1968

The Johnson Administration--Judicial Appointments--1963-1966

Harold W. Chase

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I. THE KENNEDY SELECTIONS

When Lyndon B. Johnson became President seven appointments to the federal bench made by President Kennedy were still awaiting confirmation. Since only one of these appointees, Homer Thornberry, had been confirmed by the Senate prior to the assassination, Johnson could have withdrawn the names of the other six and, presumably, could have even refused to formally appoint Thornberry. However, with understandable and admirable loyalty to the late President, President Johnson proceeded with the formalities required to effectuate the Kennedy nominations. Unfortunately for him, two of the seven nominees turned out to be highly controversial.

A. DAVID RABINOVITZ

After President Kennedy had nominated David Rabinovitz of Sheboygan to the federal district bench in Wisconsin, he let it be known that he was for Rabinovitz "all the way." However, neither of Wisconsin's Democratic senators favored the appointment. In addition, the ABA's Standing Committee on Federal Judiciary was vehemently opposed to the appointment and rated Rabinovitz as unqualified for the post. Rabinovitz had been legal counselor for the United Auto Workers in its titanic struggle with the Kohler Company of Wisconsin, and his candidacy
had been strongly urged by Walter Reuther. This led to charges from some quarters that the ABA Committee opposed the nomination because Rabinovitz was a "labor lawyer." The ABA Committee resented these charges and took the highly unusual step of refuting them in its 1964 midyear report.

In view of the opposition of the Wisconsin senators and the ABA Committee, the Senate Judiciary Committee made no move to further confirmation of Rabinovitz in 1963. However, on January 7, 1964, after Congress had recessed, President Johnson dutifully made Rabinovitz a recess appointment. The Wisconsin senators now felt freer to staunchly oppose the nomination, since they could reasonably presume that Johnson did not have the same commitment to it that President Kennedy had felt. As a result, Congress adjourned again, on October 4, 1964, without

5. Since certain statements were made in the press concerning our report to the Senate Judiciary Committee on one individual, it seems advisable to your Committee once again to acquaint the Association with certain of its procedures. It is a fact that the Committee gave no reasons in its original report to the Judiciary Committee for its finding that the individual in question was "not qualified." No inference should be drawn from this.

Suggestions have again been made by some who disagreed with this Committee that our position was affected, consciously or not, by the fact that a prospective nominee belonged to a particular political party and had been active in its political activities, or by the fact that he had been a counsel for labor unions.

We are confident that such accusations are not warranted.

Well over ninety per cent of the persons whom this Committee has found, formally or informally, to be "qualified," or better for judicial office during the past three years have belonged to the same political party as the individual in question, and while this Committee has sought to promote bi-partisan, or nonpartisan, selection of judges, it has never, in considering the qualifications of a specified nominee, considered his political designation as bearing upon that question. There is no exception to this.

The number of individuals considered during this period who have been active on behalf of labor unions is necessarily smaller but, here, too, your Committee has, we think, demonstrated that such an affiliation is not regarded by it as in any way disqualifying or even as a matter to be considered in connection with its findings with regard to a prospective nominee. For example, at substantially the same time when your Committee reported the individual in question to be "not qualified" another person who had been identified with the representation of labor unions for many years during his practice, and had been a union organizer before he became a lawyer, was found by a majority of your Committee to be "qualified." There have been many instances during the past several years where persons who have represented labor unions, or unpopular causes, or minority groups, have been found to be "qualified" or better.

89 A.B.A. REP. 188 (1964).
confirming the appointment. The outcome of the contest over the appointment of Rabinovitz might have been very different had President Kennedy lived. Following this adjournment of Congress, President Johnson allowed the vacancy to go unfilled, giving rise to pressure which Kennedy might have exploited to have his own way.6 Ultimately Johnson succumbed to this pressure, and in May of 1965 he appointed James E. Doyle to the judgeship that Kennedy had hoped would go to Rabinovitz.7

B. GEORGE C. EDWARDS, JR.

When George C. Edwards, Jr. was nominated by President Kennedy in September of 1963 to be a United States Court of Appeals Judge for the Sixth Circuit, he seemed to have a number of things going for him. He was labeled "qualified" by the ABA Committee and had the approval of the two Democratic senators from his state8 (Michigan) plus a warm endorsement from the Republican governor, George Romney.9 In addition, he had held a series of posts which on their face would seem to have afforded him with experience eminently suiting him for a federal judicial post. He had been (a) president of the Detroit City Council, 1946-1950, (b) probate judge in Detroit, Michigan, 1951-1954, (c) judge of Wayne County Circuit Court, 1954-1956, (d) justice of the Michigan Supreme Court, 1956-1962, and (e) police commissioner for the City of Detroit, 1962-1963.10 Despite these impressive credentials, Judge Edwards was subjected to more than perfunctory questioning when he appeared before a subcommittee of the Senate Judiciary Committee as part of the confirmation proceedings. Questions propounded to Judge Edwards by Senators Ervin (D.-N.C.), Dirkson (R.-Ill.), and Hruska

6. After several months the Milwaukee Sentinel editorialized: "The vacancy has gone beyond the point of public tolerance. Because of the continued inability or unwillingness of the Johnson Administration to appoint a judge, the very system of justice in that court is breaking down." David Carley, the Wisconsin Democratic National Committeeman, complained: "When I go around the state I get blistered for not bringing this thing to a head. Things are not only deteriorating from the judicial standpoint but the position of the Democratic party is deteriorating and put in jeopardy by the continued delay." N.Y. Times, March 21, 1965, at 52, col. 3.
7. For an excellent, detailed account of the politics of recent appointments to federal judgeships in Wisconsin, see Landauer, Judgeships and Politics, Wall Street Journal, July 11, 1966, at 18, col. 4.
9. Id. at 47-48.
10. Id. at 9.
(R.-Neb.) manifested concern (1) that Edwards' father had been a Socialist,11 (2) that Edwards had been a member of the American Student Union,12 (3) that Edwards had been a labor organizer,13 (4) that he had been "sentenced to thirty days in prison for a contempt arising out of an alleged violation of an injunction issued in connection with a strike,"14 (5) that he had written "a decision of the Michigan Supreme Court which upset a precedent of eighteen years, and favored the union for which [he] had worked as a paid organizer,"15 and (6) that he was a Deputy Judge of the Administrative Tribunal of the International Labor Organization.16

Representatives of the Tennessee Bar Association17 appeared at the hearings to protest the Edwards nomination, but added little to the concerns already expressed by the Senators. Mr. S. Shephard Tate, the president of that association, stated that it is "the position of the Tennessee Bar Association that the admissions by Commissioner Edwards before this subcommittee of certain past activities would show a disqualification for this high judicial office and would create in the public mind and in the bar a lack of confidence in the courts of the United States."18 Judge Edwards handled himself and the concerns about him very well—patently well enough to allay fears that he lacked judicial temperament—and his nomination was confirmed. But Mr. Tate had revealed that there had been some reservations about the appointment on the ABA Committee.19 At best, Judge Edwards had been granted a "qualified" rating begrudgingly and, however well he had handled himself in the hearings, the now well-publicized fact that he had been a militant unionist would leave lingering doubts in many quarters about Edwards' judicial temperament.

11. Id. at 13–14.
12. Id. at 14.
13. Id. at 15.
14. Id. at 15–18.
15. Id. at 18.
16. Id. at 19.
17. The state of Tennessee is in the Sixth Circuit.
18. Hearings, supra note 8, at 44.
19. ... as I understand it ... from the chairman of the American Bar Association Standing Committee on the Federal Judiciary, Mr. Robert W. Meserve, from Boston, as I recall—I recall that he wrote to me, and I understood that he wrote to this subcommittee to say that it was one of the relatively rare instances in which the committee was not unanimous, but the majority had stated that the nominee was qualified . . . .

Id. at 45.
II. JOHNSON'S 1964 NOMINATIONS

In 1964, the Johnson Administration made eighteen nominations which were in no way legacies of the late President Kennedy. A list of the 1964 nominees and some relevant data about each of them follows on the next two pages.

