal legislation. My entire file on the other application is still here, and I would think that if the President were reminded by you of his former wish that a judicial position could be found for me, then he might possibly approve.¹⁵

Pope did not receive this appointment either—New Dealer and Cornell law professor Henry Edgerton did. Pope stayed at the Justice Department until 1941 and then returned to Montana, to resume the practice of law. In 1949, he realized his life's ambition when he was named

12. Letter from Bennett Champ Clark, Mo. Senator, to President Franklin D. Roosevelt (June 29, 1934) (on file with the Franklin D. Roosevelt Presidential Library, U.S. Circuit Court of Appeal 1933–1945, OF 209).

13. Letter from James Murray, Mont. Senator, to President Franklin D. Roosevelt (May 27, 1937) (on file with the Franklin D. Roosevelt Presidential Library, Ninth Circuit 1936–1939, OF 209-i).

14. Memorandum from James Roosevelt to President Franklin D. Roosevelt (June 1, 1937) (on file with the Franklin D. Roosevelt Presidential Library, Ninth Circuit 1936–1939, OF 209-i).

15. Letter from Walter L. Pope, Attorney, Dept. of Justice, to Senator James Murray (Aug. 8, 1937) (on file with the Franklin D. Roosevelt Presidential Library, United States Court of Appeals for the District of Columbia 1933–1945, OF 51-s END).

by Harry Truman as the first Montanan to serve on the Ninth Circuit.¹⁶

Another example of policy concerns at work involves John Biggs, Jr., who served as chairman of the State Democratic Committee for Delaware and delivered the Delaware delegates for Roosevelt at the 1932 national convention. Biggs was named to the Third Circuit Court of Appeals in 1937,¹⁷ but only after he was thoroughly checked out by the Justice Department, because he had once served as counsel for the Duponts. The Justice Department concluded that Biggs's legal work was on minor matters and that Biggs "is very much in sympathy with all that the Administration does."¹⁸ After his appointment, Biggs wrote to Roosevelt: "It is our pride [referring to himself and his wife] to have been your supporters and followers in Delaware . . ."¹⁹

On occasion, the Justice Department systematically reviewed the judicial record of candidates with judicial experience to determine their policy proclivities. For example, Peter Woodbury, an associate justice on the New Hampshire Supreme Court, was considered for a First Circuit judgeship. But in April 1940, Secretary of Labor Frances Perkins wrote to Attorney General Robert Jackson, enclosing an anti-labor decision of the New Hampshire Supreme Court, in which Woodbury participated, and observed: "I feel that Judge Woodbury's attitude, as shown by this opinion, is entirely out of harmony with what I have understood to be the attitude of the New Deal toward labor."²⁰ The day after Jackson received the letter, a Justice Department lawyer sent an analysis of the opinion, concluding:

Clearly, the opinion does not display any liberal tendencies. I am not ready to conclude, however, on the basis of a single opinion, confined very largely to a discussion of the authorities, and without the benefit of argument by counsel, that a judge's concurring in such an

16. Federal Judicial Center, Judges of the United States Courts: Pope, Walter Lyndon, <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

17. Federal Judicial Center, Judges of the United States Courts: Biggs, John Jr., <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

18. Dept. of Justice, File of John Biggs, Jr. (Mar. 2, 1937) (on file with the Dept. of Justice).

19. Letter from Judge John Biggs, Jr., United States Court of Appeals for the Third Circuit, to President Franklin D. Roosevelt, (Feb. 19, 1937) (on file with the Franklin D. Roosevelt Presidential Library, Third Circuit 1937-1938, OF 209-c).

20. Letter from Frances Perkins, Sec'y of Labor, to Robert Jackson, Attorney Gen. (Apr. 25, 1940) (Dept. of Justice File of Peter Woodbury, on file with the Dept. of Justice).

opinion is reactionary or is tinged with an anti-labor bias. . . . [I]t would be advisable to make a study of Judge Woodbury's opinions in the New Hampshire Reports before reaching a definite conclusion as to his qualifications for appointment to the Federal Bench.²¹

Five days later, another Justice Department lawyer presented an analysis of Woodbury's thirty-one economic and labor decisions, finding that in sixteen cases he held against the individual or employee and in favor of the railroad, insurance company, or manufacturer. The memo included brief analyses of the individual cases and questioned whether Woodbury was "a true liberal."²² But Woodbury's supporters sought to counter the anti-labor charge. The Brotherhood of Railroad Trainmen of Nashua, New Hampshire, asserted that Woodbury "has always been a friend of labor."²³ The chairman of the Manchester Democratic City Committee wrote that Woodbury "has always been a hard worker for the cause."²⁴ And the Democratic National Committeeman for New Hampshire asserted, "He is definitely favorable to labor."²⁵ But what tipped the scales in Woodbury's favor was the endorsement of the New Hampshire State Federation of Labor.²⁶ Shortly after that endorsement, Woodbury's nomination was sent to the Senate, and he was confirmed within several weeks.

