THE WHITE HOUSE

WASHINGTON

July 21, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.
JAY B. STEPHENS
C. CHRISTOPHER COX
PATRICIA M. BRYAN
BENEDICT COHEN

FROM: PETER D. KEISLER PDK

SUBJECT: The Firing of Archibald Cox

Attached for your information is a summary and chronology of the events surrounding the "Saturday Night Massacre," which was prepared by the Department of Justice last week.

Attachment

U.S. Department of Justice
Office of the Attorney General

16 July 1987

NOTE FOR Mike Carvin
Steve Markman

FR: David McIntosh

Attached is a brief narrative of the events surrounding the "Saturday Night Massacre" which can be released for public consumption.

Also attached is a detailed chronology with citations and references to conflicting accounts which should be held for internal use in preparing for the hearings.

cc: Brad Reynolds

ROBERT BORK'S ROLE IN THE "SATURDAY NIGHT MASSACRE"

On Saturday, October 20, 1973 Robert Bork was thrust into the center of the Watergate affair when he acted upon President Nixon's order to fire Special Prosecutor Archibald Cox. The task fell to Solicitor General Bork when Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus refused to fire Cox and resigned.

As the only remaining official in the line of succession who could serve as Acting Attorney General, Bork determined that it was necessary to carry out the President's command in order to preserve institutional integrity of the Justice Department. He convinced top officials that they should not resign and immediately took steps to insure that the Special Prosecution task force would remain intact and independent. Following the Saturday Night Massacre, Bork convinced President Nixon that he must appoint Leon Jaworski as the second Special Prosecutor with full guarantees of independence.

The Decision to Fire Cox

Bork had not taken part in the drawn out negotiations with Cox over whether President Nixon would turn over all of his White House tapes. Prior to Saturday evening, Bork had only been tangentially involved in giving advice the Elliot Richardson on the jurisdiction of the Special Prosecutor. When the negotiations fell through, and Cox held a press conference to announce he would challenge the President in court to obtain the tapes, Richardson called Ruckelshaus and Bork into his office to discuss what could be done.

Everyone seemed to agree that since there was no statutory restriction the President had the power to dismiss Archibald Cox as an executive employee. Richardson told Ruckelshaus and Bork that he could not carry out the order to fire Cox because he had made a promise to the Senate at his confirmation hearing that the Special Prosecutor would be independent. At that point, Bork realized that he may be called upon to fire Cox. When Ruckelshaus said that he, too, felt bound by the commitment to the Special Prosecutor, Bork weighed the alternatives. Richardson made it clear that the President was going to insist that Cox be fired one way or another. If Bork did not carry out the order, there would be no one left in the line of authority and the Department would be decimated as the White House sought an official to carry out the President's order. Because he had been appointed before Richardson, Bork was not bound by the same commitment to Cox.

Sense of Duty to Justice Department Leads Bork to Fire Cox

Bork suggested that he could fire Cox and then resign himself to show that he was not an "apparatchik" who acted merely to save

his own job. Both Richardson and Ruckelshaus told Bork he should not resign because his presence was needed to preserve the Department of Justice. They assured Bork they would publicly back his decision to stay.

Richardson met with the President who told him that the Middle East was about to erupt into another conflict and that the Soviet Union was taking advantage of Nixon's perceived weakeness to threaten U.S. activists. President Nixon suggested that Richardson should fire Cox in order to demonstrate to the Soviets that Nixon was in charge and resign in a week when the Middle East situation had cooled down. Richardson stated that he would not fire Cox and told the President he would resign immediately. Chief of Staff Alexander Haig then called Ruckelshaus who also refused to follow the order.

Bork agreed to come to the White House where he signed the letter drafted by White House Counsel dismissing the Special Prosecutor. Final papers terminating the Special Prosecutor's charter were drawn up on Tuesday after the holiday weekend. Al Haig had the letter delivered to Archibald Cox and ordered the FBI to seal the Special Prosecutor's offices. Bork spoke briefly with Richard Nixon who asked him if he wanted to be Attorney General. Bork declined indicating it would be inappropriate.