The Johnson appointments of 1964 had several interesting characteristics. All but one of the appointees, an elevation from a district to a circuit court, were Democrats; they tended to be a little younger than Eisenhower and Kennedy appointees; a relatively high percentage (33%) had attended Ivy League law schools; a relatively high percentage (25%) of the district judges had been United States Attorneys at the time of their nomination; and two of the three special court nominees had come up through the ranks as employees of their special courts. But thunder clouds were forming on the horizon.

By ABA Committee standards, the Johnson Administration had not distinguished itself by its judicial appointments in that first full year. In comparison with the Eisenhower and Kennedy Administrations, the Johnson Administration was low in its percentage of "exceptionally well" and "well qualifieds," and very high in "unqualifieds:"

<table>
<thead>
<tr>
<th></th>
<th>Eisenhower</th>
<th>Kennedy</th>
<th>Johnson (first year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceptionally well</td>
<td>17.1%</td>
<td>16.6%</td>
<td>5.6%</td>
</tr>
<tr>
<td>Qualified</td>
<td>44.6</td>
<td>45.6</td>
<td>22.2</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>32.6</td>
<td>31.5</td>
<td>55.5</td>
</tr>
<tr>
<td>Not Qualified</td>
<td>5.7</td>
<td>6.3</td>
<td>16.7</td>
</tr>
</tbody>
</table>

The ABA Committee was not pleased. In its 1964 report, it lamented:

Last year's annual report started off with the statement that, during the period covered by it, there had been no nomination for lifetime judicial office submitted to the United States Senate of any person who had been previously reported by this Committee to the Attorney General as "not qualified." We are told that "pride goeth before a fall." Any feeling of satisfaction which your Committee may have then had in the practical agreement between its conclusions and those of the appointing authority has surely been lessened by the nominations submitted since last July.20

<table>
<thead>
<tr>
<th>Name</th>
<th>Court</th>
<th>Date Nominated</th>
<th>Status when Nominated</th>
<th>Party</th>
<th>ABA Rating</th>
<th>Age when Nominated</th>
<th>Religion</th>
<th>Law School</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bratton, Howard C.</td>
<td>District New Mexico</td>
<td>3/3/64</td>
<td>Private Practice (Had been Spl. Asst. U.S. Atty. 1951-1952)</td>
<td>D</td>
<td>Q</td>
<td>42</td>
<td>Not Known</td>
<td>Yale</td>
</tr>
<tr>
<td>Suttle, Dorwin W.</td>
<td>District Texas</td>
<td>4/11/64</td>
<td>Private Practice</td>
<td>D</td>
<td>Q</td>
<td>57</td>
<td>Protestant</td>
<td>Texas</td>
</tr>
<tr>
<td>Hemphill, Robert W.</td>
<td>District South Carolina</td>
<td>4/15/64</td>
<td>Private Practice (Had been U.S. Rep.)</td>
<td>D</td>
<td>Q</td>
<td>48</td>
<td>Protestant</td>
<td>South Carolina</td>
</tr>
<tr>
<td>Christie, Sidney L.</td>
<td>District West Virginia</td>
<td>4/15/64</td>
<td>State Judge</td>
<td>D</td>
<td>NQ (Age)</td>
<td>61</td>
<td>Not Known</td>
<td>Cumberland</td>
</tr>
<tr>
<td><em>Freedman, Abraham L.</em></td>
<td>Third USCA</td>
<td>4/15/64</td>
<td>U.S. District Judge</td>
<td>D</td>
<td>EWQ</td>
<td>59</td>
<td>Jewish</td>
<td>Temple</td>
</tr>
<tr>
<td>McNichols, Ray</td>
<td>District Idaho</td>
<td>4/15/64</td>
<td>Private Practice</td>
<td>D</td>
<td>Q</td>
<td>49</td>
<td>Catholic</td>
<td>Idaho</td>
</tr>
<tr>
<td>Simons, Charles E., Jr.</td>
<td>District South Carolina</td>
<td>4/15/64</td>
<td>Private Practice (Had been member of state legislature)</td>
<td>D</td>
<td>Q</td>
<td>47</td>
<td>Protestant</td>
<td>South Carolina</td>
</tr>
<tr>
<td>Gordon, Eugene A.</td>
<td>District North Carolina</td>
<td>4/30/64</td>
<td>Private Practice</td>
<td>D</td>
<td>NQ</td>
<td>46</td>
<td>Protestant</td>
<td>Duke</td>
</tr>
<tr>
<td>Port, Edmund</td>
<td>District New York</td>
<td>4/30/64</td>
<td>Private Practice (Had been a U.S. Atty. 1943-1953)</td>
<td>D</td>
<td>WQ</td>
<td>58</td>
<td>Jewish</td>
<td>Syracuse</td>
</tr>
<tr>
<td>Weber, Gerald J.</td>
<td>District Pennsylvania</td>
<td>4/30/64</td>
<td>Private Practice</td>
<td>D</td>
<td>Q</td>
<td>50</td>
<td>Catholic</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>Ely, Walter</td>
<td>Ninth USCA</td>
<td>6/5/64</td>
<td>Private Practice</td>
<td>D</td>
<td>Q</td>
<td>51</td>
<td>Protestant</td>
<td>Texas</td>
</tr>
<tr>
<td>-----------</td>
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</tr>
<tr>
<td>Cowen, Wilson</td>
<td>Court of Claims</td>
<td>6/16/64</td>
<td>Commissioner Court of Claims</td>
<td>D</td>
<td>WQ</td>
<td>58</td>
<td>Protestant</td>
<td>Texas</td>
</tr>
<tr>
<td>Nichols, Philip Jr.</td>
<td>Customs Court</td>
<td>6/16/64</td>
<td>Commissioner, Customs Court (Had been atty. in Dept. of Justice 1938-1942)</td>
<td>D</td>
<td>None requested</td>
<td>57</td>
<td>Protestant</td>
<td>Harvard</td>
</tr>
<tr>
<td>Anderson, Robert P.</td>
<td>Second USCA</td>
<td>8/4/64</td>
<td>U.S. District Judge</td>
<td>R</td>
<td>WQ</td>
<td>58</td>
<td>Protestant</td>
<td>Yale</td>
</tr>
<tr>
<td>Zampano, Robert C.</td>
<td>District Connecticut</td>
<td>8/4/64</td>
<td>U.S. Attorney Connecticut</td>
<td>D</td>
<td>Q</td>
<td>35</td>
<td>Not Known</td>
<td>Yale</td>
</tr>
<tr>
<td>Whelan, Francis C.</td>
<td>District California</td>
<td>8/17/64</td>
<td>U.S. Attorney California</td>
<td>D</td>
<td>Q</td>
<td>56</td>
<td>Catholic</td>
<td>California</td>
</tr>
<tr>
<td>Muecke, Charles A.</td>
<td>District Arizona</td>
<td>8/17/64</td>
<td>U.S. Attorney Arizona</td>
<td>D</td>
<td>NQ</td>
<td>46</td>
<td>Catholic</td>
<td>Arizona</td>
</tr>
<tr>
<td>Collins, Linton M.</td>
<td>Court of Claims</td>
<td>9/8/64</td>
<td>Private Practice (Had been official in Dept. of Justice 1935-1944)</td>
<td>D</td>
<td>WQ</td>
<td>62</td>
<td>Protestant</td>
<td>Columbia</td>
</tr>
</tbody>
</table>

*Elevation from a U.S. District Judgeship*
III. JOHNSON’S 1965 NOMINATIONS

The thirty-two 1965 Johnson nominations on the whole fared markedly better than the earlier ones in the ABA Committee ratings, but they were still not on a par with the Eisenhower and Kennedy appointments.

ABA Ratings of Johnson 1965 Appointments

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceptionally Well Qualified</td>
<td>9.4%</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>40.6%</td>
</tr>
<tr>
<td>Qualified</td>
<td>43.7%</td>
</tr>
<tr>
<td>Not Qualified</td>
<td>6.3%</td>
</tr>
</tbody>
</table>

A list of Johnson’s 1965 nominees with relevant data on each follows on the next several pages.

Ten of the twenty-three nominated to the district and special courts were men who had served on their respective state benches and four of the nine nominees for Court of Appeals posts were elevations from district benches. The ABA Committee was generally pleased with these choices and gave them generally high ratings.

