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Commentary on Selecting Federal Judges

BY J. WOODFORD HOWARD, JR.*

I am privileged to pay tribute to Sidney Ulmer, who is rightly honored for his leadership in building a strong department of political science and for his many scholarly contributions to judicial studies.

One character flaw of mine is the tendency to concentrate on the sticky points while taking for granted points that are good. The papers by Professor Fish and Professor Atkins have so few sticky points that I am pressed for something useful to say. So, after offering some constructive criticisms, I shall use the papers as a springboard to larger themes about conflict and consensus in judicial systems.

At the outset, I should note what the two papers have in common. Both share the central premise that different recruitment systems do make a difference, first, in the types of judges chosen and whatever that might mean for the theories of representation and, second, in their decisions—the policy outcomes. Both authors also attempt to relate background characteristics to judicial behavior. Here, however, they differ. Professor Fish's paper is a case study of a single, defeated nomination with an accent on conflict. It is an excellent case study, perceptively and beautifully written, using a traditional political model of selection. Our common teachers, Alpheus T. Mason and William M. Beane, stated this model succinctly: "The Supreme Court has always consisted largely of politicians, appointed by politicians, confirmed by politicians, all in furtherance of controversial political objectives. From John Marshall to Warren Burger, the Court has been the guardian of some particular interest and the promoter of preferred values."1 Professor Fish clearly follows a

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political model of selection in contrast to the professional model presented above.

The main pitfall of case studies is discreteness. How can findings be representative in a microscopic study with such a close focal length? Professor Fish rises above this problem by comparing the failed nomination of Judge John Parker with other nominations. He succeeds in what case studies should do, yet often don't, i.e., suggesting hypotheses and generalizations of wider application. In particular, I am impressed with the emphasis on the political dynamics in these situations, the incentives and disincentives facing the antagonists in deciding whether to fight in another round. Professor Fish reminds us that all sides of the fray calculate costs and benefits in terms of their political capital, policy agendas, and prospects in the next election. If an administration compromises on a candidate, for instance, it risks giving an appearance of appeasing the opposition. Resistance to nominees, in turn, gets harder and harder to mobilize against an administration's normal advantages. The papers noted above contained additional evidence that these dynamics are significant in most nomination struggles, not just this one. So, I suggest underscoring this political dynamics theme.

The "spite nomination" concept, on the other hand, has some problems. For one thing, President Richard Nixon did not invent it. Raymond Moley used the same notion to explain why the Roosevelt Court was so cantankerous and divided.2 The tribunal of Black, Douglas, Frankfurter, and Jackson was brilliant and scrappy. Sparks often flew. Individual expression was so free that Chief Justice Stone once rebuked the brethren: "It is not necessary to play every fly speck in the music."3 Ironically, President Roosevelt's oft-criticized packing of the Supreme Court was soon condemned for atomizing it. Moley attributed this to FDR's "purely political concept of the Court's function" and to personal pique over losing the great Court-packing fight of 1937. Ostensibly conforming to customary criteria, Roosevelt nominated southerner Hugo L. Black, westerner William O. Douglas, and Catholic Frank Murphy—all ardent New Dealers.

2 See J. Howard, Mr. Justice Murphy: A Political Biography 394 (1968).
Revenge may have entered into these choices, but the main object was surely ideological—integrating the federal judiciary into the dominant lawmaking coalition, which every administration since President Washington’s has attempted.

In addition, I doubt that spite was the primary motivation in the Carswell nomination. One can argue equally well that President Nixon was vigorously pursuing his political goals. Nixon had publicly announced his criteria. He wanted a southerner, a Republican, and a strict constructionist (code words for going slow on *de facto* desegregation); also a law and order judge (you know what that means), and an experienced trial judge. If one took Nixon’s criteria seriously, the Carswell nomination was predictable. In matching presidential purpose to recruit, as one circuit judge said the week of the nomination, he was a “perfect fit.”

Less obvious, certainly to me, was that some of his colleagues in the Fifth Circuit had politicked to get Carswell elevated from a federal district court in Florida to the court of appeals and from there to the Supreme Court. During interviews for my study of courts of appeals, a circuit judge described how colleagues had arranged for Carswell to meet leading southern Republicans during a weekend in Atlanta. His first nomination apparently was harder to achieve than the second. Dean Lewis’ point about inadequate information is well-taken here. A lot of us were fooled by the Carswell nomination. I confess that I wrote Carswell a letter of congratulations. Given the sensitivity of criminal justice issues and the doubtful caliber of other prospects, I thought it made sense to place an experienced, former U.S. Attorney and trial judge on the high court during a coming period of consolidation.

