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Federal Judges: The Appointing Process*

The author examines the various factors which interact in the process of appointing federal judges. After exploring the background of law and custom underlying the process, he presents examples of the various pressures at work and examines the interplay of forces. He notes the varying effects and shifting balance of power depending upon the court to which appointment is being made.

Harold W. Chase†

INTRODUCTION

Baseball games are played under a well-defined set of rules and customs by players manning prescribed positions, yet it is probable that no two games have been identical. These generalizations about the national pastime provide a good analogy for the process of appointing federal judges. These appointments are made pursuant to law and custom largely by a line-up of individuals occupying prescribed positions. While there are established patterns, the participants interact differently in each appointment within the framework of law and custom.

In one respect, the analogy breaks down. A baseball team fields nine men and has a roster of eligible players limited by statutory baseball law. In the appointing process, there are certain players who must participate in the game: the President; United States Senators; the Department of Justice; the candidates for the judgeship; the Standing Committee on Federal Judiciary of the American Bar Association; and political party leaders. But there is no statutory prescription limiting the game to only these participants. Frequently, others may voluntarily or involuntarily be drawn into the process.

As in baseball, how well the game is played, or how good the appointments are, is determined in large part by the ability,

* The following is an interim report on an extensive study of the appointment of federal judges being done under the auspices of The Brookings Institution. In the interest of brevity, some of the supporting data for statements made have not been included here but will, of course, be included in the final work. Many of the insights into the appointive process have been derived from personal interviews with officials who preferred not to be quoted. Their confidence is respected, and their assistance is greatly appreciated.

† Professor of Political Science, University of Minnesota.

drive and ingenuity of the players. Hopefully the appointing team can outperform the greatest of the New York Yankee teams. As a former Department of Justice official observed about the baseball analogy, "[A] baseball team can usually win a pennant by winning 70 per cent of its games; we like to do better than that."

A. LAW AND CUSTOM

Surprisingly, in view of the substantial opinion to the contrary, the Constitution is ambiguous as to how federal judges, save Supreme Court justices, must be appointed. Article II, section 2, provides that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law

The provision continues, "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Thus the question is whether federal judges are "other officers" or "inferior officers." If the answer is inferior, then Congress has the power to alter the mode of appointment within the prescribed limits without a constitutional amendment. Congress could, for example, grant the Supreme Court power to appoint judges to lower federal courts.

For much of our history, it was assumed that federal judges were other officers.¹ Early statutes dealing with federal judges stated only that they be appointed without specifying the appropriate procedure.² The practice historically has been for the President to appoint with the advice and consent of the Senate.

Congress in 1891 provided specifically that "there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional

1. See STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1593 n.2 (1833).

2. Whether the Judges of the inferior courts of the United States are such inferior officers, as the constitution contemplates to be within the power of congress, to prescribe the mode of appointment of, so as to vest it in the president alone, or in the courts of law, or in the heads of departments, is a point, upon which no solemn judgment has ever been had. The practical construction has uniformly been, that they are not such inferior officers. And no act of congress prescribes the mode of their appointment.

Id. at § 1593 n.1.

circuit judge”³ The recodification of the law in 1948 provided explicitly for the first time that all federal judges be appointed with the advice and consent of the Senate.⁴ Congress has not chosen to deviate from this position.⁵ Unfortunately, the legislative history of these provisions provides no clue as to why Congress adopted them. It seems a fair conclusion, however, that Congress simply considered these provisions to be consistent with the constitutional mandate.

In 1930, Professor Burke Shartel argued persuasively that federal judges below the Supreme Court level were inferior officers in the constitutional sense.⁶ He suggested that although inferior is usually defined as petty or unimportant, it can also be understood in a relational sense, that is, inferior to others.⁷ At least one federal court has reached the same conclusion.⁸ Thus, in this sense, even very important officers could be inferior. As Shartel also pointed out, the words of the Constitution support the relational connotation of inferior, particularly with respect to federal judges, for the courts upon which they sit are styled in the Constitution as inferior courts.⁹

In practice, the Senate is deeply involved in the appointment of federal judges, whatever the Framers intended. We can only speculate on the courts’ reaction if Congress were to attempt to exclude the Senate by lodging the appointing power in the President alone, the courts, or the Attorney General (as head of a department), and the legislation were challenged.¹⁰

3. 26 Stat. 826 (1891).

4. 28 U.S.C. § 133 (1964).

5. 28 U.S.C. §§ 44, 133 (1964).

6. Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution* (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930).

7. *Id.* at 500-01. Shartel found support for his position in *United States v. Germaine*, 99 U.S. 508 (1878). For a pithy comment suggesting the difficulty of relying on that decision for this purpose see CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1948* 365-66 (4th ed. 1957).

8. See *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878) (case did not involve judges).

9. See U.S. CONST. art. I, § 8, cl. 9; art. III, § 1; Shartel, *supra* note 6, at 501.

10. For one such speculation see HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 15 (1953). The author suggests that: “The decision concerning which officers should be appointed by the President and confirmed by the Senate is essentially political in character and has appropriately been left to legislative rather than judicial determination.” But the fact remains that the courts have never dealt squarely with the issue and, consequently, have never clearly indicated that they would leave it to Congress to decide whether federal judges were “inferior” or “other” officers.

1. Senatorial Courtesy

It is unclear why the Founding Fathers granted the Senate the power to advise and consent to appointments and how they expected the Senate to perform these functions. Recall that formidable protagonists for two conflicting proposals battled to prevail at the Convention. There were those, including Hamilton and Madison, who wanted the President alone to have the power to appoint. Others, including Sherman and Franklin, wanted the Senate alone to have the power.¹¹ According to Hamilton, the resulting compromise was that the Senate would merely pass on presidential nominations as a body.¹² In practice, however, Senators have been unwilling to accept such a limited role.

Senators, whether chosen by state legislatures or by the voters of the state, must continuously nurture their political support back home if they desire re-election. Senators, since the first Congress, have recognized that Senators from the state where the appointment is to be made have a much greater stake in a particular appointment than the other Senators. It is, of course, exceedingly useful to a Senator to be able to reward supporters with good posts in the federal government. Conversely, it is enormously damaging to a Senator's prestige if a President of the same party ignores him when making an appointment involving the Senator's home state. It is even more damaging to a Senator's prestige and political power for the President to appoint to high federal office someone who is known as a political opponent of the Senator. Senators soon realized that if they united to protect their individual interests in appointments, they could assure that the President could make only such appointments as would be palatable to them as individuals. Out of such considerations grew the custom of senatorial courtesy.

For much of our history, senatorial courtesy could be defined accurately as a custom by which Senators would support a colleague who objected to an appointment to a federal office in his state, provided the Senator and the President were of the same party. It was only necessary for the Senator to state that the nominee was personally obnoxious to him.¹³ This defini-

11. See HARRIS, *op. cit. supra* note 10, at 17-35; Morganston, *The Appointing and Removal Power of the President*, S. REP. NO. 172, 70th Cong., 2d Sess. 1-13 (1929).

12. THE FEDERALIST NO. 76 (Hamilton).

13. See HARRIS, *op. cit. supra* note 10, at 215-37; 2 HAYNES, THE SENATE OF THE UNITED STATES 736-48 (1960).

tion, however, is too narrowly drawn and too absolutely stated to explain the practice prevailing since the 1930's.

Senatorial courtesy has come to mean that Senators will give serious consideration and be favorably disposed to support an individual Senator of the President's party who opposes a nominee to an office in his state. But, as the Chief Clerk of the Senate Judiciary Committee put it, "he just can't incant a few magic words like 'personally obnoxious' and get away with it. He must be prepared to fight, giving his reasons for opposing the nominee." If his reasons are not persuasive or if he is not a respected member of the Senate, he may lose.¹⁴

True, there are precious few cases where a Senator of the President's party lost a pitched battle to reject a nomination to a federal office in his own state, but they do exist.¹⁵ Perhaps it was critical and not coincidental to confirmation in these instances that the other Senator from the state was also of the President's party and a sponsor of the successful nominee. Further, the possibility of losing a battle which might prove embarrassing to him makes a Senator careful to choose to fight only those battles which he feels pretty sure of winning.¹⁶ More frequently, the fact that senatorial courtesy will not automatically prevail, that there might be a messy fight and that he might lose, prompts a Senator to seek accommodation with the President. The President is similarly eager for accommodation because, from his vantage point, a Senator's opposition may seem too formidable.¹⁷

14. That it is not enough for a Senator to claim merely that a nominee is personally obnoxious to insure Senate rejection was made clear in an obviously carefully prepared statement delivered to the Senate in 1947 by the Chairman of the Judiciary Committee, Alexander Wiley, during the debate over the confirmation of the nomination of Joe B. Dooley to be United States district judge for the northern district of Texas. Senator O'Daniel of Texas had invoked the personally obnoxious doctrine. See 93 CONG. REC. 7991 (1947).

15. Mr. Dooley's appointment was confirmed, 93 CONG. REC. 8421 (1947). Also, F. Roy Yoke's appointment as Collector of Internal Revenue for West Virginia was confirmed in 1938, although Senator Holt of West Virginia protested that he was personally obnoxious. See 83 CONG. REC. 319-26 (1938).

16. Imagine, for example, the considerations which a Southern Senator would have to take into account before attempting to block the appointment to a federal district judgeship because the nominee was not a devout segregationist. Many Senators from other parts of the country could not afford politically to vote against confirmation, despite the realization that breaches in the custom lessen their own power.