Ratings of State Judges Nominated to District and Special Courts

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceptionally Well Qualified</td>
<td>2</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>4</td>
</tr>
<tr>
<td>Qualified</td>
<td>2</td>
</tr>
<tr>
<td>Not Qualified</td>
<td>1 (Morrissey)</td>
</tr>
<tr>
<td>No Rating Requested</td>
<td>1</td>
</tr>
</tbody>
</table>

Ratings of Judges Elevated from District Courts

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Well Qualified</td>
<td>2</td>
</tr>
<tr>
<td>Qualified</td>
<td>1</td>
</tr>
<tr>
<td>No Rating Requested</td>
<td>1</td>
</tr>
</tbody>
</table>

Only two of the nominees were United States Attorneys at the time of appointment, although ten had at one time or another served in the Department of Justice.

Normally, such a record in the ABA ratings would have been enough to merit praise in the nation’s press and would have given the administration a good public image with respect to judicial appointments. But the biggest news events concerning judicial appointments in 1965 were the highly controversial nominations of James P. Coleman and Francis X. Morrissey. Whether it deserved it or not, the Johnson Administration’s reputation came out of the fights over those nominations considerably tarnished.
<table>
<thead>
<tr>
<th>Name</th>
<th>Court</th>
<th>Date Nominated</th>
<th>Status when Nominated</th>
<th>Party</th>
<th>ABA Rating</th>
<th>Age when Nominated</th>
<th>Religion</th>
<th>Law School</th>
</tr>
</thead>
<tbody>
<tr>
<td>Langley, O. Edwin</td>
<td>District Oklahoma</td>
<td>1/7/65</td>
<td>U.S. Attorney Oklahoma</td>
<td>D</td>
<td>Q</td>
<td>56</td>
<td>Not Known</td>
<td>Tulsa</td>
</tr>
<tr>
<td>Corcoran, Howard F.</td>
<td>District D.C.</td>
<td>3/1/65</td>
<td>Private Practice (Had been U.S. Atty. in New York 1938-1943)</td>
<td>D</td>
<td>Q</td>
<td>59</td>
<td>Catholic</td>
<td>Harvard</td>
</tr>
<tr>
<td>Leventhal, Harold</td>
<td>D.C. USCA</td>
<td>3/1/65</td>
<td>Private Practice (Had been Asst. Sol. Gen. 1937-1939)</td>
<td>D</td>
<td>Q</td>
<td>50</td>
<td>Jewish</td>
<td>Columbia</td>
</tr>
<tr>
<td>*Tamm, Edward T.</td>
<td>D.C. USCA</td>
<td>3/1/65</td>
<td>U.S. District Judge</td>
<td>D</td>
<td>WQ</td>
<td>58</td>
<td>Catholic</td>
<td>Georgetown</td>
</tr>
<tr>
<td>Young, Don J.</td>
<td>District Ohio</td>
<td>4/5/65</td>
<td>State Judge</td>
<td>D</td>
<td>Q</td>
<td>54</td>
<td>Not Known</td>
<td>Western Reserve</td>
</tr>
<tr>
<td>*Gibson, Floyd R.</td>
<td>Eighth USCA</td>
<td>5/18/65</td>
<td>U.S. District Judge</td>
<td>D</td>
<td>Q</td>
<td>55</td>
<td>Catholic</td>
<td>Missouri</td>
</tr>
<tr>
<td>Hill, Irving</td>
<td>District California</td>
<td>5/18/65</td>
<td>State Judge (Had been a legal O. in D. of J. 1939-1944)</td>
<td>D</td>
<td>WQ</td>
<td>50</td>
<td>Jewish</td>
<td>Harvard</td>
</tr>
<tr>
<td>Nichol, Fred J.</td>
<td>District South Dakota</td>
<td>5/18/65</td>
<td>State Judge (Had been an Asst. U.S. Atty. 1951-1954)</td>
<td>D</td>
<td>Q</td>
<td>53</td>
<td>Not Known</td>
<td>South Dakota</td>
</tr>
<tr>
<td>Name</td>
<td>Court</td>
<td>Date</td>
<td>Status when Nominated</td>
<td>Party</td>
<td>ABA Rating</td>
<td>Age when Nominated</td>
<td>Religion</td>
<td>Law School</td>
</tr>
<tr>
<td>--------------------</td>
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</tr>
<tr>
<td>Coleman, James P.</td>
<td>Fifth USCA</td>
<td>6/22/65</td>
<td>Private Practice</td>
<td>D</td>
<td>WQ</td>
<td>51</td>
<td>Protestant</td>
<td>George Washington</td>
</tr>
<tr>
<td><strong>Thornberry, Homer</strong></td>
<td>Fifth USCA</td>
<td>6/22/65</td>
<td>U.S. District Judge</td>
<td>D</td>
<td>None Requested ***</td>
<td>56</td>
<td>Protestant</td>
<td>Texas</td>
</tr>
<tr>
<td>Gordon, James F.</td>
<td>District Kentucky</td>
<td>6/24/65</td>
<td>Private Practice</td>
<td>D</td>
<td>WQ</td>
<td>47</td>
<td>Not Known</td>
<td>Kentucky</td>
</tr>
<tr>
<td><strong>Bryant, William B.</strong></td>
<td>District D.C.</td>
<td>7/12/65</td>
<td>Private Practice</td>
<td>D</td>
<td>WQ</td>
<td>53</td>
<td>Not Known</td>
<td>Howard</td>
</tr>
<tr>
<td>Gasch, Oliver</td>
<td>District D.C.</td>
<td>7/12/65</td>
<td>Private Practice</td>
<td>R</td>
<td>WQ</td>
<td>59</td>
<td>Protestant</td>
<td>George Washington</td>
</tr>
<tr>
<td>Collinson, William R.</td>
<td>District Missouri</td>
<td>7/14/65</td>
<td>State Judge</td>
<td>D</td>
<td>WQ</td>
<td>52</td>
<td>Protestant</td>
<td>Missouri</td>
</tr>
<tr>
<td>Hunter, Elmo B.</td>
<td>District Missouri</td>
<td>7/14/65</td>
<td>State Judge</td>
<td>D</td>
<td>WQ</td>
<td>49</td>
<td>Protestant</td>
<td>Missouri</td>
</tr>
<tr>
<td>Eubanks, Luther B.</td>
<td>District Oklahoma</td>
<td>7/19/65</td>
<td>State Judge</td>
<td>D</td>
<td>WQ</td>
<td>47</td>
<td>Not Known</td>
<td>Oklahoma</td>
</tr>
<tr>
<td>Maxwell, Robert E.</td>
<td>District West Virginia</td>
<td>7/19/65</td>
<td>U.S. Attorney</td>
<td>D</td>
<td>Q</td>
<td>41</td>
<td>Not Known</td>
<td>West Virginia</td>
</tr>
<tr>
<td>Harris, Oren</td>
<td>District Arkansas</td>
<td>7/26/65</td>
<td>U.S. Congressman</td>
<td>D</td>
<td>Q</td>
<td>61</td>
<td>Protestant</td>
<td>Cumberland</td>
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<tr>
<td>Name</td>
<td>Circuit</td>
<td>Date</td>
<td>Former Occupation</td>
<td>Political Party</td>
<td>Age</td>
<td>Religion</td>
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<tr>
<td>Celebrezze, Anthony J.</td>
<td>Sixth USCA</td>
<td>7/27/65</td>
<td>Secretary Dept. of H.E.W.</td>
<td>D</td>
<td>54</td>
<td>Catholic</td>
<td>Northern Ohio</td>
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<tr>
<td>McEntee, Edward M.</td>
<td>First USCA</td>
<td>8/3/65</td>
<td>Private Practice (Had been Asst. U.S. Atty.)</td>
<td>D</td>
<td>58</td>
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<td>8/20/65</td>
<td>Private Practice</td>
<td>D</td>
<td>60</td>
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<td>District Georgia</td>
<td>8/24/65</td>
<td>State Judge</td>
<td>D</td>
<td>41</td>
<td>Protestant</td>
<td>Georgia</td>
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<tr>
<td>Frankel, Marvin E.</td>
<td>District New York</td>
<td>9/2/65</td>
<td>Professor at Columbia (Had been Asst. Sol. Gen.)</td>
<td>D</td>
<td>45</td>
<td>Jewish</td>
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<td>9/15/65</td>
<td>U.S. Foreign Aid Official (Had been Congressman 1959-1961)</td>
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<td>46</td>
<td>Protestant</td>
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<td>Russell, Dan M.</td>
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<td>9/24/65</td>
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<td>9/28/65</td>
<td>State Judge</td>
<td>D</td>
<td>55</td>
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<td>10/6/65</td>
<td>State Judge</td>
<td>R</td>
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<td>53</td>
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<td>No action by Senate 1965</td>
<td>D</td>
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<td>Not Known</td>
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### 1965 APPOINTMENTS (Continued)