My perceptions were second-hand and influenced by Carswell’s judicial colleagues. Remember, the vast majority of federal judges in the Fifth Circuit, including Chief Judge Elbert P. Tuttle, initially endorsed the nomination. There weren’t many southern Republicans to choose from. Attorney General Mitchell had ruled out a distinguished one, John Minor Wisdom, as “a damn left-winger. He’d be as bad as Earl Warren.”4 Carswell

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enjoyed a rising regional reputation in the federal judiciary. Colleagues had elected him as district-judge representative to the Judicial Conference before his elevation to the court of appeals. He also had a year's worth of experience deciding appeals as a visiting judge by designation of the circuit leadership. The ABA Standing Committee for the Federal Judiciary had rated him as well qualified for the Fifth Circuit and endorsed him lukewarmly as qualified for the Supreme Court. It is hard to believe that these judges and lawyers knew about his early segregationist speeches, his racial covenants, or his bullying civil rights lawyers in his courtroom—the things that brought him down.

The point is that none of us did enough homework. It took the hearings themselves and snooping by the press to expose these shortcomings, whereupon Judge Tuttle retracted his endorsement. Of course, Carswell was a lightweight. But we know more now about his qualifications than we did then. I don't believe that Carswell's nomination failed because of professional mediocrity. It failed because of his past racism and because of a false impression, partly from bungled testimony, that he lied to the Senate Judiciary Committee about signing a racial covenant as a U.S. Attorney.\textsuperscript{5} I hold no brief for Carswell, but to interpret this case as rejection of mediocrity is a retrospective reconstruction of past perceptions through a filter of his subsequent conduct and Senator Roman L. Hruskra's ludicrous argument that mediocrity, too, deserves a place on the nation's highest court. In my view, Carswell's was not a spite nomination. It was an ill-prepared, uncompromising pursuit of President Nixon's southern strategy to recapture the region for the GOP.

This episode highlights one common thread in our discussion thus far: Participants in the selection process don't always know enough about candidates. Just as labor unions misjudged John Parker and even William O. Douglas in the 1930s, so a lot of people, including presidential aides, fumbled Carswell's and other nominations since for want of sufficient homework. The process of discovery may be messy and at times excessive (Need we know

Judge Bork’s taste in video?). And individual reputations can be needlessly harmed. Cloture, nonetheless, is hardly the remedy. These failures teach the need for more, not less information. What the “going-over” candidates may receive in public, on balance, is a net gain for quality on the bench and the public interest.

In any event, because the dynamics of struggle are the meat of Professor Fish’s paper, one other suggestion is to relate his case study to what came out well above. These conflicts usually peak at changing political tides, when presidents are challenged and the judiciary itself is a target of contest. That was true in the 19th century no less than in the nominations of Parker, Carswell, or Bork. Only time will tell whether columnist James Kilpatrick is right, as William Howard Taft was in 1920, that the next president’s opportunity to reshape the Supreme Court, “is what matters most as the campaign moves inexorably toward that high noon to come.”

Professor Atkin’s paper is a rarity, a comparison, as distinct from a description, of selection to intermediate appellate courts in different nations. The accent is on consensus rather than conflict. It is a fine study in “prosopography,” historical jargon for collective biography, in which the analyst searches for common indicators of underlying values. The usual pitfalls of this type of aggregate study are static and surface findings. Judges, we are commonly told, are unrepresentative elites rather than cross-sections of the community. That is hardly news in most countries and inevitable where, by law or custom, judges must be lawyers. This professional requirement alone excludes more than ninety-nine percent of our civilian labor force. Sidney Ulmer wrote a fine piece in 1986 on the tendency of social background studies to be time-bound. There are risks in studies using social and economic characteristics as surrogates for more dynamic processes of socialization by which lawyers and judges learn their roles. Professor Atkins rises above these problems first by expanding his model of recruitment to the English Court

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7 Ulmer, Are Social Background Models Time-Bound?, 80 AM. POL. SCI. REV. 957 (1986).
of Appeal over time, and second by comparing results with similar courts here. Both comparisons yield insights. I was stunned to learn how impervious these all-male, upper-class tribunals are to the social revolution that has swept England since World War II. Professor Atkins also confirms the conclusion of Martin Shapiro and others that the primary function of appellate courts is a system maintenance. The common goal is to enforce the supremacy and uniformity of national law.