On the basis of my examination of the presidential papers and some Justice Department files for some of the appointees, I conclude that twenty-four of Roosevelt's fifty appointments to the courts of appeals of general jurisdiction were influenced by policy considerations. Of these, twenty (over eighty percent) occurred between 1935 and 1940, precisely when the decisions of the judiciary determined the viability of the New Deal. In total, some fifty-seven percent of the 1935–1940 appointments were dominated by policy concerns. The twenty-six other appointments to the appeals courts during Roosevelt's presidency were primarily based on partisan considerations, although no known anti-New Dealers received appointments.

21. Dept. of Justice, File of Peter Woodbury (Feb. 25, 1941) (on file with the Dept. of Justice).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Letter from Cornelius F. Foley, Sec'y-Treasurer, N. H. State Fed'n of Labor, to President Franklin D. Roosevelt (Dec. 26, 1940) (on file with the Franklin D. Roosevelt Presidential Library, First Circuit June–Dec. 1940, OF 209-a).

In my view, it was entirely appropriate for the Roosevelt Administration to consider policy views to the extent that it did. This was necessary to counter an activist Republican judiciary that had been substituting its views and policy preferences to thwart national economic and social welfare policies that were clearly in the public interest.

B. It Is Appropriate to Consider the Overall Policy Orientation of Judicial Candidates When Equally Qualified Candidates Are Under Consideration

I argue that a preference for a generally liberal, moderate, or conservative judicial candidate, consistent with the overall orientation of the Administration, is appropriate in the selection process. An example from the Kennedy Administration is illustrative.

The Administration sought to fill a vacancy on the Ninth Circuit. Judge Walter L. Pope of Montana—recall Pope from the discussion of the Roosevelt Administration—retired from that court and, following tradition, the seat would remain with someone who came from Montana. Montana's two Democratic senators, Mike Mansfield and Lee Metcalf, recommended certain individuals for consideration. First on their list was James R. Browning, who was born, raised, and educated in Montana but had lived and worked in Washington, D.C. for the previous twenty years.²⁷ For three of those years, he served as clerk of the United States Supreme Court. Senator Metcalf, in particular, favored Browning and informed the deputy attorney general.²⁸ The second name on the list was an attorney from Missoula, Montana, Russell E. Smith.²⁹ Justice William O. Douglas, a longtime friend of the Kennedy family, strongly supported Browning.³⁰ So did James Rowe, a Justice Department official during the Roosevelt Administration and a leading liberal Washington attorney with ties to the Kennedys.

27. Letter from Mike Mansfield and Lee Metcalf, Mont. Senators, to Robert F. Kennedy, Attorney Gen. (Mar. 13, 1961) (Dept. of Justice, File of James R. Browning, on file with the Dept. of Justice).

28. Letter from Lee Metcalf, Mont. Senator, to Byron White, Deputy Attorney Gen. (Feb. 22, 1961) (Dept. of Justice, File of James R. Browning, on file with the Dept. of Justice).

29. Letter from Mike Mansfield and Lee Metcalf, Mont. Senators, to Robert F. Kennedy, Attorney Gen. (Mar. 13, 1961) (Dept. of Justice, File of James R. Browning, on file with the Dept. of Justice).

30. Memorandum from Robert F. Kennedy, Attorney Gen., to President John F. Kennedy (Aug. 25, 1961) (on file with the John F. Kennedy Presidential Library, FG 505A, WHCF).

2008] *Selecting Lower Court Federal Judges Based on Policy Views* 737

Rowe, himself originally from Montana, wrote to Robert Kennedy about Browning and Smith, in which he observed:

Both of these men would make competent judges and are quite superior to the present composition of the Ninth Circuit bench, which is not saying very much. In my opinion, Browning is superior to Smith as an appellate judge because he has been steeped in appellate practice as few men in this nation have been.

. . . .