17. Former Deputy Attorney General Walsh has said "it is virtually impossible to have a person confirmed for a federal judgeship if one of the Senators from his state is either openly or secretly opposed

To be fully appreciated, it must be understood that senatorial courtesy extends beyond the Senator of the President's party objecting to an appointment to office in his own state. Senators will sympathetically hear objections of a Senator who is not of the President's party.¹⁸ Also, they will give special consideration to the protest of a Senator, particularly one of the President's party, on an appointment to a national or circuit post where the nominee comes from the Senator's state.¹⁹

Because the Senate has the power to confirm, Senators are legally free to make whatever conventions they wish in exercising this power. They could, for example, legally provide for an automatic veto by any Senator to any presidential appointment. To a degree, then, current practice bears the marks of self-restraint. This is not to imply that the President would be powerless in the face of Senate opposition, for, as we shall see shortly, he has impressive weapons to employ in a contest with the Senate on an appointment.

As a result of senatorial courtesy, there developed a corollary custom by which Senators of the President's party suggested candidates to the President for federal offices in their home states. If these candidates passed the President's muster, he appointed them. The basis for this custom was laid in Washington's administration. One of his nominees to a federal post in Georgia was rejected by the Senate in courtesy to the Georgia Senators. Washington yielded with a mild protest and appointed the nominee of the Georgia Senators.²⁰ Had Washington, with his tremendous prestige, held his ground, he might well have established a precedent which would have stunted the growth of senatorial courtesy. When later Presidents sought to reassert for the presidency the leading role in making appointments to federal offices within specific state boundaries, they met with only limited success.²¹

Although some Presidents, and indeed, some Senators, have tried to verbally punch the Senate into giving up the custom of senatorial courtesy, the custom, albeit in modified form, retains vitality.²² Senate devotion to the custom can readily be understood in terms of self-interest. Over the years Senator propo-

to the nomination." Walsh, *The Federal Judiciary*, 43 J. AM. JUD. Soc'y 155, 156 (1960).

18. See HARRIS, *op. cit. supra* note 10, at 224.

19. *Id.* at 227.

20. *Id.* at 40-41.

21. *Id.* at 90-92, 93-98.

22. *Id.* at 91-92, 228-37.

nents of senatorial courtesy have rationalized it on much the same basis as Senator Douglas did in blocking two appointments by President Truman:

[G]reat as the knowledge of a President may be, he cannot, in the nature of things, in the vast majority of instances, know the qualifications of the lawyers and local judges within a given State as well as do the Senators from that State. However excellent his general knowledge, the President does not have the detailed knowledge of the qualifications, background, and record of judges in a particular State. . . .²³

In fact, neither a President nor a Senator is normally in a position to know from his own knowledge whether or not a particular individual is a good nominee for a judicial post. The question really is who has the better resources for gaining the necessary information. The resources available to a President clearly dwarf those available to a Senator. However, a President would not always make better appointments than a Senator if each were a free agent because of the difference in personal standards. For instance, in the Douglas-Truman controversy, it would appear that Douglas' candidates were superior to those of the President.²⁴

It has become common to overexaggerate the role and power of individual Senators in the matter of district court appointments.²⁵ When a President chooses to inject himself into the appointment of district judges, he can do so effectively, as Presidents T. Roosevelt, Wilson and Hoover did.²⁶ Even granting that Senators of the party in power once may have owned district judgeships, they have not under the last four Presidents. Appointments are not made by Senators alone; other parties are deeply involved. And, just as the legal power to confirm with its corollary custom of courtesy provides a Senator with formidable practical power to employ toward securing a particular nomination, other parties in interest have special powers which can be used as counters. It does not follow that because individual Senators may be in a position to veto the appointment of judges that they must do the appointing. In fact, close examination of the appointment process suggests otherwise.

2. *The President: Expectations and Powers*

Curiously, while knowledgeable people have considered it a fact that Senators appointed district court judges, other knowl-

23. 97 CONG. REC. 12838 (1957).

24. See HARRIS, *op. cit. supra* note 10, at 321-24.

25. See HARRIS, *op. cit. supra* note 10, at 380; HAYNES, *SELECTION AND TENURE OF JUDGES* 23 (1944).

26. See HARRIS, *op. cit. supra* note 10, at 91, 96, 317-18.

edgeable people have been quick to hold the President responsible for the quality and character of judicial appointments.²⁷ Even the American Bar Association's Standing Committee on Federal Judiciary, well-versed in the ways of judicial appointments, publicly observed in 1962:

Great and deserved credit will adhere to the administration if it finally breaks the bonds of partisanship and elevates the judiciary to the level where mere patronage does not play so major a role in appointments to the bench. The time is especially auspicious for the administration to forego substantially unbalancing the judiciary any further, and to announce publicly and unequivocally that a policy of bipartisanship has been adopted and will be further effectuated in the years ahead. [It also acknowledged the role played by Senators.]²⁸

This is not to suggest that the President and his agents alone are responsible for appointments to the federal bench but, rather, to demonstrate that the President would be hard put to escape all responsibility for appointments made in his name. Consequently, Presidents generally have been very concerned that the quality of appointments made during their incumbency be high. This has been especially true of the last three administrations. And, where a President wants to insure a high level of appointments, he has legal powers which afford him considerable coin with which to bargain with the Senators individually and collectively. First, the President must submit the nomination for formal consideration of the Senate. He is under no legal compulsion to make nominations within a prescribed time limit. He can, therefore, stall or refuse to fill a vacancy. In fact, doing so may be very effective in forcing some concessions from a Senator.²⁹ Refusal to nominate can be particularly effec-

27. Editorial writers wise in the ways of government have written: "The heavy responsibility that thus necessarily falls on the President to choose wise judges has been largely delegated during this Administration . . ." *N.Y. Times*, Jan. 2, 1961, p. 26, col. 2. "It seems to us extremely unfortunate that the Kennedy administration has not made more headway toward freeing the federal courts from the bondage to political patronage. . . ." *Christian Science Monitor*, Oct. 6, 1961, p. 20, col. 1. "The national goal must be to maintain the federal judiciary at the highest possible level of ability and integrity. . . . The final responsibility of course rests upon each national administration." *St. Paul Dispatch*, May 5, 1965, p. 36, col. 2. "President Johnson has deliberately rejected a splendid opportunity to make an outstanding appointment to one of the most important courts in the entire Federal system . . ." *N.Y. Times*, Oct. 13, 1965, p. 46, col. 2.

28. 87 A.B.A. REP. 601, 610 (1962).

29. Our courts are generally overburdened and behind in their work. Leaving a judgeship unfilled creates difficulties for sitting judges and lawyers who will usually pressure their recalcitrant Senator to seek some kind of rapprochement with the Administration. How annoying

tive when coupled with a suggestion leaked to the press that a distinguished lawyer or state judge is the President's choice. The Senator is then in the position of publicly opposing the President's distinguished candidate, which may have a much different impact in legal circles and on public opinion than in a situation in which the only apparent candidate is the Senator's. The pressure on a Senator may even be greater if both his and the President's candidates are known and if there is feeling among bar and press that the President's candidate is superior.

A second important presidential power is his constitutional mandate "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." There has been stout argument throughout our history as to what the word "happen" means in this context. Some have argued that the President could fill any vacancy which happened to exist during the recess; others have urged that he could only fill those which happened to occur during the recess.³⁰ In practice, Presidents tend to take the broader view of their powers and fill both kinds of vacancies. Recently, this practice received judicial sanction from the United States Court of Appeals for the Second Circuit.³¹

Congress as early as 1863 sought to discourage Presidents

delay can be to a Senator is manifested in this communication to the Deputy Attorney General:

You have had my recommendation of L— for a Judgeship since February 3. I am amazed to learn from your letter that you hadn't even begun the F.B.I. check until July 7. There is no legitimate basis for failing to move rapidly on L—.

I am as aware as you are of the difficulties of the Court Calendar in the District, but I think I am entitled to insist that your Department give fair and expeditious consideration to the names I have pending before you ask for any others.

30. See HARRIS, *op. cit. supra* note 10, at 255-57.

31. *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962). The court pointed out the practical difficulties in doing otherwise:

If petitioner is correct that the President's recess power is limited to vacancies which arise while the Senate is away, all . . . preparation [to screen candidates] must be telescoped into whatever time remains in a session if the vacancy arises while the Senate is in session. If a resignation or retirement is received late in the session . . . the President must either forego the opportunity of utilizing all available sources of information . . . or leave the office unfilled for months until the Senate reconvenes. Even if this problem could be alleviated by suggesting to judges that they notify the President considerably in advance of anticipated resignations or retirements, we could hardly expect the President and Attorney General to possess prescience so that they may predict when vacancies caused by death or unexpected illness will occur.