Macro-studies like this, which have a longer focal length than case studies, tend to be ambitious and abstract. They lack the sex-appeal of a good nomination fight and may often raise more questions than they answer. Still, I would like to plea for the broader view of selecting judges that Professor Atkins’ paper represents. Our professions hold frequent conferences on judicial recruitment and training, but their focus tends to be limited. Recruitment usually boils down to war stories on how lawyers get judgeships and evaluating various methods of picking them in the final stage of selection. Neglected are the much longer processes by which a large pool of eligibles is progressively winnowed into a select few. Studying these processes should reveal more about the judiciary than the intramural struggles over who wins in the final round.

This is especially so if recruitment is linked to socialization. Socialization in this context concerns educating lawyers for judicial work. Judges who assemble to consider this topic usually discuss two forms of on-the-job training, either the adjustment problems of newcomers (“freshman socialization”) or their continuing education by doing (“occupational socialization”). Political scientists characteristically talk about judicial conflicts. Thus, we focus on tips and cracks of the iceberg rather than how the iceberg was formed. What needs more attention is “anticipatory socialization”—the long-term educational experiences by which “judges and co.” acquire values and learn their roles en route to office. I believe that a model of selection expanded accordingly will improve understanding of the training and values of judges, conflicts and consensus of courts, and the way the few who judge relate to the many who are judged in society.

Three interlocking processes—recruitment, socialization, and professionalization—occur simultaneously in pathways to the
bench. The American theory of training jurists is essentially anticipatory. Judges are expected to learn their craft in the process of achieving office. The code of the bench and bar is that the better the advocate, the better the judge is likely to be. This is opposite the French tradition where prospects opt early for judicial careers and undergo formal training in a centralized bureaucracy. The English practice is professional co-option, though in the past, party service affected selections more than Professor Atkins suggests. Successful candidates for judgeships in the U.S. pass through several filters: professional, political, and personal. Multiple screening has significant consequences. For one thing, it underlies our endless debates over which method of selecting judges—appointment, election, or some combination—is best. We seek professional competence, political accountability, and personal qualities of fairness and integrity; but various selection methods accent different goals, and we don’t agree about which should take priority. For another, overlapping filters tend to weed out extremes. American judges tend to be professional and political “moderates.” Both sides commonly assumed this in the fight over Bork’s nomination. Being out of the “mainstream” was enough to exclude him. Personal moderation, indeed, may well be what people mean by “judicial temperament.”

Recruitment, moreover, is reciprocal. Lawyers must want to be judges. Not everyone does. John W. Davis, the most eminent constitutional lawyer of his day, declined a nomination to the Supreme Court, saying: “I have taken the vows of chastity and obedience but not of poverty.” Because personal ambition enters the equation, we can draw on a substantial literature of vocational choice in social psychology to understand better the reciprocal pull between personality and office.

Professor Atkins stresses the importance of recruitment and socialization for the cohesion of intermediate appellate courts in England. Consensus is their hallmark, not conflict. The same is true for United States courts of appeals. How do we explain

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their relatively low dissent and reversal rates? Heavy caseloads, routine error correction, and panel rotation all may be at work in this country. Career paths of circuit judges also suggest that an underlay of shared values and experiences may act as bonding agents. For example, a plausible explanation for the Fifth Circuit’s outstanding leadership on behalf of national values during the desegregation crisis is that the majority of the judges had already shaken segregationism and local allegiances in the process of becoming eligible for appointment. Several of them had been reared outside the region. Most had served in federal posts or practiced law as representatives of regional and national clients in urban centers of the new south. Their hides had thickened against parochial pressures, so to speak, on their way to the bench.

Collegial courts also develop traditions and norms to which newcomers are expected to conform. Paul R. Hays of the Court of Appeals for the Second Circuit offers a good example. Hays, a former Columbia law professor and labor arbitrator, had been chairman of New York’s Liberal Party before President Kennedy appointed him to the Second Circuit. His conduct on the bench was less liberal or activist than expected. When asked for his conception of the permissible range of judicial lawmaking or innovation, he replied that he shared the general attitude of his court to apply the law as it stands. If Hays was “resocialized” on the bench, he was not alone. This outlook has dominated the Second Circuit for a long time. I am still fascinated by the explanation that a distinguished southern jurist gave for the different judicial styles then prevailing between the Fifth and Second Circuits. In civil rights and criminal cases, he said, it is hard for judges not to let visceral reactions determine the result and then search the authorities for support. Commercial transactions on which the Second Circuit concentrated, by contrast, leave less room for “justice.” Certainty and planning are higher values when dealing with other people’s money.