Assuming that I exaggerate and that these two men are actually comparable in competence and judicial temperament, there are I think the intangibles which weigh more heavily in favor of Browning than of Smith. I must tread softly here for, by definition, intangibles are hard to weigh. Nonetheless, I submit the trend as toward Browning and against Smith:

First, not only is the Ninth Circuit a weak bench, it is a conservative bench quite out of step with the premises of the New Frontier and almost all of us understand those premises. In the great run of cases it does not much matter whether a judge is liberal or conservative if he is a good judge. There are a handful of cases, however,—and, Heavens [sic] knows, they always seem to be the important ones!—where the judicial mind can go either way, with probity, with honor, self discipline and even with precedent. This is where the “liberal” cast of mind (we all know it, few of us can define it) can move this nation forward, just as the conservative mind can and does hold it back. This is intangible truth, but every lawyer knows it as reality! Browning would go forward, Smith would hold back.

Second, the political point of view of a candidate deserves weight when other things are equal, or almost equal. . . . [W]hen the shadings are close, when you are deep in the gray, it seems to me that all the weight should go to the man who has been devoted to the Democratic Party. It is possible to be deeply devoted to the Democratic Party and not to be such a partisan that an observer might say there is an absence of judicial temperament.

Browning, I think, is such a man. I know of his devotion. . . . I personally know that over the years he has contributed vast amounts of time and money to good Democrats. On this point, both of his Senators will strongly attest.

I do not think “Rusty” Smith is such a man. I think he is entitled, as aren’t we all, to his convictions and if his convictions in the 1950’s happened to be Eisenhower that was not only his privilege, it was his duty. But I think also privilege and duty carry with them the consequences of their acts. I do not think it is unduly partisan of me if I feel a good man cannot and should not live in both worlds!

I feel confident the Ninth Circuit would be improved by either of these man [sic], but vastly improved by James Browning, the more competent, the more liberal, the consistent Democrat.³¹

A complicating factor was that the American Bar Association Standing Committee on Federal Judiciary had rated Browning “not qualified.”³² Attorney General Robert Kennedy explained in a memorandum to the President that the Justice Department “feels that Mr. Browning, who has been recommended by Senators Mansfield and Metcalf, is qualified for the Court of Appeals for the Ninth Circuit,” and he also claimed that “Justice Douglas also strongly recommends his appointment.”³³ The unqualified rating

is based to a great extent upon the reactions of Western judges and lawyers. Mr. Browning, who hails from Montana, has not spent much, if any, of his legal career in the West and it seems to us that those people giving adverse opinions are somewhat unfamiliar with his development. It is anticipated that this appointment, if made, will draw considerable criticism from the Bar Association and conservative press. . . . The Senators and Mr. Browning prefer to go ahead, as does the Department.³⁴

Browning received the nomination and was readily confirmed, after which he went on to a distinguished career on the Ninth Circuit. Five years after Browning’s appointment, Russell Smith received a federal district court appointment from Lyndon Johnson.³⁵

31. Letter from James Rowe to Attorney Gen. Robert F. Kennedy (June 17, 1961) (James Rowe Papers, on file with the Franklin D. Roosevelt Presidential Library, James Browning File, Box 86).

32. Memorandum from Robert F. Kennedy, Attorney Gen., to President John F. Kennedy (Aug. 25, 1961) (on file with the John F. Kennedy Presidential Library, FG 505A, WHCF).

33. *Id.*

34. *Id.*

35. Federal Judicial Center, Judges of the United States Courts: Smith, Russell Evans, <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

My examination of the Kennedy presidential papers revealed that three of Kennedy's twenty appeals court appointments to courts of general jurisdiction were likely influenced, in large part, by overall policy orientation, whereas the remaining seventeen were governed by more traditional political concerns.³⁶

Another example is from the administration of Richard Nixon, an administration markedly more conservative than Kennedy's. When running for President in 1968, Richard Nixon attacked the Warren Court's judicial activism, promised to name "strict constitutionalists," and suggested that he would use the power of judicial selection to transform the courts from liberal activism to conservative judicial restraint.³⁷ Early in 1969, a young White House staffer, Tom Charles Huston, wrote a seven-page memorandum to the president concerning judicial selection.³⁸ Huston began by noting:

Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench—not merely to 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.

....

In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made. That is, the role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to set at least the outer limits of judicial action.

....

There are several angles from which a President can approach the question of what type of man he wishes to appoint to the federal bench. First, he may determine, as apparently President Eisenhower

36. See GOLDMAN, *supra* note 1, at 172.

37. See BRUCE ALLEN MURPHY, FORTAS 466–67 (1988).

38. Memorandum from Tom Charles Huston to President Richard Nixon (Mar. 25, 1969) (on file with the Nixon Materials Project, National Archives, The Judicial Branch 1969–1970, Ex FG 50, WHCF).

did, that the “judicially fit” as determined by the ABA should be appointed wherever possible, consistent with practical political considerations. Or he may choose to regard judicial appointments—as did FDR—as essentially a patronage problem to be worked out with the interested political parties (with ABA approval sought after the decision has largely been finalized). Another alternative is the one which has largely been ignored since William Howard Taft: the President can take an active personal interest in appointments to all judicial vacancies. A final possibility, for which I cannot muster an historical precedent, is for the President to establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.