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<th>Name</th>
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<td>10/13/65</td>
<td>Governor of Wisconsin</td>
<td>D</td>
<td>Q</td>
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<td>Thomas, William K.</td>
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<td>10/18/65</td>
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<td>Ohio</td>
<td></td>
<td>No action by Senate 1965</td>
<td></td>
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</table>

- * Elevation
- ** Negro

*** In considering the Thornberry elevation, it was felt that there was no need for another ABA rating, since he had been rated a short time before when nominated for the district bench. The ABA Committee protested vigorously at being by-passed.\(^{21}\) Subsequently, all nominees for elevations have been subject to an ABA rating as in the past two administrations. In its 1965 report, the ABA announced that the Committee would henceforth give ratings to nominees for Customs Court.\(^{22}\)

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A. JAMES P. COLEMAN

When President Johnson nominated Coleman, a former Mississippi governor (1956-1960) for a post on the Court of Appeals for the Fifth Circuit in June of 1965, it was a foregone conclusion that the nomination would create a furor among liberals and in the civil rights movement. Mrs. Victoria Gray of Hattiesburg, one of the leaders of the Mississippi Freedom Democratic Party, raged at a news conference: "Throughout Mr. Coleman's long career, he has held virtually every type of office in the State of Mississippi, all of which have been won only over the rights—and often the bodies—of Negro citizens of that state."23 Representative Don Edwards (D-Cal.), chairman of Americans for Democratic Action, issued a statement:

It is ironic that at the very point that the American Government and people have taken steps to eradicate segregation from this country, the American President should appoint to the court a man committed to frustrating the will of the people and the human rights guaranteed to every man, regardless of race.24

It was true that Coleman was a strong segregationist with a legalistic rather than an emotional approach to separation of the races. He had, as governor, pushed a number of laws intended to rigidly maintain racial segregation in schools and in public accommodations through the Mississippi legislature.25 However, Coleman also led an unsuccessful fight to adopt a new state constitution which did not mention race, supported John F. Kennedy for President in 1960, prevented the White Citizens Councils from receiving tax money, called in the FBI to investigate a lynching in southern Mississippi, and supported former Representative Brooks Hays of Little Rock when he was unseated by a segregationist. He was branded a "Kennedy liberal" by Ross Barnett during his successful gubernatorial campaign in 1961 and was unable to shake that label during his own unsuccessful gubernatorial campaign in 1963.26

In a strategy conceived to counter or at least to put the barrage of criticism in perspective, the Attorney General of the United States took the highly unusual step of testifying in behalf of Coleman at the beginning of Senate Committee hearings on the

24. Id.
25. Id. Senator Wayne Morse (D-Ore.) inserted a full dossier on Coleman's segregationist positions into the Congressional Record. 111 Cong. Rec. 18,235-41 (1965).
Attorney General Katzenbach made no effort to deny that Governor Coleman had supported racial segregation. The burden of his testimony was that Coleman's statements in support of segregation cannot be considered in a vacuum. They must be considered in the context of the society and the times in which they were made. In the second place, there is a full record of other actions taken and other pronouncements made by the same individual.

These other activities give perspective to the picture and alter the surface impression. When the full picture is considered, we see not the caricature of an unyielding white supremacist but a man who was frequently willing to take great political risks to support moderation and respect for law and order when the opposite course would have been the politically expedient one.

The Attorney General's appearance and able advocacy did not allay the stronger critics of the nomination. Among others, Rep. John Conyers (D.-Mich.), Rep. William F. Ryan (D.-N.Y.), Professor Thomas R. Emerson (Yale Law School), Professor Louis Lusky (Columbia Law School), and representatives of leading civil rights organizations appeared before the Committee to vigorously protest the nomination. As they read Coleman's record, the best that could be said for him was that he had been subtle in support of segregation rather than extreme. Throughout the hearings, Senator Javits (R.-N.Y.) and Hart (D.-Mich.), both members of the Judiciary Committee, also demonstrated

27. N.Y. Times, July 13, 1965, at 1, col. 4. This was believed to be the first time in this century that an Attorney General had given public testimony to a congressional committee on behalf of a federal judicial appointee. In 1929, however, Attorney General William D. Mitchell had spoken during an executive session in support of the appointment by President Hoover of Albert L. Watson to a district judgeship in Pennsylvania. In addition, Attorney General Herbert Brownell, Jr. sent a statement which was read to the committee by an assistant in support of President Eisenhower's appointment of Simon E. Sobeloff to the Court of Appeals in the Fourth Circuit. Id.


29. Id. at 17-119.

30. For example, Professor Emerson stated:

No one would suggest the appointment of a person who advocated the use of force and violence in race relations. That is not the problem. The problem is to appoint persons who will seek to evade, delay, obstruct in various ways enforcement of Federal laws as declared by Congress and the Supreme Court. That is exactly the approach to segregation which Governor Coleman's record indicates he has followed in the past.

Id. at 48.
their reservations about the nomination by the questions they asked.

It was Senator Edward M. Kennedy (D.-Mass.) who finally put the crucial question to Mr. Coleman. After informing the Committee that President Kennedy had asked Coleman to be Secretary of the Army in 1961 and after suggesting that the responsibilities of a federal judge are quite different because of civil rights questions, Senator Kennedy asked, "Do you hold any personal beliefs or have any doubts that seriously question this national policy [as indicated in the Brown decision and the Civil Rights Acts]?"31

Mr. Coleman answered:

No, sir, I do not have. I think that the people of Mississippi know that if I go on the Court of Appeals that I am going to do my duty one hundred percent pursuant to the decisions of the Supreme Court which are binding on me and of other judges as well as acts of Congress which has [sic] been sustained by the Supreme Court of the United States. I will have no difficulty whatever in doing that. I wouldn't allow my name to be considered for a judgeship, Senator Kennedy, if I did have any difficulty.32

Evidently, an overwhelming majority of the Judiciary Committee and of the Senate itself did not feel that the case against Coleman was so clear or so impressive as to compel rejection of his nomination. The Committee voted its approval 13 to 2 and the Senate followed suit 76 to 8.33

Liberal elements in the political spectrum were still opposed to the nomination as evidenced by the names of the Senators who voted against confirmation: Case (R.-N.J.), Cooper (R.-Ky.), Douglas (D.-Ill.), Hart (D.-Mich.), Javits (R.-N.Y.), Morse (D.-Ore.), Nelson (D.-Wis.), and Proxmire (D.-Wis.). Three others were paired against the nomination: Hartke (D.-Ind.), Mondale (D.-Minn.), and Neuberger (D.-Ore.).34 Significantly, this roster does not include some names that one would expect to find on a list of Senate liberals. Some, like Clark (D.-Pa.), McNamara (D.-Mich.), and Tydings (D.-Md.), felt compelled to explain their lack of opposition. Senator Robert Kennedy (D.-N.Y.) went on record saying, "We have not often agreed, but Governor Coleman is a man of his word and in my judgment a man of high character."35

31. Id. at 128.
32. Id. at 128-29.
34. Id.
35. 111 Cong. Rec. 18,243 (1965).
Clearly, administration efforts notwithstanding, there were still significant and articulate elements even in the Senate who regarded the nomination as, to say the least, a poor one. The attention given in the press to accounts of criticism of the nomination as well as the coverage of the hearings tended to create an impression that something was amiss in judicial selection. It is reasonable, therefore, to conclude that the administration did not come through this contest unscathed.