Ensuring That the Watergate Prosecution Continues

When Bork returned to the Justice Department, Richardson and Ruckelshaus urged him to stay on as Acting Attorney General. Bork indicated he would and immediately called Criminal Division Assistant Attorney General Henry Petersen and other top Department officials to urge them to stay. Petersen agreed to remain and was put in charge of the investigation. Haig had requested that the top lawyers in the Special Prosecution task force also be fired, which Bork refused to do. Instead, he called Cox's Deputy, Philip Lacovara, to assure him that the task force employees would continue the investigation as Justice Department employees.

The next day Bork held a meeting with Henry Petersen, Philip Lacovara and Henry Ruth, another Deputy to Archibald Cox, to discuss the status of the Watergate prosecution. Ruth and Lacovara reported that in two to four weeks they would complete some investigations, but that others would take more time and would require more evidence from the White House. Bork assured Lacovara and Ruth that they would have complete independence in continuing the investigation, including the right to go to court to obtain whatever evidence they needed.

Bork Selects Leon Jaworksi As Special Prosecutor

During the next three weeks, Bork convinced President Nixon that another Special Prosecutor had to be appointed. He began an extensive search for the right person -- someone who had

experience in prosecuting criminal actions and was well known in the legal community. Ultimately, Bork convinced President Nixon to accept his selection -- Leon Jaworski. Nixon agreed that he would not dismiss Leon Jaworski or diminish his jurisdiction, even in extreme circumstances, without first obtaining a consensus from the "group of eight," consisting of the Senate and House Majority and Minority leaders and the Chairmen and ranking minority member of the Senate and House Judiciary Committees. At Bork's insistence, Leon Jaworski was granted the same charter as Archibald Cox with the additional Presidential guarantees.

The rescission of the regulations granting Cox independent prosecution authority was challenged by Ralph Nader in the D.C. District Court. Judge Gesell entered an order declaring the rescission to be illegal, because the grant of independence implied a requirement that Cox consent to any rescission. Ralph Nadar was dismissed as a plaintiff and no relief was granted the other plaintiffs because they had no standing. Some question was raised about the timing of the dismissal (Saturday) and the subsequent rescission (Tuesday). However, Bork's action in firing Cox automatically amended the Justice Department regulations creating his office.

Although at the time Bork bore the brunt of criticism for the "Saturday Night Massacre," commentators have since credited him for saving the Justice Department through his strong leadership in time of crisis. He was able to carry out the President's order to fire Cox, and thereby maintain the Justice Department's integrity, while at the same time he preserved the Watergate investigation and protected the prosecutors from political pressure, thereby ensuring that justice was served.

Chronology

Saturday, 20 October 1973

- Until late Saturday afternoon, Bork had not been involved with the Special Prosecutor at all, expect for informal discussions on jurisdictional problems of the Special Prosecutor (2 or 3 with Richardson and perhaps 2 with Cox and his staff). Bork did not know the details of the Special Prosecutor's jurisdiction and did not participate in the negotiations to turn over the tapes. [Bork Press Conf]

- On Saturday afternoon: Bork goes "down the hall" to watch the press conference at which Cox indicates he will seek all of the Nixon tapes. [Bork Press Conf]

- Richardson's Secretary stopped by Bork's office to tells him Richardson wishes to speak with him -- Bork assumes the request was related to Special Prosecutor Cox, but has "no idea what my involvement was going to be."