The President . . . may insist that some evidence exists as to the attitude of a prospective judge toward the role of the court. He may insist upon a man who has a passion for judicial restraint, a respect for the healthy diversity which arises in a free society, an awareness that the courts are a conservative and stabilizing force in society, an understanding that abstract constitutional doctrines cannot be substituted for broadly accepted community values. The criteria he can establish are as varied as the views of the court held in different political, social, and legal circles today. But if he establishes *his* criteria and establishes *his* machinery for insuring that the criteria are met, the appointments he makes will be *his*, in fact, as in theory.³⁹

President Nixon not only read the memo carefully, but also directed it to Deputy Attorney General Kleindienst with a handwritten notation: “RN *agrees*—Have this analysis in mind in making judicial nominations.”⁴⁰

No formal White House screening procedure was ever put in place—that would happen with the presidency of Ronald Reagan—but it is likely that overall policy orientation was generally a given in the selection process. For example, no liberal Democrat was named by Nixon. Indeed, conservative Republican senators were primarily making recommendations of conservative Republican lawyers. My review of the Nixon presidential

39. *Id.*

40. Memorandum from John D. Ehrlichman, Assistant to the President for Domestic Affairs, to the Staff Sec’y (Mar. 27, 1969) (on file with the Nixon Materials Project, National Archives, News Summaries, President’s Office Files, Mar. 1969, Box 30).

papers suggests, however, that there is evidence of stated policy concerns for only one of his forty-five courts of appeals appointees.⁴¹ The papers reveal more traditional political concerns in the appointment process. Thus, I conclude that the overall policy concerns that overhang the process were appropriate given the absence of a systematic, policy-oriented screening process that could have led to the nomination of individuals with extreme views, which would call into question their ability to be fair and impartial.

III. WHEN IT IS NOT APPROPRIATE TO CONSIDER POLICY VIEWS

A. It Is Not Appropriate to Consider Policy Views in Such a Manner that Will Call into Question the Ability of Candidates to Administer Impartial Justice with Reference to Individual Civil Rights and Liberties

Assuming a high level of professional competence and achievement, a candidate for federal judicial office should also display judicial temperament, that is, an ability to be fair and impartial in the administration of justice, neither consistently favoring nor opposing the position of government prosecutors in criminal cases and other government attorneys in civil cases. Admittedly, judicial temperament is a vague concept to operationalize, particularly with individual candidates for judicial office, but I argue that the judicial selection machinery should not be geared up to screen out otherwise qualified, fair-minded individuals who are members of the President's party but who have not actively committed themselves to an administration's policy preferences when it comes to individual civil rights and liberties. The machinery implemented by President Ronald Reagan and his successor President George H. W. Bush created the potential for using policy concerns inappropriately.⁴² Nothing inherent in the machinery was necessarily inappropriate, but as many of the examples recounted here illustrate, the cumulative effect was an administration that undermined the federal judiciary as the repository of fair and neutral adjudication of the law to the possible detriment of individual civil liberties and rights.

At the outset, it must be recognized that President Ronald Reagan's domestic policy concerns, aside from economic and government regulatory

41. See GOLDMAN, *supra* note 1, at 207.

42. See generally GOLDMAN, *supra* note 1, at 285–345 (detailing the Reagan Administration's judicial nomination process). Note that Presidents Bill Clinton and George W. Bush also utilized the judicial selection machinery that originated with the Reagan Administration.

issues, were shaped by opposition to civil libertarian decisions of the Supreme Court.⁴³ Those decisions included the establishment of the right of a woman to abort a nonviable fetus, the use of remedies such as busing to bring about desegregation of the public schools, the exclusionary rule (barring the use, in court, of evidence seized in violation of the Fourth Amendment), generous readings of the Bill of Rights to provide for the rights of the accused, prohibitions on devotional prayer rituals in the public schools, and affirmative action in employment and education.⁴⁴ In terms of judicial philosophy, the Reagan administration was looking for those who believed in judicial restraint.⁴⁵ Such judges would likely share Reagan's conservative political beliefs, and therefore, be opposed to these and similar policy positions in court decisions.⁴⁶ A political conservative, Reagan no doubt believed, would read the Constitution narrowly. And to accomplish the goal of naming to the bench those sharing such policy positions, his administration created the very sort of apparatus that Tom Charles Huston had advocated during the beginning of the Nixon Administration.⁴⁷