B. Francis X. Morrissey

In late September of 1965, President Johnson announced the nomination of Francis X. Morrissey to the District Court of Massachusetts. Official Washington, and indeed aficionados of American politics everywhere, were titillated by the riddle: why did President Johnson nominate a Kennedy-sponsored candidate whom the Kennedys manifestly never dared to nominate when one of them was President and another was Attorney General? Morrissey himself shed some light on the matter by telling friends that shortly before the assassination President Kennedy had promised him the nomination after the 1964 election. Undoubtedly, the Johnson administration would not have selected Morrissey for a judgeship on his own initiative. But when Senator Edward M. Kennedy continually pressed for Morrissey’s nomination, President Johnson was induced to go along with what he perceived to be the late President's wishes in the matter as he had done on his earliest judicial appointments. The nomination was also consistent with his predilection for acceding to senators’ wishes in regard to appointments whenever possible. Little credence was given by most knowledgeable commentators

36. Id.
39. Id.
39a. A Los Angeles Times story stated: President Johnson informed Democratic congressional leaders Wednesday that he will stand behind the controversial nomination of Francis X. Morrissey...

Mr. Johnson reportedly believes ... that the late President made a private commitment to his father [Joseph P. Kennedy] to nominate Morrissey [for the judgeship] after the 1964 election. The President is said to feel that he should move forward with the nomination out of respect for his predecessor and as a special favor to [former] Ambassador Kennedy. Los Angeles Times, Sept. 30, 1965, at 6, col. 4-5.
to the idea that the President hoped to embarrass the Kennedys by the nomination.\textsuperscript{40} After all, Johnson was politically astute enough to know that he himself would not come through unblemished, if the nomination was fiercely contested and/or if the appointment was made, and Morrissey turned out to be a poor federal judge. By the same token, Edward Kennedy was not being enticed unknowingly into sponsoring Morrissey; he, too, was well aware of the pitfalls inherent in the nomination.

The ensuing battle over the nomination demonstrated clearly that Edward Kennedy wanted the nomination for Morrissey with all his heart, whatever the reasons. Morrissey had served the Kennedys, father, John, and Edward, long and well.\textsuperscript{41} Whether out of personal gratitude, respect for his father, sincere admiration and respect for Morrissey, or what is more likely, a combination of all of these elements, Senator Edward Kennedy fought prodigiously for Judge Morrissey's appointment.

Battle lines were quickly drawn. The ABA Committee and important elements of the nation's press expressed their opposition immediately and in no uncertain terms.\textsuperscript{42} The \textit{New York Herald Tribune} called the nomination "nauseous."\textsuperscript{43} In a highly unusual step, Judge Wyzanski of the Federal District Court of Massachusetts—one of the most highly regarded albeit controversial federal judges—wrote to the Senate Judiciary Committee urging disapproval of the nomination on the grounds that Morrissey "has neither the familiarity with the law nor the industry to learn it" necessary to be a good federal judge.\textsuperscript{44} Morrissey was not without supporters, however. For the edification of the Senate Judiciary subcommittee which held the hearings on the nomination, Senator Edward Kennedy was able to produce an impressive array of supporters, including Speaker of the House John W. McCormack (D.-Mass.) and the President of the Massa-

\textsuperscript{40} As \textit{Washington Post} staffer John P. McKenzie put it:
Political and bar figures familiar with the Morrissey-Kennedy relationship also discounted another theory that has been prevalent in Washington—that President Johnson sought to "mousetrap" Edward Kennedy by yielding on an appointment for which the Senator would be criticized. \textit{Washington Post}, Oct. 1, 1965, at A11, col. 2.


\textsuperscript{42} \textit{Washington Post}, Sept. 27, 1965, at 1, col. 3; \textit{id.}, Sept. 29, 1965, at 1, col. 6.

\textsuperscript{43} \textit{Washington Post}, Sept. 29, 1965, at 1, col. 7.

\textsuperscript{44} \textit{Id.}
chusetts Bar Association who testified that his organization endorsed the nomination.  

There apparently were many in and around Boston who saw the ABA Committee-Wyzanski opposition as simply a kind of snobbery because of Morrissey’s humble beginnings and his lack of posh educational credentials. In rebuttal, the ABA Committee rolled out before the subcommittee hearings its three biggest guns, its last three chairmen, Jenner, Meserve, and Segal. Their testimony hit hard at the chinks in Morrissey's armor. They pointed out that he had poor legal credentials by contemporary standards. He acquired a law degree from a school which was unaccredited at the time he attended it; in the course of his work there he had failed four important courses; he had failed his bar examination twice; and he had acquired very little significant legal experience prior to being appointed a municipal judge. The ABA Committee made it abundantly clear that they did not regard this municipal judgeship as being particularly valuable experience for one going on the federal bench.

Despite the lacing Morrissey received at the hands of the ABA Committee’s Big Three, it was not his lack of credentials or his lack of significant legal experience which finally did him in. In 1933, for purposes not altogether clear, Judge Morrissey obtained a law “degree” from a diploma-mill in Georgia and on the basis of that degree was admitted to the bar of Georgia. To gain admission to the bar, Morrissey had claimed that he was

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45. *Hearings on the Nomination of Francis X. Morrissey, supra* note 41, at 31-38.
46. John P. MacKenzie of the *Washington Post* captured the flavor of these feelings when he visited Boston several weeks before the hearings.

The home of “The Last Hurrah” could not care less what the American Bar Association thinks of Francis Joseph Xavier Morrissey.

To a degree, the same opinion holds for the view of Chief Judge Charles E. Wyzanski, Jr. that Morrissey is unqualified to sit in his Federal District Court.

In fact, if there is any strong feeling around the courthouses and Democratic parlors, it is one of wry satisfaction that the organized bar will probably go down swinging this week in its fight to block Morrissey's Senate confirmation. The elevation of Morrissey from the Boston Municipal Court represents to many an “inspiration”, a wonderful success story.

47. *Hearings on the Nomination of Francis X. Morrissey, supra* note 41, at 45-98.
48. *Id.* at 56-66 (testimony of Albert E. Jenner). For Morrissey's version of these events, see *id.* at 98-103.
a resident of Georgia. Mr. Jenner asserted that Morrissey had remained in Georgia only long enough to gain admission to the bar and had then returned to Boston. Although he never explicitly said so, Jenner implied that this action reflected on Morrissey's integrity. Jenner stated to the subcommittee "... it is this course of events that led us to reach the considered judgment that Judge Morrissey is not qualified to serve in this high important office." Later in the hearings, Judge Morrissey asserted that "I honestly and sincerely thought that I could practice law and be successful practicing law in the state of Georgia." When Senator Tydings asked Morrissey how long he had stayed in Georgia, Morrissey replied, "Totally about nine months." When Tydings asked, "How long after you were admitted to the bar?", Morrissey replied, "I would say about six months or a little less than six months."

The fat was now in the fire. Evidence was brought to light that Morrissey was a candidate for a seat in the Massachusetts legislature during the period he claimed to be resident in Georgia. The Justice Department authorized an FBI investigation "to find out what really happened in Georgia." Strangely, the confirmation now seemed to hinge on what should have been a peripheral issue.

Within a matter of several days, Attorney General Katzenbach sent a letter to Senator Eastland (D.-Miss.), Chairman of the Senate Judiciary Committee, stating that the FBI investigation substantiated Morrissey's version of his Georgia activities. Then, with a large number of its members not voting, the Senate

49. Id. at 56–66 (testimony of Albert E. Jenner).
50. Id.
51. Id. at 59.
52. Id. at 101 (testimony of Francis X. Morrissey).
53. Id. at 103.
54. Id.
57. As the Washington Post observed in its news story:
   The issue was not principally whether he utilized a short-cut "diploma mill" route to win his legal spurs—he never used the Georgia credentials as a passport to Massachusetts practice. Rather, it was whether Morrissey, who pleaded loss of memory on crucial points, had been completely open with the Senators who had to pass judgment on his qualifications.
Judiciary Committee voted 6-3 to recommend confirmation.\textsuperscript{59} The Committee action did little to dispel growing Senate uneasiness over the nomination.\textsuperscript{60} A story alleging an association between Morrissey and a deported Mafia figure became the object of wide speculation.\textsuperscript{61} In a dramatic surprise move, Senator Edward Kennedy rose in the Senate on October 21, 1965, to ask that the nomination be sent back to the Judiciary Committee.\textsuperscript{62} With a voice described as "choked with emotion" and "near tears,"\textsuperscript{63} Senator Kennedy lashed out at the critics of the nomination. He asserted that the FBI had backed Morrissey "on every controverted point. . . . No one who knew Frank Morrissey could doubt that he was telling the truth."\textsuperscript{64} He upbraided the ABA Committee for its posture on Morrissey's qualifications:

The ABA was not satisfied with Judge Morrissey's legal education and training—perhaps because he attended a local law school at night, rather than a national law school by day.