Id. at 712.

from making frequent use of the recess appointment by enacting a provision reading: "nor shall any money be paid out of the Treasury of the United States, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office . . . until such appointee shall have been confirmed by the Senate."³² Current law on the subject is more carefully drawn to withhold salary payment, with some exceptions, from a recess appointee who was picked to fill a vacancy which "existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. . . ."³³ Although a recess appointment must still be confirmed by the Senate, and despite the financial risk which the appointee may run, a President sometimes may be able to obtain confirmation for a sitting judge which might have been impossible had the Senate acted before the appointee filled the post on a temporary basis.³⁴

Because of the prestige of his office and his access to the mass media, the President can exert a powerful influence upon public expectations as to judicial appointments which may, in turn, affect the play leading to appointment. If the public can be conditioned to expect high level appointments, it may become poor politics for a Senator or state party leader to seek to place men on the bench who do not measure up to the expectation. In such a case, a President may be hoisted with his own petard, for he, too, may find it poor politics to make a particular appointment if that appointment does not measure up to the level of expectation he has helped to create. For example, when it was rumored that "President Kennedy wants to name Boston Municipal Judge Francis X. Morrissey, his former secretary and a life long friend of the Kennedy family, to the single new federal judgeship now available in Massachusetts," members of the Boston and Massachusetts bar associations and the press were outraged because Morrissey seemed poorly qualified for the post.³⁵ Influential elements of the press were quick to point

32. 12 Stat. 646 (1863).

33. 54 Stat. 751 (1940), 5 U.S.C. § 56 (1964).

34. For example, in 1961 when the nomination of Judge Irving Ben Cooper ran into a stormy controversy before the Senate Judiciary Committee, the fact that he had been serving on an interim appointment was very helpful, if not critical, to his cause. See *Hearings Before a Subcommittee of the Senate Judiciary Committee on the Nomination of Irving Ben Cooper*, 87 Cong., 2d Sess. (1962).

35. See *Christian Science Monitor*, July 14, 1961, p. 16, col. 3; *N.Y. Times*, July 3, 1961, p. 5, col. 1.

out the irony of a President considering the nomination of a man who did not meet the standards for the office that the President himself had set.³⁶

3. *The Deputy Attorney General*

While George Washington could personally know virtually all the outstanding people of his day and appoint men to judgeships who were known quantities to him, no modern President can hope to do the same. If a President takes seriously his legal responsibility for nominating and appointing federal judges, the search for and screening of candidates requires more time than he can personally give to it. But, even if he eschews a major responsibility and is willing to have Senators name appointees, he will at least want to be sure that appointments will not reflect adversely upon him. To obtain such assurance requires a more intensive investigation than the President has time to make. Consequently, it has become customary for the President to assign his Attorney General the responsibility for advising him as to judicial appointments. In turn, it has become customary, at least in the last three administrations, for the Attorney General to make it a primary responsibility of the Deputy Attorney General to make recommendations for such appointments. In the last two administrations, where there were an unusually large number of judicial appointments to be made, the day-to-day leg work of acquiring data on prospective nominees and negotiating with Senators was assigned by the Deputy to an assistant. The last two men to perform these functions, Joseph Dolan (1961-1965), and Ernest C. Friesen,

36. *Ibid.* See also Chicago Daily Tribune, July 6, 1961, § 1, p. 16, col. 2.

In its news item dealing with the Morrissey story, the Christian Science Monitor pointedly recalled the words President Kennedy spoke when he signed a bill adding new judgeships shortly after becoming President: "I want to take this opportunity to say that for our federal courts I shall choose men and women of unquestioned ability." Christian Science Monitor, July 14, 1961, p. 16, col. 3. Later, when Morrissey's nomination became a reality during the Johnson Administration, the Washington Post lashed the President with these words:

The President ought to change his mind about nominating Judge Francis X. Morrissey . . . If it is too late to change his mind about sending the nomination to the Senate, he ought to withdraw it. . . .

The judicial appointments of this Administration have been of a very high order. The Morrissey appointment is particularly objectionable because it is in contrast with most of the court appointments that President Johnson has made. . . .

Washington Post, Sept. 28, 1965, p. A14, col. 2.

Jr. (1965-), have been exceptionally capable, and have markedly shaped and influenced the decisions of the Deputy.

Because the relationship between the Attorney General and the Deputy must be close in an organizational and personal sense, the Attorney General is kept apprised of important developments as the Deputy seeks to fashion a recommendation. At any time, the Attorney General may indicate that he would like the Deputy to proceed in a specific way. The Attorney General may even make the initial suggestion as to a possible nominee, asking the Deputy to check him out. Whatever communication the Attorney General receives from Senators and others will be passed on to the Deputy with or without comment.

To a lesser extent, the Attorney General will keep the President informed. If it appears that a particular recommendation may cause difficulty with a Senator or party leaders, there may be some discussion. Conversely, if the President has had communications from a Senator or party leaders, he will relay the information to the Attorney General with his comments. The President can, of course, at any time specify whom he wants nominated and that settles the matter. But, Presidents rarely do so; rather, Presidents generally are willing to have the Attorney General make the recommendation. In the end, the President will take one good, hard look at the recommended nomination. At that point, the President may seek assurance from the Attorney General that the nomination will stand up when it goes to the Senate or that he has been informed of any anticipated difficulties and the reasons for making the nomination in spite of them.³⁷

Although the President or the Attorney General may at any time direct the Deputy Attorney General to follow a prescribed course of action or refuse to accept his recommendations, the Deputy in practice plays the leading role in exercising the President's power. In the last three presidencies, the office of Deputy Attorney General has attracted men of extraordinary ability: William P. Rogers, 1953-1957; Judge Lawrence E. Walsh, 1957-1961; Justice Byron P. White, 1961-1962; Nicholas de B. Katzenbach, 1962-1965; Ramsey Clark, 1965- . Such men have not been content to sit back and screen recommendations offered by Senators. Whenever possible, they took the initiative

37. Some Presidents have further interviewed the particular candidate before submitting the nomination. See Rogers, *Judicial Appointments in the Eisenhower Administration*, 41 J. AM. JUD. Soc'y 38, 40 (1957).

in seeking out and proposing candidates. As an assistant to one of these Deputies put it: "we take all the ground the Senators let us take." But there have been some very interesting differences in degree of zeal with which Deputies have sought to take ground, largely traceable to their respective President's general attitude toward the Senate. The Eisenhower team was much more aggressive in urging their own nominees on Senators than the present team. Evidently President Johnson, as a consequence of long years in the Senate, believes in senatorial prerogative and is deferential where he can be. President Eisenhower, on the other hand, was not so impressed with senatorial claims to appointments and backed his team strongly in their efforts to take ground against Senators.

Thus, while the Deputy has no legal power in his own right to make nominations, to the extent that he can influence the Attorney General and the President, he can invoke the President's power. This is known and understood by other principals in the appointment process and it facilitates direct negotiations between them and the Deputy.

4. *The White House Staff*

During the Kennedy administration, the contact between the Attorney General and the President was very close and direct. No member of the White House staff participated actively in the process of judicial selection. Of course, members of the staff who dealt with Senators liked to be informed of the progress of nominations. Shortly after Robert Kennedy's resignation, however, President Johnson asked John Macy, the President's Special Assistant on personnel matters and Chairman of the Civil Service Commission, to review nominations suggested by the Department of Justice. As Macy sees it, his function is to maintain a kind of quality control. To this end, he endeavors to have his office make an independent investigation and evaluation of each suggested nominee.

One could speculate that the President's original purpose in imposing a White House screening was merely to protect his own political interests at a time when he could not be sure about the political loyalties of the team at the Department of Justice.³⁸ But Macy feels that his search for men and women to fill important vacancies in Government must include judgeships, since

38. Recall how long President Johnson deliberated about elevating Deputy Attorney General Nicholas Katzenbach, a Kennedy appointee, to Attorney General.

a person might well be considered a good prospect for both a seat on the bench and a high administrative post at the same time. Whatever the reasons, Macy and his small staff now take a hard independent look at recommendations of the Department.

5. *The American Bar Association*

In 1945 the American Bar Association established the Special Committee on Federal Judiciary, later to become the Standing Committee on Federal Judiciary³⁹ which passes on the qualifications of nominees to the federal bench. It has become customary for the Senate Judiciary Committee to consider these reports from the ABA Committee.⁴⁰ Further, the ABA Committee customarily submits an informal report to the Department of Justice on any person the Department is seriously considering for appointment. The Committee will indicate whether a particular person is "Exceptionally Well Qualified," "Well Qualified," "Qualified," or "Not Qualified" for a judicial post. Needless to say, the Committee has a profound impact on the selection process. As experience attests, a rating of "Not Qualified" will not necessarily mean that a particular man will be withdrawn from consideration, but no administration is eager to have very many of its appointments so classified. For this reason, the ABA Committee is significantly involved in the selection process.

6. *The Senate Judiciary Committee*

Senate rules require that the Judiciary Committee pass on all nominations to the federal bench and make recommendations to the Senate. Customarily, a subcommittee holds hearings on all such nominations, but in most cases the hearing is perfunctory. The Committee members do not regard it as their function to actively help select judges. Rather, they regard themselves as watchdogs, safeguarding the interests of the public and the Senators, individually and collectively.

To safeguard the interests of individual Senators, the Committee checks with the Senators of the state where the nominee will hold his post, in the case of a district judge, or the Senators of the state where the nominee is from, if he is to serve on a

39. See Segal, *Federal Judicial Selection — Progress and the Promise of the Future*, 46 MASS. L.Q. 138-39 (1961). See generally GROSSMAN, *LAWYERS AND JUDGES* 82-196 (1965), for a detailed description of the Committee and its operation.