Professionalization surfaces here, too, though probably less so than in England. Half of the circuit judges in my study had served earlier on a federal district court. Not one of them, including J. Skelly Wright, espoused an innovative view of a judge’s function. Politicians may complain with Fiorello La-
Guardia: "It is queer what the bench will do to a man." But Dean Lewis is right; the robe changes people. Political scientists, in my opinion, underrate the significance of professionalism in the American legal system. "The inscrutable force of professional opinion," as Judge Benjamin N. Cardozo put it, "presses upon [judges] like the atmosphere." I think that is true. Just as we criticized a purely professional model of selection presented above, so we should beware a purely political model presented here.

In truth, we need to integrate both. After a long wrestle to prove otherwise in three United States courts of appeals, I concluded that professional and political ideologies of judges are less polar opposites than overlapping value structures in keeping with our selection methods and their public functions. This melding of values and expectations undergirds judicial consensus and makes it possible for the Supreme Court to guide the premises of decision in fifty-one legal systems in this country with only one-percent review from the top. Our problem as scholars is how to weave political and professional values into our models in order to discern their influence.

In sum, I champion a broad view of judicial selection to advance our common understanding of the judiciary. Choosing judges involves more than picking winners in the last lap. It also involves long-term processes by which jurists are trained and integrated into courts as working institutions of government. A broad view of selection, one that couples recruitment, socialization, and professionalization, should open windows of understanding at many levels. For one thing, it helps resolve tough, micro-macro problems in social science of linking individuals to groups of decision-makers and then to judicial systems and whole countries. Professor Fish shows that case studies of individuals need not be discrete. Linking socialization with recruitment also points out that judicial selection itself is not discrete. It is a subset of a much larger subject in the study of leader-


ship—the fit of personality and office—which cuts across several disciplines and literatures.

Professor Atkins demonstrates that social-background analysis need not be static. His study also suggests why a broad view of selection is essential in understanding courts as institutions. One difficulty with the "legal realist" model of judicial decision, which so profoundly influences American academics, is the premise that judges are soloists. Appellate judges in reality work as members of groups. That condition perforce qualifies the effects of individual values and escalates our need to comprehend how collegial courts cohere. Studying the dynamics of career development in pathways to the bench helps to solve the riddle of judicial integration and independence. We see greater informal fetters on individual discretion and stronger sinews of cohesion, within and among courts, than statistics of formal review and reversal might suggest. We find reasons for the continuity of judicial institutions and styles over time, both in England and the United States. We discover clues why regional law may persist in tribunals whose official mission is nationalization. We lay a basis for comparing the interplay of formal rules and informal relations in different courts and countries over time.

A broad view of selection even connects to jurisprudence. In current disputes over subjectivity in interpretation of legal texts, Stanley Fish and other literary theorists tell us not to worry. Structure comes less from formal rules than from informal roles and shared values of the interpretative community.\textsuperscript{13} Professor Atkins' study of social backgrounds and recruitment suggests why this apparently occurs in the English Court of Appeal. If we meld political and professional values, as befits our overlapping recruitment screens, a similar substructure likely sustains the federal judicial system. Shared values, internalized by judges en route to office and reinforced on the job, are the primary glue that keeps our highly decentralized judiciary from flying apart. Overlapping political and professional ideologies narrow the range of judicial conflict and the aperture of essential Supreme Court review. A hierarchy of doctrine is maintained by coordinating the "premises of decision" among trained workers

\textsuperscript{13} S. Fish, Is There a Text in This Class? (1980).
who exercise discretion in this interprétative community. A prime function of review is to keep this vast system of informal roles and expectations working. Precedents thus become bonds as well as chains.

Herbert A. Simon, our leading organizational theorist, observes that the problem of organization is inextricably interwoven with the problem of recruitment. People are more important than machinery. Alas, it took me years of study to learn this lesson. Sidney Ulmer understood the connection from the start. That is just one reason why we gather here: he leads the pack most of the time.

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