I think it is well to point out, however, that good judges are not to be found only in great law schools. And to restrict judicial appointments to the graduates of such schools is to adopt a selection system which is profoundly undemocratic.\textsuperscript{65}

Pulling out all the stops, Senator Kennedy went on:

His father a dockworker, the family living in a home without gas, electricity or heat in the bedrooms; their old shoes held together with wooden pegs their father made. As the child of this family, Frank Morrissey could not afford to study law full time, but had to study at night, . . . snatching what time he could for his family.\textsuperscript{66}

Senator Mansfield (D.-Mont.), the Senate Majority Leader, rose to commend Senator Kennedy and to assert that there were

\begin{center}
\begin{tabular}{lcl}
\textbf{For Confirmation} & \textbf{Against Confirmation} & \textbf{Not Voting} \\
Eastland & Dirkson & McClellan \\
Burdick & Ervin & Long (D.-Mo.) \\
Dodd & Scott & Bayh \\
Hart & & Tydings \\
Kennedy, E. & & Hruska \\
Smathers & & Fong \\
\end{tabular}
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\begin{center}
Wicker, The Morrissey Affair, N.Y. Times, Oct. 22, 1965, at 26, col. 1. \textsuperscript{60}
\end{center}

\begin{center}
Id. \textsuperscript{61}
\end{center}

\begin{center}
111 Cong. Rec. 27,935-36 (1965). \textsuperscript{62}
\end{center}

\begin{center}
\end{center}

\begin{center}
111 Cong. Rec. 27,935-36 (1965). \textsuperscript{64}
\end{center}

\begin{center}
Id. \textsuperscript{65}
\end{center}

\begin{center}
Id. \textsuperscript{66}
\end{center}
votes enough to confirm the nomination. In any case, it is not clear that Senator Kennedy was actually giving up the ghost. He asked only that the nomination be recommitted to the Judiciary Committee. Presumably, the action to recommit would allow time to air the FBI report and to refute or explain the allegation of association with an underworld character and still leave the way open for confirmation. The President had reassured Senator Kennedy before the dramatic Senate action that he himself was very much behind Morrissey's nomination or he would not have submitted it, but that it was a Senate matter, and he would abide by the Senator's judgment. Judge Morrissey, however, had had enough. Within a fortnight, he wrote to the President and asked that his name be removed from further consideration. The President lauded him for his courage and agreed to comply with his wishes in the matter.

Whatever the merits (or lack of them) of attempting to put Judge Morrissey on the federal bench, the carnage of the battle was monumental. John P. MacKenzie assessed the damage accurately in a perceptive post-battle account in the Washington Post:

Senator Edward M. Kennedy (D.-Mass.), Morrissey's sponsor, suffered a variety of injuries. Only by dropping the fight in the showdown Senate session Thursday did he cut his losses in strained relationships and political I.O.U.'s. His allies were grateful and they warmed to his emotional withdrawal speech, but their gratitude was of the it-feels-so-good-when-the-beating-stops variety.

Only the Senator's reputation for political loyalty was enhanced. The affair did nothing to boost his influence at the White House, for he risked injuring President Johnson. His ability to concede defeat showed a new phase of his political maturity, but he did lose. . . . His standing in Boston may actually have improved, but in the last analysis he did dump Morrissey.

Sen. Robert S. [sic] Kennedy (D.-N.Y.), who dispensed more Federal judicial appointments than any Attorney General in history, did no good for his own legal reputation by trying to rescue a nomination he never consummated while at the Justice Department.

President Johnson who nominated Morrissey after John F. Kennedy could not or would not bring himself to do it, was injured in a vital area—pride in the quality of executive appointments. . . .

67. Id. Senator Dirkson later claimed that this was not so. N.Y. Times, Oct. 22, 1965, at 1, col. 8.
68. 111 Cong. Rec. 27,955-36 (1965).
70. N.Y. Times, Nov. 6, 1965, at 1, col. 8.
71. Id.
The American Bar Association is not unscathed in victory. Handicapped by its own mechanical standards for qualifications, the ABA failed to persuade politicians at the nominating and early confirmation stages. It blocked confirmation only by taking off the gloves with the Kennedys, by dredging records and by testimony off limits in paneled law office waiting rooms.

The ABA entered the thicket without hope of victory but with determination to frame an issue for future appointments to the Federal bench. It ended up playing a fierce political game and the victory may have been costly in terms of the prestige and disinterestedness of its judgment on nominees. . . .

In the Senate itself, only the unanimously opposed Republicans and their leader Everett M. Dirkson of Illinois, seem to have emerged free of scratches.

But Senate Democrats will be licking their wounds for a long time. The nomination was exposed to public view just long enough so that Senators could not avoid looking at it. Some of them were revolted, and others who have made lofty statements on the need for a strong judiciary were in an embarrassing predicament.

Perhaps the biggest loser in the whole affair is Attorney General Nicholas deB. Katzenbach, whose summary of the last-minute FBI check into the Georgia incident carried so little weight on Capitol Hill. Instead of rehabilitating the nominee and the defunct Athens, Ga. “law school” Morrissey attended, Katzenbach’s action brought the charges that the FBI had been politically invoked.

Katzenbach, who only a year ago was Bobby Kennedy’s indispensable deputy at Justice, found his name used in ardent support of the nomination. In vouching stoutly for the credibility of the nominee, Katzenbach left a cloud over the investigative process that screens nominees for high office.72

IV. JOHNSON’S 1966 NOMINATIONS

Despite its posture that it was not much impressed with ABA ratings, and its posture with respect to the climactic meeting of the President and the ABA Committee in May of 1966,73 the Administration apparently was concerned about the need to make appointments which would deserve high ratings from the Committee. Understandably stung by the criticism which had been heaped upon it as a result of the Coleman and Morrissey nominations, the Administration had good reason to seek to regain the confidence of the press and public, if not the Committee. In any case, for whatever reasons, the nominations in 1966

73. Some sort of rift had obviously developed between the Administration and the ABA Committee over the Morrissey nomination. The Committee met with the President, but no official announcement of any new understanding was made. Washington Post, May 19, 1966, at A6, col. 5–7.
through May were excellent by ABA Committee standards. Of 12 nominations, 2 (16.7%) were rated exceptionally well qualified, 6 (50%) well qualified, 4 (33.3%) qualified and none unqualified. For all of 1966, the score for 63 nominations was:

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<th>Rating</th>
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<th>Percentage</th>
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<tr>
<td>Exceptionally Well Qualified</td>
<td>9</td>
<td>14.3%</td>
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<tr>
<td>Well Qualified</td>
<td>30</td>
<td>47.6%</td>
</tr>
<tr>
<td>Qualified</td>
<td>23</td>
<td>36.5%</td>
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<tr>
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<td>0</td>
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</tr>
<tr>
<td>No Rating Given</td>
<td>1</td>
<td>1.6%</td>
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The chart following on the next several pages is a tabulation of some significant data on the Johnson nominees of 1966.