40. See Segal, *supra* note 39, at 138-39.

circuit, special, or District of Columbia court. With rare exception, the Committee tends to support an individual Senator who objects to a nominee. The Committee reviews the report from the ABA Committee on Federal Judiciary. In addition, the chairman is apprised of the information developed by the FBI investigation of the nominee on behalf of the Department of Justice. Also, the Committee provides an opportunity through open hearings for anyone to object to a nomination, offering whatever evidence he may have that the nominee is not fit for the post. Some effort is made to keep such testimony relevant and responsible, but the Committee is very generous in allowing people to be heard.

The Committee can affect the selection process markedly in three ways. First, it can delay Senate action on confirmation in the hope of embarrassing the President or testing his determination to make a particular appointment. Delay may be used to afford the Committee or individual members the opportunity to seek Senate support in opposing the nomination.⁴¹ Although effective at times, delay is not effective against a determined President who can expect support from a majority of the Senators. If the Judiciary Committee as a whole refuses to act, a majority of the Senate can take the matter out of the Committee's hands via a discharge petition.

41. President Kennedy's nomination of Judge Thurgood Marshall, a Negro who had served many years as special counsel for the NAACP, and the events which followed, provide a good example of the use of delay by some Committee members. Marshall was originally nominated September 23, 1961. N.Y. Times, Sept. 8, 1962, p. 1. A few weeks later, October 6, 1961, he was made a recess appointment. Nothing was done by the Committee about the appointment until May of 1962. Then, hearings were held before a subcommittee selected by Senator Eastland of Mississippi. Two of the three subcommittee members were Southerners: Johnston of South Carolina and McClellan of Arkansas (the other member was Hruska of Nebraska). *Hearings Before a Subcommittee of the Senate Judiciary Committee on the Nomination of Thurgood Marshall*, 87th Cong., 2d Sess. (1962). When the subcommittee failed to report, the full Committee under tremendous political pressure bypassed the subcommittee and voted to recommend confirmation on September 7, 1962. N.Y. Times, Sept. 8, 1962, p. 1, col. 3. A few days later the Senate confirmed the appointment. Perhaps, the Chairman and other southern members only hoped to demonstrate to their constituencies that they were opposed to the nomination, for the odds seemed poor that in this particular case they would be able to embarrass or discourage the President or pick up enough Senate support to reject the nomination.

Although it could be argued that this was one of those rare instances where Committee members were using the Committee to serve their personal interest, the Southerners may have felt that they were acting in the public interest by trying to prevent a poor appointment.

A second way in which the Committee can affect the selection process is through Committee hearings. These hearings afford the Senators—individually and collectively—their best means for influencing judicial selection by attuning the Senate as a whole, the press, and the public to the objections against a nominee. Committee members can dispel or enhance this informational process significantly by their arrangement and questioning of witnesses.⁴² In the sense that the Senate Judiciary Committee's hearings provide an opportunity to expose real or alleged weaknesses of nominees, they can exert a powerful influence on the conduct of parties to the nomination process.

In the same fashion, Senate debate over confirmation affords still a third opportunity for Senators to seek to embarrass the administration by questioning the wisdom of a particular appointment. Here, individual members of the Senate Judiciary Committee who have dissented from the majority's recommendation can be expected to play a leading role, for they will have a familiarity with the nominee's record. A Senator who is unable or unwilling to invoke senatorial courtesy can still throw some telling punches. Such action will rarely defeat a nomination, but the prospect of denunciation on the Senate floor may weigh heavily in the deliberations of appointing principals.

7. *The FBI Report*

As a matter of course, the Department of Justice requests FBI investigation of serious contenders for nomination to federal judicial posts. In addition to seeking information on the character of the person, FBI investigators interview lawyers and judges to get an indication of the professional standing of the

42. Appointment makers view with foreboding the prospect of a public hearing in which their candidate may be denounced by the official representative of the ABA Committee in the following way: "I was given substantial evidence of unjudicial conduct on the special sessions bench, involving tantrums, excoriation of counsel, and general lack of poise on the part of Judge Cooper. . . . [m]y informants gave me . . . testimony . . . to the effect that Judge Cooper lacked judicial temperament." *Hearings Before a Subcommittee of the Senate Judiciary Committee on the Nomination of Irving Ben Cooper*, 87 Cong., 2d Sess. 40 (1962). And where Herbert Brownell, president of the Association of the Bar of the City of New York and a former Attorney General of the United States testified: "I conclude, if ever a clear case of lack of judicial temperament existed, this is it. If ever a candidacy for judgeship called for refusal of confirmation, I respectfully submit this is the case." *Id.* at 206. It is true that Cooper was confirmed in spite of this cannonade, but it is a safe bet that those who were instrumental in securing the nomination for Judge Cooper were chary about getting involved soon in another such donnybrook.

possible nominee. The merits of such a custom are obvious; federal judges should be men of unassailable integrity. FBI agents are in a position to interview a wide variety of people who may be able to provide information about a man's character, information which would not come to light in the investigation conducted by the ABA's Committee.⁴³

A report from the FBI which is considered to be adverse is lethal to a candidacy. But what are the criteria of an adverse report? Bear in mind that FBI agents collect and report whatever information is given them by those they interview. They attempt to verify important allegations against the person being investigated, but they will not delete such allegations from their report even if they seem insubstantial. This may seem a dubious practice, but its virtues become manifest when one examines the reason for it which J. Edgar Hoover articulated to a Senate subcommittee years ago:

I think that when the time comes that the Bureau must decide what shall go into a report and what shall not go into a report, then we are functioning as a Gestapo. I think we must report accurately and in detail what any person tells us In the reports we submit to other agencies, we do report on the reliability of the source of information, if we know it.⁴⁴

Also, it is important to note that the FBI does not evaluate its own reports. Rather it acts solely as an impartial fact-gathering agency.⁴⁵ Consequently, the evaluation of the FBI report on a candidate for the judiciary is made by Department of Justice officials. Thus, the question of what kinds of information make a report adverse and what kinds of criteria are employed are matters for them to decide, at least initially. Solid evidence of personal dishonesty or meaningful association with racketeers or subversives will, without question, be regarded as adverse. But beyond that, Department officials have never established clear-cut criteria, each report being evaluated on an *ad hoc* basis. In general, the standard employed appears to be whether the report "shocks the conscience" of the officials in the Department of Justice or, perhaps, whatever they feel would shock Senators, the press, and the public. To some, an illicit romance

43. Investigating lawyers could, for example, thoroughly investigate a man's professional activities without uncovering the fact that he has a clandestine relationship with some racketeers.

44. *F.B.I., Testimony of the Director on February 3 and February 7, 1950 Before the Senate Subcommittee on Appropriations Regarding the 1951 Appropriations Estimate for the Federal Bureau of Investigation* (mimeo).

45. Hoover, *The Confidential Nature of FBI Reports*, 8 SYRACUSE L. REV. 2 (1956).

of any kind might be enough to take a contender out of consideration. To others, it might not, if the principals were discreet.⁴⁶

Despite its virtues, the FBI investigation raises some specters. J. Edgar Hoover has consistently, and for good reasons, taken the position that FBI files must be confidential.⁴⁷ Aside from appropriate officers in the appropriate agencies, no one, including Senators, except under very special circumstances, is allowed to see the FBI files. In this connection, the Department of Justice has worked out a procedure for transmitting file information to the Chairman of the Senate Judiciary Committee.⁴⁸ Individual Senators can obtain only whatever file information the Department of Justice officials or the Chairman of the Judiciary Committee are willing to tell them. Consequently, it would be possible for Department officials, in jockeying for position with a Senator over a particular nomination, to indicate that the man had been removed from contention because of an adverse FBI report. The suggestion of an adverse FBI report clearly carries an aura of incontrovertibility and finality which might well make a Senator feel that he should drop the matter. Actually, such allusions could be groundless and merely a daring maneuver to head off a nomination to which the real objection was lack of competence but where a Senator could be

46. One situation which some time ago caused consternation in the Justice Department involved a contender who, it was alleged, had helped trap a wife into an illicit situation for a divorce proceeding. Significantly, despite misgivings, Department officials did not feel that they could oppose the nomination on those grounds alone, for in other respects the candidate checked out well.

47. Hoover, *supra* note 45, at 4.

48. An officer of the Department, normally the Executive Assistant to the Deputy Attorney General but sometimes the Assistant Deputy Attorney General, calls on the Chairman of the Senate Judiciary Committee with the F.B.I. file of a nominee which the Committee is to consider. The officer gives an oral resume of anything in the file which might possibly be considered derogatory and answers any question the Chairman may ask by way of clarification. If the Chairman wishes to look at the file, he will do so but only in the presence of the officer. In some rare instances, another member of the Committee, who has been serving on the subcommittee dealing with a particular nomination, has been allowed to see the file, but only in the presence of the Department of Justice officer. Under no circumstances is the file ever left with the Chairman or other committeemen. As a practical matter, therefore, the members of the Judiciary Committee only know what the Chairman wishes to tell them. This, of course, does not prevent persons outside the government who oppose the nomination from supplying committee members with derogatory information which may be identical with that in the file.

expected to effectively counter such an objection.⁴⁹ Because of the requirement of confidentiality of FBI reports, it is usually not possible to confront a nominee in an open hearing before the Senate Judiciary Committee with derogatory information and allow him to defend himself. In short, the only check on an adverse report is a Senator's zeal and persistence, and this can only be brought into play when a Senator is interested in a candidacy.