The Reagan Administration established the Office of Legal Policy, headed by an assistant attorney general for legal policy whose responsibility was judicial selection.⁴⁸ That office became the locus for the screening of candidates for federal judgeships.⁴⁹ That screening process included systematic analyses of the candidate's public record, including judicial decisions if the candidate had judicial experience.⁵⁰ Top Justice Department officials met as a group to make recommendations to the Federal Judicial Selection Committee, another Reagan Administration innovation and joint White House-Justice Department committee chaired by the White House Counsel.⁵¹ This committee systematically considered political, patronage, and policy concerns for each potential nominee to an

43. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 16–18 (1991).

44. See HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 6 (1988).

45. *Id.*

46. *Id.* at 5.

47. See GOLDMAN, *supra* note 1, at 205–07 (citing Memorandum from Tom Charles Huston to President Richard Nixon (Mar. 25, 1969)).

48. *Id.* at 291.

49. *Id.* at 292.

50. See *id.* at 299 (providing examples of the considerations and processes of the Justice Department in screening potential nominees).

51. *Id.* at 292.

extent never before seen with judicial selection.⁵² The committee presented a consensus recommendation to the President that resulted in a judicial nomination.⁵³

This systematic screening was not an inherently inappropriate method of considering policy concerns. The danger is that, on occasion, it could be and was used to select the more extreme and less moderate conservatives about whom serious questions could be raised as to their judicial temperament.

The internal screening process of the Reagan Administration is amply revealed in the presidential papers. For example, Assistant Attorney General for Legal Policy Jonathan Rose wrote in his memo, which recommended Yale Law School Professor and noted conservative legal scholar Ralph Winter to the Second Circuit, that the selection method was “[r]eview of available philosophically compatible law school faculty members.”⁵⁴ Those already on the bench being considered for elevation had their records reviewed. For example, in another internal memo recommending U.S. District Court Judge Jesse E. Eschbach, Rose noted: “Judge Eschbach’s opinions were reviewed and found to reflect the positions of this Administration. He is well qualified. He is also a Republican.”⁵⁵

Another example concerned a prospective woman appointee to one of two vacant district judgeships in Ohio.⁵⁶ Republicans in Ohio recommended Lizabeth A. Moody, an accomplished attorney who was the first woman to become a partner in a Cleveland law firm.⁵⁷ The party’s right wing pushed for the arguably less qualified but more conservative Alice M. Batchelder, the wife of Reagan’s Ohio campaign chairman in

52. *Id.*

53. *Id.*

54. Memorandum from Jonathan C. Rose, Assistant Attorney Gen., to William French Smith, Attorney Gen. and Edward C. Schmults, Deputy Attorney Gen. (May 26, 1981) (Fred Fielding Files, on file with the Ronald Reagan Presidential Library, CFA, Box 425).

55. Memorandum from Jonathan C. Rose, Assistant Attorney Gen., to William French Smith, Attorney Gen. and Edward C. Schmults, Deputy Attorney Gen. (July 7, 1981) (on file with the Ronald Reagan Presidential Library, President’s Federal Judicial Selection Comm. Meeting, CFA, Box 426).

56. Phil Gailey & Warren Weaver, Jr., *Briefing: A Judicial Decision*, N.Y. TIMES, Aug. 3, 1982, at A14.

57. *Id.*

1980, who ultimately received the appointment.⁵⁸

President Reagan, during the congressional campaign of the fall of 1986, made a speech linking his policy concerns and the appointment of judges. He said:

The proliferation of drugs has been part of a crime epidemic that can be traced to, among other things, liberal judges who are unwilling to get tough with the criminal element in this society. We don't need a bunch of sociology majors on the bench. What we need are strong judges who will aggressively use their authority to protect our families, communities, and our way of life; judges who understand that punishing wrongdoers is our way of protecting the innocent; and judges who do not hesitate to put criminals where they belong—behind bars. . . . [W]e've been appointing [strong judges and] . . . [i]t's already beginning to have an effect.⁵⁹

An example of inappropriate use of policy screening concerned the unsuccessful attempt of New York Republican Senator Alfonse D'Amato to have William E. Hellerstein, a public defender, appointed to a federal district court judgeship in New York City.⁶⁰ Hellerstein, a Democrat, headed the Criminal Appeals Bureau of the New York Legal Aid Society, served as a staff attorney for the United States Commission on Civil Rights, and had been vice president of the Association of the Bar of the City of New York.⁶¹ But, the Justice Department soon discovered that in 1979 Hellerstein had written an article on court congestion that suggested the criminal justice system would be better off not imprisoning those convicted of relatively minor offenses such as prostitution, gambling, and possession of small amounts of narcotics.⁶² Hellerstein was not nominated because, as White House Counsel Fred Fielding revealed in an interview, a candidate “active for defendant's rights” would be eliminated from consideration.⁶³

58. *Id.*

59. 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1348 (1986).