- Richardson calls Bork into his office for first time and "filled me in on what was taking place." At that time matters remain "fairly fluid." Ruckelshaus and some Richardson aides are in the office. [Bork Press Conf]

- Richardson, Ruckelshaus and Bork discuss pressure from White House to fire Cox and a variety of possible reactions. Richardson concludes he cannot do it because of commitments made during his Senate confirmation hearings [Bork Press Conf]

- Richardson asks Ruckelshaus "Can you fire him, Bill?" [1984 Post interview] Ruckelshaus thinks for a minute and says "no." [Bork Press Conf]

- Bork first realizes he may be called upon to fire Cox when Richardson asks Ruckelshaus to do so. [1984 Post interview] [Bork Press Conf]

- Richardson then asks Bork "Can you fire him, Bob?" [1984 Post interview]

- After thinking for a moment, Bork decides he is not in same "special position" which Richardson and Ruckelshaus find themselves and tells Richardson he could discharge Cox, but that he should resign afterwards to avoid the perception that he followed the order to save his job.[Bork Press Conf]

  ** Bork responds "Wait a minute, let me think" and walks around Richardson's office while the others continue

discussing other matters. Bork considers the fact that there is no one else in the line of authority. Then he concludes he would fire Cox and resign to avoid looking like an "apparatchik." [1984 Post interview]

- o Richardson responds "No, you've got to stay. The department needs continuity." [1984 Post interview] Ruckelshaus also urges Bork to stay. [Bork Press Conf] and says that if he stuck by his post "Elliot and I will say publicly that we urged you to stay." [Doyle]

- o No final decision is made then -- and discussions continues throughout the afternoon. [1984 Post interview]

- o Richardson goes over to the White House. [1984 Post interview]

- o Richardson meets with Alexander Haig, Len Garment, Charles Allan Wright, and Fred Buzhardt. Haig asks him to fire Cox. Richardson then meets with Nixon and Haig and offers his resignation. Nixon asks him to fire Cox now and wait a week to resign because of recent conflict in the Middle East and threats from the USSR. Richardson refuses. [Doyle]

- o Ruckelshaus and Bork discuss differences in their respective moral positions regarding the discharge of Cox during the afternoon. [1984 Post interview]

  - oo Ruckelshaus had determined earlier in the week he would resign because he felt he was under a commitment to the Senate and he felt it was the morally correct action. [Doyle]

  - oo Bork and Ruckelshaus agree Bork is in a different moral position. Bork remembers thinking, can I survive this professionally? He contemplates the "murder-suicide" of firing Cox and resigning. [Doyle]

- o Haig calls Ruckelshaus to order him to fire Cox and states that Ruckelshaus should wait a week until the Middle East cools down to resign. Ruckelshaus refuses. [Doyle] At the end of the call, Bork gets onto the phone and Haig asks him to come to the White House [Bork Senate Testimony on Special Prosecutor Bill]

- o Richardson returns from the White House and says to Bork "You've got to do it, carry it off."[1984 Post interview] "Somebody has got to do it. He is going to be fired. You've got the nerve and the brains." [Doyle]

  - * Bork testified in the hearing on the Special Prosecutor legislation that Richardson and Ruckelshaus neither urged him to fire Cox nor did the urge him not to do so. They realized the moral choice was Bork's. [Bork Senate Testimony '73]

- Bork decides to fire Cox and calls his wife to tell her what he has to do. [1984 Post interview]

- Bork rides in a White House car with Garment and Buzhardt. [Doyle] Upon arrival, Haig begins to persuade Bork that he needs to fire Cox to preserve the President's ability to control the executive branch. Bork indicates to Haig that he has already decided to fire Cox but has not decided whether he will resign. [Bork Senate Testimony '73]

    - Note: At the subsequent hearings, Sen. Bayh questioned Bork whether Haig told Bork that he was at the top of the list for the Supreme Court as an inducement to fire Cox. Bork testified that Haig did not discuss the Supreme Court at that time, and that it would have been inappropriate to do so. [Bork Senate Testimony '73]

    - Bork testified that he recalled that when he first became Solicitor General Haig had mentioned the Supreme Court position. Bork did not indicate that it was in connection with Watergate in any way.