The ratings of the Johnson nominations in 1966 made the overall Johnson record with the ABA through 1966 compare more favorably with the records of his immediate predecessors on both the high and low points of the scale:

<table>
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<th>Johnson 1st Year</th>
<th>Johnson Overall through 1966</th>
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<tr>
<td>Exceptionally Well Qualified</td>
<td>17.1%</td>
<td>16.6%</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>44.6%</td>
<td>45.6%</td>
</tr>
<tr>
<td>Qualified</td>
<td>32.6%</td>
<td>31.5%</td>
</tr>
<tr>
<td>Not Qualified</td>
<td>5.7%</td>
<td>6.3%</td>
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</tbody>
</table>

On other significant characteristics, the Johnson appointments were not markedly different from those of his immediate predecessors:

<table>
<thead>
<tr>
<th></th>
<th>Number of Appeals Court Appointments</th>
<th>Number Who Had Been Federal District Judges</th>
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</thead>
<tbody>
<tr>
<td>Eisenhower</td>
<td>45</td>
<td>17</td>
</tr>
<tr>
<td>Kennedy</td>
<td>21</td>
<td>8</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>28</td>
<td>14</td>
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<table>
<thead>
<tr>
<th></th>
<th>Number of Appeals Court Appointments</th>
<th>Number with Judicial Experience at Fed. or St. Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eisenhower</td>
<td>45</td>
<td>28</td>
</tr>
<tr>
<td>Kennedy</td>
<td>21</td>
<td>11</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>28</td>
<td>16</td>
</tr>
</tbody>
</table>

It is significant that three of the appeals courts appointees who did not have previous judicial experience were men of considerable stature. The controversial James P. Coleman, after all, had been the Governor of Mississippi (rated WQ by the ABA Committee). Anthony J. Celebrezze had been Secretary of Health, Education and Welfare (rated Q), and Frank M. Coffin at forty-
### 1966 APPOINTMENTS

<table>
<thead>
<tr>
<th>Name</th>
<th>Court</th>
<th>Date Nominated</th>
<th>Status when Nominated</th>
<th>Party</th>
<th>ABA Rating</th>
<th>Age when Nominated</th>
<th>Religion</th>
<th>Law School</th>
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<tbody>
<tr>
<td>*Feinberg, Wilfred</td>
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<td>1/19/66</td>
<td>U.S. District Judge</td>
<td>D</td>
<td>WQ</td>
<td>45</td>
<td>Jewish</td>
<td>Columbia</td>
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<tr>
<td>Lynch, William J.</td>
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<td>1/19/66</td>
<td>Private Practice</td>
<td>D</td>
<td>WQ</td>
<td>57</td>
<td>Catholic</td>
<td>Loyola</td>
</tr>
<tr>
<td>Thomas, William K.</td>
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<td>State Judge</td>
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<td>Ohio State</td>
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<td>Customs Court</td>
<td>1/19/66</td>
<td>Judge, Civil Court of N.Y.C.</td>
<td>D</td>
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<td>43</td>
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<td>Motley, Constance B.</td>
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<td>1/28/66</td>
<td>Pres. Borough of Manhattan Ass't Counsel NAACP</td>
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<td>Q</td>
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<td>Minnesota</td>
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<td>Previous Role</td>
<td>Party</td>
<td>State</td>
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<td>Law School</td>
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<td>D</td>
<td>WQ</td>
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<td>Harvard</td>
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<tr>
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<td>6/15/66</td>
<td>State Judge (Had been Asst. U.S. Atty.)</td>
<td>D</td>
<td>Q</td>
<td>53</td>
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<td>State Judge (Had been Asst. U.S. Atty.)</td>
<td>D</td>
<td>Q</td>
<td>53</td>
<td>Not Known</td>
<td>Cincinnati</td>
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<td>6/15/66</td>
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<td>WQ</td>
<td>53</td>
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<tr>
<td>Pittman, T. Virgil</td>
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<td>6/15/66</td>
<td>State Judge</td>
<td>D</td>
<td>WQ</td>
<td>50</td>
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<td>Loyola</td>
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<td>EWQ</td>
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<td>Univ. of Miami</td>
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### 1966 APPOINTMENTS (Continued)

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<th>Religion</th>
<th>Law School</th>
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<td>Texas</td>
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<td>WQ</td>
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<td>State Judge</td>
<td>D</td>
<td>WQ</td>
<td>60</td>
<td>Catholic Chicago</td>
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<tr>
<td>Skelton, Byron G.</td>
<td>Court of Claims</td>
<td>8/17/66</td>
<td>Private Practice</td>
<td>D</td>
<td>WQ</td>
<td>60</td>
<td>Protestant Texas</td>
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<tr>
<td>Wise, Henry S.</td>
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<tr>
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<td>9/9/66</td>
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<td>WQ</td>
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<td>9/9/66</td>
<td>Private Practice</td>
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<td>Q</td>
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<td>Private Practice</td>
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<td>WQ</td>
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<td>Peckham, Robert F.</td>
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<td>9/9/66</td>
<td>State Judge</td>
<td>D</td>
<td>Q</td>
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<td>von der Heydt, James A.</td>
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<td>9/9/66</td>
<td>State Judge</td>
<td>D</td>
<td>Q</td>
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<td>McRae, Robert M.</td>
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<td>9/22/66</td>
<td>State Judge</td>
<td>D</td>
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<td>Date Nominated</td>
<td>Status when Nominated</td>
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<td>Age when Nominated</td>
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<td>Private Practice</td>
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<td>WQ</td>
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<td>State Judge</td>
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<td>Q</td>
<td>57</td>
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<td>Q</td>
<td>52</td>
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<td>10/6/66</td>
<td>Customs Court Judge</td>
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<td>Q</td>
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<td>Harvard</td>
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<td>Private Practice (Formerly Congressman 1949-51)</td>
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<td>Q</td>
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<td>D.C. Judge</td>
<td>R</td>
<td>WQ</td>
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<td>Georgetown</td>
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<td>State Judge</td>
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<td>Tulane</td>
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<tr>
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<td>Date</td>
<td>Position</td>
<td>Party</td>
<td>Race</td>
<td>Age</td>
<td>Religion</td>
<td>State</td>
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<td>Russell, Donald S.</td>
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<td>10/11/66</td>
<td>U.S. Senator</td>
<td>D</td>
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<td>D</td>
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<td>62</td>
<td>Protestant</td>
<td>Valparaiso</td>
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| Simpson,  
Bryan       | Fifth USCA | 10/11/66 | U.S. District Judge | D     |      | 63  | Protestant | Florida        |
| Robinson, Aubrey E. | District D.C. | 11/16/66 | D.C. Judge        | D     |      | 44  | Protestant | Cornell        |

* Elevation
** Negro
six had been a well-regarded Congressman and a high-ranking U.S. Foreign Aid official (rated EWQ).

Thirty-four per cent of Johnson's district court appointees had previous judicial experience as against 26 per cent of Eisenhower's and 33 per cent of Kennedy's. The Johnson judges included only 5 per cent from the opposing party as compared to 5 per cent for Eisenhower and 8 per cent for Kennedy. The Johnson Administration showed a small margin of overall partiality for younger appointees than its predecessors:

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<th>Circuit Court Judges</th>
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<td>60 and over</td>
<td>50-59 40-49 30-39</td>
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<tr>
<td>Eisenhower</td>
<td>10% 56% 31% 3%</td>
<td>10% 64% 22% 4%</td>
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<tr>
<td>Kennedy</td>
<td>8 54 34 4</td>
<td>8 62 30</td>
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<tr>
<td>Johnson (through 1966)</td>
<td>11 44 44 1</td>
<td>7 61 29 3</td>
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<th>Circuit Court Judges</th>
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<td></td>
<td>Mean  Average</td>
<td>Mean Average</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>53 51</td>
<td>54 53</td>
</tr>
<tr>
<td>Kennedy</td>
<td>52 52</td>
<td>53 52</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>51 51</td>
<td>52 52</td>
</tr>
</tbody>
</table>

A larger percentage of the Johnson appointees identified themselves as Catholics or Jews than did the Eisenhower and Kennedy appointees:

<table>
<thead>
<tr>
<th></th>
<th>Catholics</th>
<th>Jews</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eisenhower</td>
<td>13%</td>
<td>7%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>15%</td>
<td>8%</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>23%</td>
<td>8%</td>
</tr>
</tbody>
</table>

The Johnson Administration also showed some partiality toward graduates of Ivy League Law Schools:

<table>
<thead>
<tr>
<th></th>
<th>District Judges</th>
<th>Appeals Court Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eisenhower</td>
<td>21%</td>
<td>29%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>18%</td>
<td>19%</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>24%</td>
<td>32%</td>
</tr>
</tbody>
</table>

Twelve per cent of the Johnson appointments were made from the ranks of U.S. Attorneys as compared to 7 per cent in the Eisenhower Administration and less than 3 per cent in the Kennedy Administration.