B. PRESSURES AT WORK

Every candidate for major political office, however great his own resources are, needs help from others in his campaigns. People, in large numbers, jump into the fray expecting no personal favors. They may feel ideologically that it is important for a particular candidate or party to win. They may need the kind of stimulation and fulfillment they obtain by participation in the rough and tumble of a campaign. Or they may become involved out of a sense of duty or the idea that a good citizen should participate. Others, however, give of their time and money with the full expectation that, should their candidate win, they will have a good claim to favors. The favors sought frequently are public offices. It is axiomatic that one path to appointive office is to ingratiate oneself with those who hold the appointing power. Baldly stated, the axiom has disturbing overtones. One implication is that appointments are obtained as a quid pro quo for service rendered without regard for qualifications. Looking at it from another perspective, a person working in a campaign has a unique opportunity to demonstrate his ability to a candidate. If the candidate wins and then has the opportunity to appoint or help appoint to high office, he has a coterie who have demonstrated that they are like-minded as to political philosophy and are capable. What is more natural in such a situation than to seek to place such people in high governmental posts?⁵⁰ To the degree that an appointment is made on qualifications and ability, it is inaccurate to describe it as a

49. In fairness, Justice Department officials assert this could never happen, that Senators will persist in finding out in general "what you have on my man," and in many cases they are already familiar with the facts which constitute the "derogatory" information and do not feel that it is critical.

50. This phenomenon, in a sense, is not unique to politics. In business, academic or other endeavors, it is common for someone, upon attaining high office, to seek to find places in his organization for people with whom he has worked before and for whom he has a high regard.

purely political appointment. But political considerations lay enormous pressures on the appointment makers.

At one time, fresh from his experience of steering the presidential campaign of Franklin D. Roosevelt to victory, James A. Farley had the temerity to suggest that he could keep a party together and working effectively without patronage: "I am convinced that with the help of a few simple ingredients like time, patience, and hard work, I could construct a major political party in the United States without the aid of a single job to hand out to deserving partisans."⁵¹ If it is possible to do so, not many professional politicians believe it. Rather, they believe it is imperative to use appointments to high office to encourage the future participation of others. Consequently, the party professionals will pressure appointment makers to reward the faithful. Rewarding the faithful has become so much a part and parcel of our system that it would be fair to say that it has the significance and meaning of custom; appointment makers are expected to follow custom and are under pressure to do so. However much an appointment maker might want to make his selection on merit alone, he cannot ignore custom without risk of sparking great discontent among the professionals in his party. Appointment makers are not unaware of the limitations set for them, however much they might desire to mitigate their influence. A kind of practical compromise is often effected by an approach suggested by an appointment maker in this way: "We feel that we owe certain people jobs but we do not feel that we owe them *specific* jobs." In elaboration, he explained, no one is promised a judgeship for services rendered nor will anyone be appointed to a judgeship if he does not have the qualifications for the post. But there is a frank recognition that it is incumbent upon the appointment makers to take care of those who contributed heavily to the efforts of the past campaign and that somewhere in the vast spectrum of posts available they can find a spot becoming to the talents of those who have a substantial claim to consideration.

The essence of these observations is this: Appointment makers are constrained to appoint to judgeships those who have rendered service to the President or to the Senator(s) from his state, if of the President's party, or to the President's party generally. There is, however, freedom to pick and choose among the faithful for specific jobs.⁵²

51. FARLEY, *BEHIND THE BALLOTS* 237 (1933).

52. Byron White's forthright statements, when he was Deputy At-

Unfortunately, there is no quick litmus paper test to divine who is the most deserving of the deserving. People active in the party and campaigns all have their own notions as to who has done most for the cause. There is a further complication in the fact that in our system it is possible for someone to perform Herculean tasks in behalf of the candidacy of a President without doing much or anything for a Senator's candidacy or vice versa. Thus, the chief appointment makers, the appropriate Senator and those who represent the President, may feel a strong obligation to and admiration for two different men, both of whom have labored hard in party vineyards. But neither the Senator nor the presidential advisors can safely take into account only their own estimates of a potential appointee's contributions to the party's efforts if they want to insure future support for themselves and keep the party sinews strong. They must consult with party leaders in the state and make it clear that they have given consideration to their views. The extent to which a party leader's views will receive consideration depends in large part upon his real or apparent power in party circles.⁵³ In the reckoning of Senators and the presidential advisors, the views of Governors and Congressmen of their own party normally must be given special consideration. The views of the Vice President and cabinet officers with regard to appointments in their respective states, if they retain a lively interest in state politics, will also be influential. Finally, the views of local and national party committeemen will be sought. These people will in turn be importuned by lesser lights in the party who feel that their efforts in the party's behalf entitle them to some consideration from party leaders.

1. *Pressure from Candidates*

It is often said in respect to honorific posts of all kinds, in government and out, that the post should seek the man. Perhaps this is the ideal, but it does not describe what happens with

torney General, are very much to the point. He told the American Bar Association House of Delegates that "there is nothing odious about the preference for Democrats," that the selection of judges is a "political process in the best sense of those words," and that "the central question in choosing them [the appointees] was ability, not politics." *Minneapolis Star*, Feb. 20, 1962, p. 14A, col. 6; *N.Y. Times*, Feb. 20, 1962, p. 21, col. 6.

53. For example, a Justice Department official in a Democratic administration makes it clear that in making judicial appointments to the district courts in Illinois, "Mayor Daley of Chicago must have a seat at the conference table."

judicial appointments. Rarely does a person who has not actively sought the appointment receive it. Even the most distinguished jurists have actively sought their nominations.

For lawyers and state judges in virtually all jurisdictions, save perhaps the southern district of New York, a federal judgeship is a highly sought after prize. The pay is, by most people's standards, substantial. And, when coupled with life tenure and a most favorable retirement arrangement, these judgeships become very attractive.

To lawyers, there are special attractions which transcend financial benefits. For them, it is hard to conceive of more important or prestigious positions; judges are kings in their courtrooms and they are treated accordingly inside and outside the courtroom.⁵⁴ Illustrative of the importance and prestige of being a judge is the answer this writer received when he respectfully asked a distinguished and elderly appeals court judge, "Why, in view of the favorable retirement plan, don't more judges retire at age seventy?" His answer was as simple as it was profound: "When you are an active judge, you are somebody. When you are a retired judge, you are nobody."

In order to be in serious contention for a judgeship, an aspirant must usually make it clear that he wants the post. He can do this in a variety of ways, ranging from very active campaigning in his own behalf to having others do it for him. Efforts can be made by the candidate or those working in his behalf to bring pressure to bear on the appointment makers through political leaders. Obviously, it is to a candidate's advantage to have a record of active support in the campaigns of the President or the appropriate Senator or for the party generally, for then a good case can be made that the candidate is owed special consideration.⁵⁵

54. To get some feel for a judge's standing among lawyers it is recommended to the nonlawyer that he attend a bar association meeting or a law school alumni banquet and observe the respect, and in some cases the obsequiousness, lawyers manifest for the judges.

55. This point was well made by Judge Samuel Perry in a humorous and candid speech in which he told the Chicago Bar Association in 1951 how he became a federal judge:

Since we are talking confidentially I will be perfectly frank with you folks in admitting that I tried to obtain the appointment seven years ago and learned then that it requires not one but two Senators. At that time I was out of politics and they did not need me. Therefore, I decided that this time if I wanted that appointment I had better get back into politics—which I did. . . .

MURPHY & PRITCHETT, *COURTS, JUDGES AND POLITICS* 95 (1961).

When a candidate has not made such a record, he must rely more heavily on the backing of those in the party who seek support of his candidacy on the basis of consideration due them. If he is not a member of the President's party, it becomes necessary to convince party leaders that in this particular situation it is good politics to appoint someone of the other party. Sitting federal judges will be frequently drawn into the campaign in spite of the myth that judges must and do refrain from involvement in the political processes. This involvement will be discussed shortly.

Aspirants invariably seek to enlist the aid of local and state bar association groups to help pressure the appointment makers.⁵⁶ Presumably, state political leaders and Senators cannot afford to ignore the advice of local and state bar associations. Wherever and in whatever manner possible, candidates will, of course, endeavor to marshal support from the press.⁵⁷

56. The Committee on Federal Judiciary of the American Bar Association does not solicit the views of the local and state bar associations as such. Therefore, it is frequently the case that someone who has received the endorsement of those groups will not be rated as qualified by the ABA Committee.

57. The following letter from a former distinguished district judge to his Senator, written at a time when he was seeking nomination, is illustrative of how hard candidates normally campaign for the office, even if they try to convey the impression, as this particular letter writer did, that they have "hardly moved a muscle." In reading the letter bear in mind that neither the candidate nor the Senators of the state were of the President's party and take note of the involvement of federal judges.

Dear Senator J—:

As you suggested at my pleasant visit at your home Sunday, I give you herewith a confirmatory memorandum.

In the first place, the matter was a great surprise to me. In fact, when Chief Judge P— of the Federal Circuit spoke to me . . . , I gratefully declined.

But, when he and Chief Judge L— of the District Court again talked with me . . . , and when I found that our good friend Judge X—[the Chief Justice of the State Supreme Court] was in accord, I reconsidered. For, . . . the Federal judiciary have . . . the most interesting judicial jurisdiction in the entire country, which to my mind outweighs the salary loss.