        * (Early in Watergate) Haig asked Bork to be Nixon's chief Watergate lawyer--hinting a Supreme Court appointment would be the reward. Bork asked to hear the tapes, and declined when he was not permitted to do so. [Doyle]

- Bork signs the letter discharging Cox [1984 Post interview] pursuant to letter from Nixon ordering him to do so and instructing Bork to bring Watergate investigations back into the Department of Justice [NYT 21 Oct -- reprint of Nixon, Bork letters]

    - Bork later testified that he was not anxious to fire Cox because: (1) because Bork liked Cox personally, (2) Bork anticipated the furor and abuse that would follow, and (3) Bork did not want to be perceived as doing what others refused to do in order to save his job. [Bork Senate Testimony '73]

- Bork is taken to see President Nixon, who thanks him for executing his order and asks Bork whether he would ever like to be Attorney General. Bork responds--no, that would be inappropriate. [Doyle]

- Haig indicates that there were reports that documents were leaving the Special Prosecutor's office. With Bork's concurrence, Haig calls Director Kelly and orders that the Special Prosecutor's offices be sealed by FBI agents. [Bork Senate Testimony '73]

- Bork returns to Justice where Richardson and Ruckelshaus urge him to stay as acting Attorney General to preserve continuity at the Department and to prevent massive resignations. [Bork Senate Testimony '73 on Special Prosecutor Bill] Bork's next act is to call Henry Petersen and ask him to stay on as AAG Criminal Division. [Bork Press Conf]

- Haig directs Bork to fire Richard Ben-Veniste, Philip Lacovara, and Henry Ruth. Bork refuses this order on the ground that it would be an overt subversion of justice by causing an unreasonable delay in the Watergate investigation. [Newsweek, Periscope, 29 Sep 75]

- Bork calls to Philip Lacovara and says that for the time being all employees of the Special Prosecutor task force will be carried as Department of Justice employees. [Doyle]

Sunday, 21 October 1973

- o Bork telephones Cox to ask him to come into the Department and brief them. Cox refuses and tells Bork that Hank Ruth can tell Bork everything he needs to know. [Doyle]

- o Bork removes FBI agents from Special Prosecutor's office and replaces them with DOJ security personnel (as previously arranged). FBI agents are also removed from Richardson's and Ruckelshaus' offices. [Bork Senate Testimony '73]

- o Bork meets with Henry Ruth, Philip Lacovara and Henry Petersen in his office to discuss how far along the Special Prosecutor's task force is. [Bork Senate Testimony] Ruth and Lacovara indicate that some matters are within 2 to 4 weeks of completion, but others are a long way off. They indicate that with respect to each transaction they plan to seek all the indictments at once. [Bork Senate Testimony]

- o Bork indicates that he wants the Watergate Special Prosecution unit to continue doing precisely what it has been doing under Cox and that they would have their independence. He tells Lacovara and Ruth that it will guard their independence, including their right to go to court to get evidence. [Bork Conf. Hearing 1982] "I hope you guys have strong cases. If you lose them I'm going to be accused of bagging them." [Doyle]

    - * Lacovara and Ruth indicate that White House interference make it impossible to maintain an appearance of impartial investigation, that the Special Prosecutor's Office needs more evidence from the White House, and that Petersen would have the appearance of a conflict because he will likely be a witness in the Watergate cases against the Justice Department and White House officials. [Doyle]

    - * The meeting ends shortly after an emotional argument between Lacovara and Petersen, in which Petersen tells Lacovara that if they press charges against reputable, former Justice officials they had better have iron-clad cases. [Doyle]

    - * NOTE: Doyle places this meeting on Monday, 22 October.

Tuesday, 23 October 1973

- Elliot Richardson conducts a farewell press conference in the Great Hall at 11:00 am.[Doyle]

- Nixon announces that he will comply with Judge Sirica's order to turn over the tapes. [Doyle]

- Bork issues official documents rescinding the Special Prosecutor regulations retroactively effective 21 October 1973. [Bork Senate Testimony '73]

- Bork and Petersen meet with the the Special Prosecution team who are polite but question why Bork fired Cox. Bork indicates he wishes them all to stay on the team. Petersen indicates he did not see a need for a separate press official. [Doyle]

Wednesday, 24 October 1973

- Bork and Petersen hold press conference to discuss the firing of Cox and plans for the continuation of the Watergate investigation.