60. Letter from Alfonse D'Amato, N.Y. Senator, to President Ronald Reagan (Feb. 27, 1984) (on file with the Ronald Reagan Presidential Library, WHORM, FG 53, # 203939).

61. GOLDMAN, *supra* note 1, at 302.

62. SCHWARTZ, *supra* note 44, at 81–82.

63. *Id.* at 83 (quoting Interview by Nina Totenberg, National Public Radio, with Fred F. Fielding, White House Counsel for President Reagan (Aug. 28, 1985)).

The Justice Department, as part of its screening procedure, interviewed judicial candidates. An Eleventh Circuit candidate, described his interview: “I was asked questions about my personal background, my legal background, and my interest in the position. I was also asked general questions relative to judicial philosophy, how I as a judge would approach cases of various types, etc.”⁶⁴ Stephen J. Markman, who served as assistant attorney general for legal policy, described the interview process in the context of candidate screening:

Each interview generally ran between 30 minutes and one hour, and candidates generally averaged between four and five hours of interviews during their visit to the Department. . . . These interviews supplemented our analysis of the candidate’s written record and our communications with individuals in the state or district who could speak to the candidate’s reputation and abilities.

. . . Department interviewers sought to learn more about a candidate’s background and professional experience and to determine whether he or she appreciated that the source of law for a self-governing citizenry is the consent of the people themselves as expressed in the Constitution and legislatively-enacted statutes and not the judiciary; in other words, whether a candidate reasoned from constitutional premises. Candidates who evinced an intention to impose their policy preferences from the bench, whether liberal or conservative, were not selected.⁶⁵

Markman noted that many issues were discussed in the interviews, including “federalism, the separation of powers, statutory interpretation, constitutional interpretation, criminal justice, and a candidate’s reasons for wanting to go on the federal bench.”⁶⁶ Markman also claimed that candidates were not asked “their perspectives on contemporary issues of controversy such as abortion or school prayer.”⁶⁷ However, a National Public Radio report found that several female candidates for judgeships “were asked directly about their views on abortion. One female State

64. Questionnaire completed by Emmett R. Cox for the Senate Judiciary Comm. (on file with the National Archives, Senate Judiciary Comm. file on Emmett R. Cox); see also *Federal Court Nominees on Executive Calendar: Hearing Before S. Comm. on the Judiciary*, 100th Cong. 5195 (1988) (indicating that Mr. Cox answered questions concerning judicial temperament and the proper role of precedent).

65. Stephen J. Markman, *Judicial Selection: The Reagan Years*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 33, 38–39 (1990).

66. *Id.* at 40.

67. *Id.*

court judge said she was asked repeatedly, how she would rule on an abortion case if it came before her.”⁶⁸

There are numerous other examples in the Reagan presidential papers of policy orientation screening. In one instance, the Justice Department was considering candidates for an Eighth Circuit position that would go to a South Dakotan and decided to recommend Roger L. Wollman, an Associate Justice of the Supreme Court of South Dakota. The summary from the White House Counsel’s office noted:

The Justice Department reviewed a number of Justice Wollman’s opinions on the South Dakota Supreme Court. Based on those, Justice concludes that he is not an activist, as his opinions reflect a generally conservative outlook and a healthy respect for the limited role of the judiciary. Justice notes that Wollman’s opinions are straightforward and workman-like, evidencing thought about the issues, familiarity with the law, and review of pertinent outside materials such as law reviews and other commentaries. Justice reports that Justice Wollman has been careful in his application of the exclusionary rule. In the few opinions he authored where the rule was relevant, he simply applied the law to the facts and did not make sweeping policy statements for future cases.⁶⁹

Another example concerns the Justice Department recommendation to the Judicial Selection Committee of University of Texas Law Professor Lino A. Graglia to fill a vacancy on the Fifth Circuit. The summary notes:

Justice reports that Professor Graglia has long been a leading spokesman for the contraction of the role of the federal judiciary has come to play in the regulation of all areas of American life. He is particularly identified as a critic of racial classification in public school assignments.