From then on they have taken the matter in hand, while I, whether wisely or not, have hardly moved a muscle, save to talk to you and Senator Z—[the other Senator from the state], who has been an intimate friend for years.

Judge L— has, however, kept me advised. . . . [H]e and Judge P— went to see Chief Justice M— [of the United States Supreme Court], who expressed unusual interest, and indicated he might, perchance, contact the highest quarters. Thereupon, Judge L— visited the Deputy Attorney General A—, in charge of such matters for the Attorney General, and a long-time friend. He told L— he felt a Republican appointment to one, at least, of the two vacancies in the state would be good Democratic politics, since there are now but two active Republican federal

2. *Pressure of State Tradition*

Frequently, state tradition makes for political pressures which appointment makers can ignore only at peril to themselves and the party. It is sometimes traditional for judge-ships to be divided on a geographical basis or to be spread among the constituent nationality groups in the state. To upset the usual balance may create the impression among a minority group that the appointment makers are hostile to them. Consequently, appointment makers are sometimes in the position where failure to make a particular appointment may be misinterpreted to their political disadvantage.⁵⁸

judges in the entire circuit. In this view I think you told me the Attorney General himself concurred.

Then Judge L— got Judge M— of [another] Federal Court of Appeals, and my predecessor as Chairman of the . . . committee of the American Bar Association, to write Assistant Attorney General H—, and Judge P—, in turn, wrote the Attorney General. For your information, I enclose copies of the above-mentioned letters and my "Who's Who."

Furthermore, Judge L— communicated with Judge C—, of the Court of Appeals, who is such a long-time friend of the President that he always stays at the White House when he visits Washington. Judge C— came to know me as my successor as Chairman of the ABA Committee, and he promptly wrote L— that he would take the matter up with the President personally, and "present it in the most favorable manner that I know." Unfortunately, Judge C— is a very sick man unable to leave his home, and as yet has, therefore, been unable to talk to the President. . . . Doubtless, however, he will shortly take the matter up personally otherwise, if he has not done so already. I hope to have word on this shortly, and will immediately advise you, since I would think it desirable, though perhaps not necessary, for this to precede even a follow-up news article on a Republican appointment, as to which I gathered you thought you might appropriately contact Mr. D— [newspaper publisher].

Meanwhile—and altogether—I have talked with but two close personal friends; (1) F—, because of his letter to you, who will help on the Democratic angle; (2) W—, President of the X.Y. Bank, who serves with me on the board of a foundation, both of them being very glad to help. W— has already spoken with N— [President of a university in the state] and I— [President of a large bank in the state]. Both will be glad to write the President.

Judge X— [Chief Justice of the State Supreme Court] thinks it would be a good idea to have the State Bar Association . . . go on record favoring a Republican appointment to at least one of the two vacancies. Do you concur in this?

. . . .

Yours very truly,

58. For example, in one district it had become customary to elevate the United States Attorney to the district bench when a vacancy occurred. At the time of one such vacancy, the United States Attorney was of the Jewish faith. When there was speculation that someone else might be appointed, the Senators from the state and the Department of Justice were deluged with communications pointing out that the considerable Jewish community in the state would regard it as a deliberate

3. *The Pressure of Good Politics*

Running counter to the pressures described above is the pressure that is sometimes generated by the idea that it is good politics to avoid the usual political considerations in selecting judges. For example, there is no doubt that a Democratic President will be hailed in many quarters for nominating outstanding Republicans to the bench. It is sometimes good politics to appoint an extraordinary lawyer or state judge to the bench regardless of political considerations. Consequently, the appointment makers occasionally bow to such considerations in making a particular appointment even in the face of anguished wails from party regulars. This can be done more easily in situations where package deals can be made. Thus, if there are three openings in a particular state, the President's men may propose a slate which would include two nominations which the Senators and state party leaders are eager to see named and a nonpartisan or opposing party member for the third. It will then be suggested that agreement be reached on the slate as a whole. To bring a concession in these circumstances is easier, at least relatively so, than it would be if there were only one post available. It is noteworthy that President Kennedy's advisors felt that it was imperative in overcoming resistance to Republican appointments that the first be made in the President's own state. As a Department of Justice official suggested, the President and his representatives knew that in urging Senators and state party leaders to consider Republican appointments they would be asked to establish the President's bona fides by doing in his state what he was asking them to do.

Unfortunately, however, recent selections made as a consequence of the pressure of good politics have proven to be the exception and not the rule.

4. *Pressure from Sitting Judges*

Although pressure from sitting judges is rarely a decisive factor in the appointment of judges, it cannot be ignored. It is generally supposed that sitting judges with meticulous regard for the separation of powers would not actively seek to influence the appointment makers; in fact, however, they do. Judges are

affront if the custom were broken when a Jew happened to be the United States Attorney. It became apparent to the appointment makers that as a practical matter they had little choice but to elevate the United States Attorney, who achieved an outstanding and lengthy record of service.

consulted by officials in the Justice Department and by the ABA Committee in regard to prospective nominees. What is perhaps more surprising is that frequently judges will take it upon themselves to urge a candidacy without waiting to be consulted. If the judge is a Learned Hand or a prestigious member of the Supreme Court, a strong letter may have a profound impact on the appointment makers, particularly where the field has been narrowed to a few choices.⁵⁹ Often, however, a judge will manifest an uneasiness or self-consciousness which undoubtedly reflects feelings of guilt about becoming involved in promoting a candidate.

C. THE INTERPLAY OF FORCES IN THE APPOINTMENT PROCESS

1. *District Courts*

The appointment process cannot be described adequately as a series of formal and automatic steps. An appointment grows out of the interaction of a number of people with varying and, to some extent, countervailing powers attempting to influence each other within a framework imposed on them by law, custom, and tradition.

Once it is known that there is or will be a vacancy on the federal bench, the jockeying for position begins in earnest. Some groundwork undoubtedly will have been laid far in advance. Some provident aspirants may have established themselves by their political activity in anticipation of the day when the opportunity would surely arise. The President, at the beginning of his administration, will have indicated implicitly or explicitly

59. Imagine the impact of a letter from Learned Hand which states in part:

I think there have been not more than two occasions during the long period that I have served as a judge when I felt it permissible to write a letter in favor of anyone for a judicial appointment. However, I feel so strongly that the Second Circuit would be greatly benefited by the appointment of Mr. X— that I cannot refrain from writing you to express my hope that you may see fit to fill the vacancy now existing in the Circuit by selecting him

Or consider the impact of a letter from an outstanding member of the Supreme Court which elaborates in great detail on his general estimate of a candidate:

In view of my close concern during practically the whole of my professional life with the quality of the federal bench, I venture to commend to your favorable consideration Mr. Y—. Y— is one of those rare creatures whose talents and capabilities so far exceed those of even able men that in talking of him one must indulge in conscious understatement in order to avoid disbelief on the part of those who have not had intimate experience with his capacities

what he wishes done with respect to appointments. His men in the Department of Justice will have been actively or passively collecting names and information about good prospects. The appropriate Senators will have been importuned from time to time with suggestions for future judicial appointments. If there has been a recent appointment to a post in a particular state, all parties to the nomination process have in mind the also-rans, some of whom must be contenders for the next vacancy. A large percentage of nominees have been considered one or more times before actually being designated.

While the aspirants have others generate support for their candidacy, the President's men in the Justice Department canvass people whom they know, in and outside of the Department, as to qualified candidates. Strategic in this situation are members in the Department who have or are thought to have special knowledge about lawyers in their native states. They may recite the virtues of particular individuals from memory or they may contact people back home and relay the information so garnered. Others who have worked in the political hustings with the crucial Department officials will also be queried. Or as is frequently the case, they will not wait to be queried but will offer gratuitous advice.

At the same time, the Senators of the President's party will be actively or passively collecting information on candidates. In regard to district judgeships, there are several courses of action available to a Senator. Some Senators, such as Frank Lausche (D. Ohio) and the late Harry Byrd (D. Va.) do not like to play an active role in judicial selection. They feel that the appointment of judges is the President's constitutional job and that for them to ask the President to appoint their candidates would be akin to asking favors for themselves. They do, of course, feel that they have the right to oppose a Presidential nomination, if they do not like it. Consequently, in such situations the initiative lies with the officials in the Department of Justice. Nevertheless, the Department will still clear a prospective nominee with the Senator before formally proposing him in order to avoid confirmation problems.

A much larger number of Senators will submit a list of candidates and suggest to the Department that any one of those named on the list will be acceptable to them, inviting the Department to make the selection. The reason for such an approach can be readily understood. As the old saying goes, "In making an appointment, you make fifty enemies and one in-

grate." By drawing up a list and placing the onus for decision on the Department, a Senator can satisfy more and disappoint fewer candidates. As indicated earlier, the team at the Department of Justice is happy to move into the breach and make the selections. But Senators who submit lists do not always do so for the purpose of letting the President's men pick and choose; some use the list as camouflage. For, while they send a letter with the list to the Department with copies for all interested parties, they call upon or phone officials to indicate who their real choice is.⁶⁰

Most Senators feel that if they are of the President's party, they should designate the nominee subject to the approval of the Department of Justice. Some even take the proprietary view that they own the job. For example, one Senator wrote to the Attorney General listing five names and saying: "On the basis of your investigation and survey, I shall make my final choice of the nominee" The President's agents bristle at the suggestion that they only investigate and check on candidates for the Senators.