For whatever it is worth, which admittedly may not be very much, another piece of interesting data is offered.
Percentage of Appointments in Who's Who the Year Before Appointment

<table>
<thead>
<tr>
<th>President</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eisenhower</td>
<td>35%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>27%</td>
</tr>
<tr>
<td>Johnson (through 1966)</td>
<td>45%</td>
</tr>
</tbody>
</table>

V. THE LBJ BRAND ON JUDICIAL SELECTION

Understandably, at the beginning of his term, President Johnson was too preoccupied with other matters to give much attention to judicial selection. The team at the Department of Justice remained the same, and they continued to conduct their judicial selection business as they had done while President Kennedy was alive. There were, however, some signs of restiveness on the part of the White House Staff. Joseph Dolan was asked to meet with White House staffers Walter Jenkins, Ralph Dungan, and Jack Valenti. Dolan outlined the procedures in use for the selection of nominees to the bench, and it was agreed that business should go on as usual. At that time Walter Jenkins, the President’s key aid, assured me as he had Dolan that no changes in procedure were contemplated. There seemed to me, nonetheless, a greater effort on the part of Dolan to keep White House staffers informed in an informal way of significant developments leading up to the Departmental recommendations of nominees. It is significant, too, that of the three White House Staffers with whom Dolan dealt, only Dungan was a carry-over from the Kennedy Administration. Jenkins and Valenti were brought to the White House by Johnson.

It was not long before President Johnson began to put his individual mark on the appointment process. Robert Kennedy resigned from his post as Attorney General in early September of 1964 to embark on his quest for a seat in the Senate. Joseph Dolan followed soon after to become the victorious Robert Kennedy’s Administrative Assistant. In the meantime, John Macy, Chairman of the Civil Service Commission was brought over to the White House to serve also as a personnel advisor to the President. His role was “to pull all appointment matters together.”

At first, Dungan continued to function with respect to non-judicial appointments, but he was destined to leave soon to be-

74. Dolan was the Deputy Assistant Attorney General who had the responsibility of investigating potential judicial appointees.
75. N.Y. Times, Sept. 4, 1964, at 1, col. 2.
come ambassador to Chile.\textsuperscript{78}

Giving a White House staffer, John Macy, a role in judicial selection was a marked departure from the method of operation which prevailed during the Kennedy Administration, when the White House staff members were reluctant to insert themselves between the brothers Kennedy. Needless to say, circumstances had changed markedly. From the time of Robert Kennedy's resignation in September 1964 to the middle of February 1965, Nicholas Katzenbach was Acting Attorney General. Katzenbach was closely identified as a Robert Kennedy man. Political alignments and enmities being what they were, there was good reason for the President to desire to protect his own political interests by having a member of his staff active in judicial selection. A case can, of course, also be made for the logic and wisdom of having one man in the White House Office review all high-level appointments, since some who have been considered for federal judgeships might also be fit for other important posts and vice versa. At any rate this was the President's reason, in Macy's view, for giving him this role. President Johnson's special feelings for John Macy began when Johnson, as Vice President, was serving as chairman of the Committee on Equal Opportunity in Federal Hiring. Macy gave him a great deal of help at a time when Johnson felt slighted by other members of the Kennedy Administration.\textsuperscript{79} In any event, for whatever reasons, John Macy was given a role to play in judicial selection, and he has continued to play that role to this day.

After patently lengthy deliberation, the President appointed Katzenbach as the Attorney General. Three things were noteworthy about the appointment. First, was the time it took to make it. Second, was the President's announcement of it.\textsuperscript{80} Third, was his appointment, at the same time he appointed Katzenbach Attorney General, of Ramsey Clark, about whose

\textsuperscript{78} N.Y. Times, Jan. 16, 1965, at 10, col. 1.
\textsuperscript{79} N.Y. Times, June 28, 1965, at 21, col. 3.
\textsuperscript{80} Mr. Johnson said he ... called Mr. Katzenbach in and asked him what he would like to do with his future. The President revealed that he had asked Mr. Katzenbach if he would like a "high judicial appointment" or another important job in the Government, outside the Cabinet. He said that Mr. Katzenbach had indicated a desire to stay in the executive branch.

The President, without saying so flatly, left the impression that he had only been testing Mr. Katzenbach. He said that a few days later he told him he would like him to be the President's lawyer.

political loyalties he could be surer, as the Deputy Attorney General.

According to Macy, the bulk of the work and negotiation with Senators is still done at the Justice Department. Macy works with them on an informal and telephonic basis. As Justice formulates a choice, Macy checks it out, both on the basis of objective credentials and through his own network of contacts. Macy's office has developed a host of confidential and respected contacts throughout the country. In considering a nomination, Macy's office, as a matter of routine, checks out the candidates with its own sources. These are people whom Macy, in a long and distinguished government career, has come to know personally and whose judgments as to personnel he has come to trust. The President himself takes an unusual personal as well as official interest in every high-level appointment. A former staffer attributes the President's personal interest to three factors. First, the President by nature is people-oriented, i.e., he thinks in terms of people rather than in terms of things. He has an inordinate range of acquaintanceships, and he knows personally or knows about a larger percentage of the people considered for high office than any previous president. Second, because of his humble origins, the President, more than most presidents, has a feeling that high posts in government, aside from their importance, are exceptionally good jobs and, therefore, should go to only the most deserving and meritorious contenders. Because of his interest in people and his view that these high posts are choice prizes, he is personally curious as to who is being considered. Third, the President's penchant and zeal for consulting with everyone who might be able to add something to a presidential decision or who should be consulted for one reason or another means that the President frequently requests that Macy consult with named individuals.

Since checking and consulting with people tends to create reciprocal expectations, it is not surprising that Macy's office receives a great deal of gratuitous advice from the people he consults about people who should be considered when a vacancy occurs. Such suggestions are passed on to Justice for investigation.

In contrast to his recent predecessors, President Johnson has indicated to his team that he wants greater deference to senatorial prerogative in judicial selection. Whereas Joseph

Dolan in the Kennedy Administration and William Rogers in the Eisenhower Administration sought “to take as much ground” as they could for the President in jockeying with Senators over judicial selection, Ernest C. Friesen, who replaced Dolan, explained that his orders were to go along with the Senators of the President’s party unless the Senators urged unacceptable appointments. It is not difficult to reconstruct reasons for President Johnson’s predilection for deference to Senators. Johnson, both as a Senator and as Senate Majority Leader insisted on his senatorial prerogatives because he believed in them. Further, perhaps, more than any other president in our history, he is closely attuned to the political process in which senatorial prerogative plays a crucial part. This deference manifests itself in one very significant way. President Johnson has been most reluctant to use the recess appointment as a means of forcing Administration choices for judgeships on reluctant Senators.\(^8\) Whereas 14 per cent of Eisenhower’s appointments were first recess appointments and 22 per cent of Kennedy’s appointments were first recess appointments, not one of the purely Johnson appointments in his first two years of office were recess appointments. When the Senate did not act on three appointments in 1965, LBJ waited until the next year to offer their names to the Senate again rather than make recess appointments. Surprisingly, whereas Presidents Eisenhower and Kennedy employed delay as a tactic for pressing for their Administration choices by taking seven months or longer to fill a vacancy in 26 per cent and 18 per cent of the nominations respectively, of the first 81 appointments in the Johnson Administration 26 or 32 per cent were appointments to vacancies which had been open for seven months or more. This can be partly explained by the fact that it took the "new" team a while to get its bearings. While the incidence of delayed appointments has diminished the longer the Johnson Administration has been in power, it has not done so significantly when compared with the Eisenhower and Kennedy Administrations.

VI. CONCLUSIONS—THE HYPOTHESIS SUGGESTED BY THE DATA

What emerges from this account of the Johnson Administration’s selection of federal judges and the comparisons of the characteristics of its selections with those of the Eisenhower and Kennedy Administrations suggests that the dynamics of

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82. *Id.* at 217.
judicial selection are such that administrations which are basically concerned with making appointments of high quality, will choose the same kinds of people for the same kinds of reasons whatever goals and standards they articulate and whatever procedures they employ.