... His strengths—intellectual honesty, a strong conservative philosophy, and the ability to think and speak clearly—also give rise to his principal weakness, a tendency to say exactly what he thinks regardless of the political consequences. Hence, Justice reports that Graglia is likely to be opposed vigorously by proponents of racial

68. *Hearings on Appointments to the Federal Judiciary and the Department of Justice Before S. Comm. on the Judiciary*, 99th Cong. 430 (1985) (statement of Sen. Metzenbaum).

69. Judicial Selection Materials on Roger L. Wollman (Feb. 1985) (Fred Fielding Files, on file with the Ronald Reagan Presidential Library, CF 514).

2008] *Selecting Lower Court Federal Judges Based on Policy Views* 747

quotas and busing. Nevertheless, Justice notes that the very qualities which create Graglia's political liabilities will make him an important addition to the Federal judiciary.⁷⁰

But Graglia was not nominated after the ABA told the Reagan Administration that he would receive a "not qualified" rating.⁷¹ It turned out that in 1979 Graglia had counseled what, in effect, would have been civil disobedience to a federal court order requiring busing as part of a school desegregation plan.⁷²

A Tenth Circuit candidate, University of Kansas Professor of Law and Vice Chancellor for Academic Affairs, Deanelle Reece Tacha, was described in the summary of the Justice Department's recommendation that she be selected as follows:

Her views, as expressed in her interviews, are quite conservative on constitutional matters and in accord with those of the Administration.

....

Mrs. Tacha . . . is also a critic of *Cooper v. Aaron*, the 1958 opinion in which the Supreme Court unilaterally declared itself to be the final and exclusive arbiter of the Constitution. According to Justice, this is a most unusual and conservative position for a judicial candidate to take. In the case of Mrs. Tacha, it appears to be based on her understanding of constitutional history.

Although Mrs. Tacha is relatively young and has had only two years of litigation experience with a private firm, Justice states she appears qualified for the job and is philosophically preferable to the other candidates.⁷³

Available evidence in the Reagan presidential papers suggests that at least seventy-five percent of appeals court judges were driven by policy

70. Judicial Selection Materials on Lino A. Graglia (May 1985) (Fred Fielding Files, on file with the Ronald Reagan Presidential Library, CF 514).

71. GOLDMAN, *supra* note 1, at 326.

72. *Id.*

73. Judicial Selection Materials on Deanell Reece Tacha (Aug. 1985) (Fred Fielding Files, on file with the Ronald Reagan Presidential Library, CF 515). Note that Professor Tacha received the appointment. Federal Judicial Center, Judges of the United States Courts: Tacha, Deanell Reece, <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

concerns.⁷⁴ The balance was likely a result of the more usual political considerations.

Reagan's successor in office, George H. W. Bush, was also committed to appointing conservatives, and his administration continued the major judicial selection innovations of the Reagan Administration; although, the Office of Legal Policy was renamed the Office of Policy Development and judicial selection moved to the Attorney General's office. Screening was done in both the Justice Department and White House Counsel's office. The emphasis on policy positions of judicial candidates continued as the following example suggests, an example I contend reflects an inappropriate policy screening.

The example concerns Jose Cabranes, who was then a Federal District Court judge. In the presidential papers is an analysis of his record in terms of the possibility of elevating him to the U.S. Court of Appeals for the Second Circuit. The memo noted:

Judge Cabranes' judicial writings are scholarly, reflecting a lucid style and careful attention to detail. He is seldom reversed, in part because he is careful to rest most of his decisions on multiple legal grounds. . . .

In general, however, Judge Cabranes' academic writings and judicial opinions mark him as a judicial activist with deeply held views regarding the power of the courts to bring about social change. Judge Cabranes provided a detailed exposition of his legal philosophy in a 1982 speech that he delivered as part of a symposium on the Connecticut Constitution. The symposium dealt with the suggestion, often made by judicial liberals, that in response to increasing conservatism by federal courts, state courts should take the lead in protecting what they regard as individual rights and freedoms. Judge Cabranes rejected this premise, re-emphasizing the primacy of federal courts as guardians of individual liberties. . . .

. . . .

Some of Judge Cabranes' criminal law decisions reflect a greater solicitude for the rights of criminal defendants than is found among conservative jurists[, and in a number of cases,] Judge Cabranes has given limited weight to law enforcement interests. . . .