60. The following exchange of letters gives a good indication of why it is useful for a Senator to submit a list pro forma even if the Senator knows from the start whom he would like to see named. It is easier to stave off recriminations where there is an appearance of due consideration and a decision on the merits, or so some Senators think. Interestingly enough, and to support this view, recipients of such senatorial assurance, however cynical about the selection process, tend to believe their own Senator. Evidence of this is the fact that they will bother to write letters, assemble requested data and seek support at the bidding of a Senator even when it is a poorly kept secret that he has made up his mind. A candidate for a district judgeship wrote to his senator:

I respectfully request that I be considered as a candidate for the appointment to the Federal Judgeship vacancy

.
I am certain you are acquainted with my political background; this background is strongly Republican and I have always been active in furthering the interests of the Republican party. I have been a precinct committeeman and have served as County Republican Chairman. I will have the support of the ——— County Bar Association; the Republican County Committee and numerous prominent lawyers of our state. I also have the assurance of active support by Congressman R— and other prominent and influential Republicans in the state.

The Senator replied:

I have made no commitments and have done nothing further on the matter than to indicate to all interested persons that they send me biographical data and background so that I might have it before me when the time comes to resolve and determine this appointment.

There are quite a number of applicants and I want everyone to feel that I shall undertake to be as fair and impartial as I possibly can in resolving this matter.

When a Senator feels strongly about what he considers to be his prerogative, the President's men may have considerable difficulty thwarting his attempt to impose on them an unfavorable nominee. Thus, it is understandable why there is a ready disposition in the Department to accept a good suggestion for nominee from the Senator without much question. If there are two Senators of the President's party from a particular state, Department arithmetic has it that the effect of two Senators wanting a particular man for a district judgeship in their state is more than one plus one. The sum is more like infinity, for it would only be with great trepidation that the President's men would attempt to counter the will of both Senators.

Interestingly enough, the fact that two Senators are involved may give the President's men a wedge for taking more ground in the appointment process. If the Senators are not agreed on a candidate, as is frequently the case, the President's men can jockey suggestions to them trying to find a nominee who is their choice primarily but acceptable to both Senators. In such situations, it is important for the President's men not to convey the impression to either Senator that they have favored the candidate of the other. But Senators are not unaware of the effectiveness of these divide and conquer tactics and many of them will seek to work out an arrangement with the other Senator from their state so that they will always appear to make common cause on appointments. The easiest device for doing so is to split up appointments, including nonjudicial appointments.

Despite the efficacy of presenting a united front, some Senators are so estranged politically from the other Senator of the state that they just cannot work out a satisfactory arrangement. The American electorate apparently has no overpowering allegiance to either party or political ideology. And, even where the Senators are nominally of the same party, it is possible for them to be far apart politically.

As indicated previously, when a Senator or two Senators of the state has or have settled on a candidate, the President's agents are predisposed to accept him, unless they feel he does not meet their standard for character and competence. But this does not mean that they have played a passive role. Operating on the basis that "you can't beat someone with no one," the President's men frequently take initiative in proposing candidates to the Senator. It may turn out that all interested parties have had the same person in mind all along. But such initiative on the part of Department officers may put the Sena-

tor in the dual position of presenting his own candidate while actively opposing the man suggested by the Department. This can become embarrassing for the Senator if word is leaked to the press as to whom the Department is considering and the state press finds the Department's choice worth lauding. The Senator is then placed on the defensive locally. His position may be untenable if the Department has fixed on a prestigious lawyer or state judge who has considerable support in his own right among party and bar leaders in the state.

The Senators, however, have a counter strategy. If a Senator beats the Department and issues a press release stating that a particular person will be the next federal district judge, he has placed his own prestige on the line. For the presidential assistants to contest the Senator's choice at this point involves the politically important issue of face-saving. It is, however, a daring maneuver, for should the Department oppose his choice and it turns out that they have good grounds for doing so, the Senator will have difficulty saving face. On the other hand, the President's men may prefer to swallow hard and take the Senator's man without contest, in preference to embarrassing him. This is particularly true if the Senator is regarded as powerful.⁶¹

When several appointments are to be made to the bench in a particular state, the Department and the Senators may be able to compromise. For example, in the Kennedy Administration, it was easier to get Senators to accept a Republican ap-

61. Senatorial strategy in the use of the premature press release was described and decried by the St. Louis Post-Dispatch. That newspaper editorialized, after Senator Stuart Symington announced he would recommend James H. Meredith, his former campaign manager, for nomination to a district judgeship:

By announcing his choice, and Senator Long's concurrence, when he did, Senator Symington made it more difficult for Attorney General Robert Kennedy to exercise independent judgment on the matter. Although the Kennedy Administration owes nothing to Mr. Symington, who for a time was a candidate for the Democratic presidential nomination, it would naturally be reluctant to embarrass or humiliate any Senator by rejecting his nominee. St. Louis Post-Dispatch, Nov. 26, 1961, p. 26, col. 3. A few days later, in a news story, the paper reported:

Obviously realizing there is a good deal of opposition to Mr. Meredith because of his lack of judicial background, Senators Symington and Long decided this week to recommend him for the post left vacant by the death of United States District Judge Randolph Weber, rather than Judge Moore's seat. This would enable Mr. Meredith to be appointed quickly on a temporary basis by President Kennedy, and to serve on this basis until confirmed by the Senate. Such an appointment would tend to prevent opposition forming. St. Louis Post-Dispatch, Nov. 29, 1961, p. 3B, col. 3.

pointment for one of several vacant positions than it would have been where only one vacancy was to be filled.

Basically, the presidential assistants and the Senators, when they are of the same party, want to avoid open conflict. Both sides appreciate that each has the ability to inflict heavy damage on the other. The President's men view with heavy heart a knock-down-drag-out fight in Judiciary Committee hearings, just as Senators dread having it bruited about in the press back home that their candidate does not meet Presidential standards. Negotiations, therefore, begin in a spirit of accommodation. The principals want to avoid a fight, but most of them are prepared to take all the ground they can.

Depending upon personality, the principals may be frank and direct in their approach or they may play it close to the vest, trying to gauge the true feelings of the others without giving up the same information on themselves. Frequently, pointed banter in face-to-face situations is a useful device for drawing out information. How does the Senator react when the Deputy Attorney General or his assistant says to him, with a smile: "Oh you can't be serious about putting Joe Smith on the bench?" Conversely, the Senator may watch closely for a reaction when he tells the Attorney General in what appears to be a joking manner: "If Jack Jones doesn't get that judgeship, I'm going to be MIGHTY unhappy."

If it turns out that the Senator has a man that pleases the Executive branch, the negotiations are swiftly closed, provided the reports of the FBI and the ABA Committee on the Judiciary are in the candidate's favor. If the Senator's candidate does not please Department officials, or the President's advisors are pressing a candidacy which is not to the Senator's liking, or both are happening at the same time, the jockeying for position becomes a serious business. The best strategy for the President's agents at this point is to sit tight and not move forward in the formal process of appointment. This will cause immediate concern for the Senator. If the Senator had not been very strong on his proffered candidate, he may quickly back down and seek agreement on another choice. On the other hand, the Senator may try to force the issue by dragging his feet in some endeavor which means a great deal to the President.

Despite frequent allegations to the contrary, appointment makers do not like to be put in a position in which votes in the Senate on the President's program depend upon a particular judicial appointment. Few Senators want to bargain away their

independence to vote as they see fit on major issues. It is often more important to them politically to vote against the President on a particular issue than to have a specific individual named judge. The President's assistants may at times feel that going along with a Senator on a judgeship in return for a key vote would be in the public interest. Yet, there is good reason for avoiding such trading. As one Justice Department official sees it: "Once you give ground even for momentous reasons, you are in the position of the young lady who was asked if she would spend the night with a man for a million dollars and, upon replying 'yes' was asked 'well, how about for five dollars.' To her outraged 'what do you think I am?' came the answer, 'we've already established that, we're just bargaining on price now.'" Undoubtedly, there have been occasions when there has been an unspoken quid pro quo, Presidential acquiescence to a Senator's wishes with respect to a judicial appointment in return for a vote, but it has been rarer than is generally believed. And it must be remembered that when a President does attempt to bargain with judgeships he is limited in what he can do. For reasons already explored, the President cannot just go ahead and name someone whom the Senator from the state and of his party will oppose, and expect to have him confirmed. Thus, his best currency for purchasing compliance is delay and favoring one Senator in the state over another.

The idea that judgeships are wantonly bargained away by Presidents seems to have gained currency as a consequence of a quotation attributed to Franklin D. Roosevelt.

[W]e must hold up judicial appointments in states where the delegation is not going along. We must make appointments promptly where the delegation is with us. Where there is a division we must give posts to those supporting us.⁶²

But President Roosevelt was aware of the limitations. He was not suggesting that his powers be used to secure votes on specific legislation but rather on general support. This puts a different complexion on the matter. It is a much higher order of politics for the party leader to insist upon general support from party members in the Senate in return for his support than it is for a President to trade acquiescence on a judgeship for a vote on one particular issue before the Senate. After all, the notion that a President should give special consideration to Senators from his own party should logically call for the same Senators

62. Farley, *Why I Broke with Roosevelt*, Collier's, June 21, 1947, p. 13.

to give special consideration to the President. If they fail to do so, by what logic can they insist upon preferred treatment for themselves?