74. See GOLDMAN, *supra* note 1, at 307.

2008] *Selecting Lower Court Federal Judges Based on Policy Views* 749

In construing the Constitution, Judge Cabranes is willing to look beyond the text and the intent of its Framers.⁷⁵

Judge Cabranes was eliminated for consideration by the Bush Administration but was ultimately elevated to the Second Circuit in 1994 by Bush's successor in office, President Bill Clinton.⁷⁶

Another example from the first Bush Administration concerned the evaluation of an Idaho state judge, Duff McKee, who was one of four men recommended by Idaho Republican Senator McClure to fill a vacancy on the Ninth Circuit. The memo noted that the Justice Department had asked Judge McKee to submit "his ten favorite opinions."⁷⁷ But the memo noted that "[t]hree of these are quite problematic."⁷⁸ One opinion concerned the counting of time spent on parole that was decided in favor of a convicted criminal.⁷⁹ Another involved Judge McKee's "refus[al] to apply the 'good faith' exception to the exclusionary rule."⁸⁰ The third was a finding that allowed a plaintiff to sue in a civil suit, contrary to a statute denying liability.⁸¹ The memo concluded: "These three opinions would likely be sufficient cause for rejecting Judge McKee even if they were part of a random sample of his work. That he selected them from his corpus as three of his favorites seems dispositive."⁸² McKee was eliminated from consideration.

The evaluation of the candidacy of Federal District Judge Susan H. Black for a vacancy on the Eleventh Circuit, on the other hand, had a more positive outcome. Judge Black, a Carter appointee to the district bench, was the subject of a detailed examination of her opinions. The examination revealed:

Judge Black's extensive record of opinions generally demonstrates a commitment to strict interpretation of both substantive law and rules

75. Judicial Selection Materials on Jose A. Cabranes (Lee Liberman Files, on file with the George H.W. Bush Library, CF OA/ID 02081, Box 40964).

76. Federal Judicial Center, Judges of the United States Courts: Cabranes, Jose Alberto, <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

77. Judicial Selection Materials on Duff McKee (Lee Liberman Files, on file with the George H.W. Bush Library, Ninth Circuit Court of Appeals, OF 56, OA/ID 20356, Box 40950).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

of procedure. . . .

In the criminal law area—where she has handled large numbers of death row habeas petitions—Judge Black’s decisions are strict and unsentimental. . . .

Judge Black’s decisions on the civil side also demonstrate restrained interpretation of constitutional claims, strict application of procedural bars to recovery, and conscientious application of pertinent precedent. . . .

Judge Black’s opinions do not reveal any discernible tendency towards overly expansive construction of asserted rights or judicial legislating.⁸³

The assessment of Judge Black’s record seems to have been more balanced and hence, more appropriate than the previous example from the first Bush Administration.

IV. CONCLUSION

This Article began by questioning when it is and is not appropriate to use the policy views of judicial candidates in the selection of federal judges. My conclusion is that when judges are thwarting economic and social welfare policies of the President and Congress, as happened in the 1930s, it is appropriate to be concerned with the policy views of candidates for judicial office to the extent that they govern who is and who is not appointed. Even on the matter of overall policy orientation of a judicial candidate—whether liberal, moderate, or conservative—I believe it is appropriate for those involved in the selection process to also be concerned. But, when there is a systematic effort to thwart the sometimes moderating effects of senatorial patronage politics by screening out judicial candidates who do not hold extreme views of individual civil liberties and civil rights, then there is a very real danger, in my view, that the administration of justice will be less than fair and impartial, and that judges of questionable judicial temperament may come to populate the courts, ultimately resulting in a loss of public confidence in our system of justice. That is not to say that the systematic evaluation processes put in place by

83. Judicial Selection Materials on Susan H. Black (Lee Liberman Files, on file with the George H.W. Bush Library, OA/ID 02081, Box 40963). Note that Judge Black was elevated in 1992. Federal Judicial Center, Judges of the United States Courts: Black, Susan H., <http://www.fjc.gov/history/home.nsf> (last visited Apr. 21, 2008).

2008] *Selecting Lower Court Federal Judges Based on Policy Views* 751

the Reagan Administration are necessarily problematic; however, they must be used very carefully to avoid doing damage to the image and reality of fairness and impartiality by judges. I am not suggesting that all or most of the Reagan and Bush appointees were tainted by the process. But there is disturbing evidence, some examples of which have been recounted here, that the fine line between appropriate and inappropriate consideration of policy views may have been breached by both administrations.⁸⁴

This Article did not consider how the confirmation process affects the selection of judges, but one point is obvious: if a nomination is driven by policy concerns, then it is to be expected that the evaluation of that nominee by the Senate will also be governed by policy concerns.

84. When and if the presidential papers of Bill Clinton and George W. Bush are made available, it may then be possible to document the use of policy considerations by these administrations.