But, whatever one makes of the Roosevelt record, in the last three administrations judgeships have not been used to pressure Senators to vote right on specific issues. Myths die slowly, however, and it is not surprising that from time to time a newsman will report, as Joseph Alsop did, that "getting the foreign aid bill off the cliff where it was so desperately dangling also required judgeships and public works and much other pork and patronage. . . ."⁶³

White House aides who are involved in liaison work with Congress like to be kept informed on the status of appointments so that they will know what to say if queried about an appointment while talking to a Senator about the President's legislative program. At times, they may ask that an announcement of a particular appointment be delayed pending a vote in the Senate, not to bargain, but rather to prevent a Senator from reacting to a legislative proposal in a moment of personal pique. In recent years, there has been one situation, but probably not more than that, in which a Senator made it clear that unless the President accepted his nominee, he would refuse to go along with the administration in any matter. Interestingly enough, he did carry out his threat.

When the President's assistants employ Fabian tactics and the Senator chooses not to succumb, a ready and available strategy is to try and out wait them. They normally like to fill the vacancies quickly in order that the work of the judiciary keep somewhat apace with the demands on it. This gives the Senator an opportunity to test the resolve of the Executive branch. However, the Senator is at a disadvantage at this point, for the political pressure to fill the vacancy comes from within the state and means more to the Senator than to national officers. Also, the President might make a recess appointment and this might make the situation more difficult for the Senator. When things reach such an impasse, there will generally be more effort to seek accommodation rather than resort to open warfare. For the President's aides are not eager to go the route of the recess appointment which will not avoid, but merely forestall, an open fight with the Senate which they stand a good chance of losing. However, the President's assistants may, in their efforts to dis-

63. Alsop, *Successful Cliff-hanger*, Washington Post, Aug. 7, 1961, p. A11, col. 2.

suade a Senator from backing a particular candidate, receive a big assist from an adverse report from the FBI or the ABA Committee. Not many Senators will want to bear such a cross, particularly if the grounds for the unfavorable reports are the kind which will engender public opprobrium if aired.

When accommodation cannot be reached, one of three possible results occur: The President's men make no effort to fill the vacancy; the President formally designates a nominee unacceptable to the Senator and invariably loses the contest for confirmation, if the Senator fights to the bitter end; or, the President makes a recess appointment and loses the contest for confirmation at the next session of Congress. As suggested earlier, when a President employs either of the last two courses of action, the pressure may be too great for the Senator to persist in opposition. But the outcomes indicated are based on the assumption that the Senator will go the full route in opposition. It is important to stress that ultimately the Senator is not in a position to initiate the action which constitutes a throwing down of the gauntlet when the impasse has been reached. In a very real sense, the President's constitutional power to make the formal nomination provides him with the advantage that is inherent in taking offensive action, whereas the Senator in the moment of truth has only defensive weapons.

2. *Circuit Courts*

In making appointments to circuit courts, the balance of power shifts markedly to favor decision making by the President's men. The power of the individual Senator with respect to appointments to the district bench was derived from the custom of senatorial courtesy. By the nature of things, this custom cannot be invoked effectively where circuit court judgeships are involved. Each circuit covers at least three states. No one Senator or pair of Senators can claim that they are the only members of the Senate with a vital interest in appointments to the court. In fact, Senators from the states covered by the circuit necessarily vie with each other to obtain consideration for their choices. Since there is no legal prescription for distributing circuit judgeships geographically, no Senator can claim that as a matter of legal right a particular nomination should go to a person from his state. Conceivably, Senators from states in a circuit could combine and work out a plan for distributing circuit judgeships among the states and present a united front against the President if he failed to recognize the plan, but this

occurs infrequently. In such a context, a Senator from one state objecting to an appointment to the circuit court approved by the Senators of the state from which the appointment is made cannot hope for support from his colleagues in the face of conflicting claims for support. But, as suggested earlier, senatorial courtesy can be invoked effectively by a Senator of the state from which the nominee of the President comes.

What this means in practice is that the President's agents may pick and choose among candidates urged upon them by the Senators of the President's party from all the states in the circuit. More importantly, it gives them more latitude for selecting their own candidates by manipulating the Senators' desire to have the appointment made from their own state, even if they have to give way on the precise choice.⁶⁴ Obviously, it is important to a Senator's political prestige to appear able to obtain a larger share of patronage than others.

Just as in the case of district judgeships, some Senators eschew responsibility for designating and pushing candidates for circuit judgeships, reserving the right to oppose a nominee from their own state who is distasteful to them. But most Senators will strive to have the judgeship go to someone from his state. In this connection, the Senator will endeavor to show why his candidate deserves more consideration, either on the grounds that his state rates the post or that his candidate is superior to others, or both.⁶⁵

In making their selection, the President's assistants quite clearly are limited by: the FBI report, the ABA Committee report, the home state Senators' reactions; and, the political

64. Suppose they have in mind a first-rate man from the state of Missouri for a vacancy in the Court of Appeals for the Eighth Circuit. Suppose also that the Senator from Missouri, of the President's party, has been pushing a candidate which is not acceptable to the President's men. The President's men are in position to say to the Missouri Senator, "we cannot appoint your candidate. If you persist to pushing him, we'll just have to appoint Smith (who is the choice of the Minnesota Senators of the President's party). However, if you can see your way clear to accepting Jones of Missouri (the person they really want), we will be happy to appoint him."

65. The following is a typical presentation made by a Senator in a letter to the Attorney General:

For many years New Jersey has had only one of the seven judgeships in the Court of Appeals for the Third Circuit. Considering all factors including, importantly, the relative volume of the Court's business originating in New Jersey, we feel very strongly that an increase in New Jersey's representation on the Court would be most appropriate assuming, of course, that the right man can be found. Judge Q— is indisputably the right man.

power of the Senators who have manifested a great interest in particular candidacies. None of these factors has a precise value in the equation which adds up to appointment. Rather, each appointment is the result of an interplay of forces which is *sui generis*. However, the fact remains that the President and his assistants, and the forces which pressure them, play a more important role in the selection of circuit judges than of district judges.

3. *The Other Federal Courts*

In appointing judges to the District Court of the District of Columbia, the Court of Appeals for the District of Columbia, the United States Court of Customs and Patent Appeals, the United States Court of Claims and the United States Customs Court, the power of the individual Senator is further diminished in favor of the President. Since the selection for these posts can be made from any state in the union, any one Senator's claim to an appointment is necessarily weak. This does not mean, however, that Senators will not endeavor to press candidacies for these posts. On the contrary, a Senator frequently desires to place less qualified persons to whom a political debt may be owing in those posts. If such parties were to be appointed to the district court in the Senator's state or the court of appeals in the circuit, a poor performance on the judge's part would be a constant reminder of the Senator's poor judgment. Discontent with a particular judge may help contribute to disenchantment with the Senator who urged his appointment among constituents, particularly among lawyers who as a group are articulate and politically powerful. Consequently, the best solution in such cases is for the Senator to secure for his man an appointment to a federal bench outside the state.

When it comes to the District Court and the Appeals Court for the District of Columbia, there is a powerful countervailing force to this unloading process. Because the District of Columbia is the situs of the federal government, a large share of important court actions involving government agencies and officials are brought to those courts. The Executive Department, therefore, will strongly oppose the placement of less qualified persons on the bench of courts which are so important and to which they must bring much of their own considerable legal business.

For the special courts, there is no such countervailing force. There is a tendency for the President's assistants to regard these courts as relatively unimportant. It is not regarded as a great

compromise of principle to oblige a Senator or to meet the President's own political obligations by appointing to those courts persons who would not meet standards they set for district and appeals courts. Note, however, that the number of these posts is limited and Senators, in making claims to them, must compete with all other Senators of the President's party as well as with those individuals who want the posts and who have legitimate claim to special consideration from the President. Senators who hold powerful positions in the Senate formal and informal hierarchies and Senators who have been exceptionally loyal to the President will normally be able to do more to secure the nominations for their candidates. It is unlikely, however, that any one Senator will secure more than one such nomination from any administration.

Again, it is important to emphasize that a Senator of the President's party may effectively forestall the nomination of a person from his own state to a national office if that person is not acceptable to him. That this generalization applies to nominations for the special courts is illustrated by the late Senator Harry F. Byrd's effective opposition to the confirmation of J. Lindsay Almond for a post on the Court of Customs and Patent Appeals.⁶⁶ For this reason, the President's men will normally clear such appointments with the Senators of the state from which their desired appointee comes before making the designation official. In this connection, it is pertinent to recall President Kennedy's answer in a press conference to a question regarding the difficulty in securing confirmation for Almond:

Well, I don't quite understand why the Senate is failing to act. Almond's the distinguished Governor of Virginia. It was my understanding when his name was sent up here there was no objection by the Senators that were involved.⁶⁷

The President's words suggest that no effort was initially made to by-pass Senator Byrd, but rather that the signals were crossed.

CONCLUSION

In conclusion, the time has come to set aside the simplistic explanation that Senators alone determine appointments to the federal bench. For better or worse, the process is much more complicated and, indeed, much more interesting. Any assessment from this quarter of the efficacy of the process, in terms of the quality of the judges appointed, must await completion of a larger study of which this is a part.

66. See N.Y. Times, Oct. 25, 1962, p. 8, col. 4.

67. N.Y. Times, Aug. 23, 1962, p. 14, col. 8.