- Bork explains what happened on Saturday and indicates that he would not agree to limit the Justice Department's ability to gather further evidence from the White House. [Bork Press Conf.]

- Bork is questioned about whether he had lawfully repealed the DOJ regulations stipulating that Cox could only be removed for "case." Bork explained that his action as Attorney General in firing Cox obviously amended the regulations and that any argument to the contrary was a "legalism." [Bork Press Conf.]

- Bork indicates that he feels the Nixon letter to him directing that Cox be fired guaranteed Bork the ability to conduct a full and vigorous investigation. Bork states he is considering several options for carrying on the Watergate investigation, including the appointment of another Special Prosecutor. [Bork Press Conf.]

Tuesday, 30 October 1973 (circa)

- o Bork calls Richardson for advice on a successor Special Prosecutor. Richardson indicates he had compiled a list of 55 or so candidates After reviewing this file, Bork discusses the possibilities with his staff, his wife, and several White House aids (Haig, Garment, and Buzhardt).

- o Bork determines that Jaworski is the best candidate because he has prosecutorial experience and is a well known figure in the legal community. [Bork Senate Testimony '73] Bork calls over to the White House to propose Jaworski [Bork House Testimony '73]

    * Haig proposed several candidates and Bork finally agrees to Leon Jaworski as a successor to Cox. Haig telephones Jaworski, who initially declines. Haig urges him to come to Washington to discuss the job. Jaworski makes a brief call to Bork, but perceives Haig to be in charge. [Doyle]

- o Jaworski meet with Haig, Garment and Bork at the White House. Haig gives Jaworski assurances from the President that he will be independent. [Bork Senate Testimony '73]

- o Bork gives Jaworski assurances that he will be totally independent in the investigation. [Doyle] [Bork Senate Testimony '73]

- o Bork discusses with Haig the need to grant to Jarworski the same authority Cox had and total independence. [Bork Senate Testimony '73].

Wednesday, 7 November 1973

- Guidelines are published which reestablished the Special Prosecutor with the same authority as under Cox. In addition, a safeguard is built in which provides that if there are exceptional circumstances which justify removal of the Special Prosecutor, the President would not do so without first obtaining approval from 6 of 8 top Congressional leaders. This provision is later amended to include any change in jurisdiction. [Bork Senate Testimony '73].

Wednesday, 14 November 1973

- In a suit brought by Ralph Nadar and three Congressmen, Judge Gesell declares that "Archibald Cox, appointed Watergate Special Prosecutor ... was illegally discharged from that office" on the grounds (1) that the limitation on removal required consent of the Special Prosecutor before the office could be abolished and (2) that the revocation of DOJ regulations was arbitrary and unreasonable because the office was recreated 3 weeks later with virtually identical provisions. [Bork Senate Testimony '73] Ralph Nadar is dismissed as a plaintiff and the court holds that the other plaintiffs (who did not include Cox) lack standing to receive injunctive relief.

THE WHITE HOUSE

WASHINGTON

July 23, 1987

MEMORANDUM FOR PAMELA J. TURNER
DEPUTY ASSISTANT TO THE PRESIDENT
FOR LEGISLATIVE AFFAIRS

FROM: JAY B. STEPHENS ORIGINAL SIGNED BY J.B.S.
DEPUTY COUNSEL TO THE PRESIDENT

Attached is a proposed Senate floor speech dealing with the issue of Senator Biden's recusal from handling the Judiciary Committee hearings on Judge Bork. This was drafted pursuant to Tom Korologos' suggestion yesterday.

Attachment

Mr. President--

This body has before it a question of great significance--the nomination of Judge Robert Bork to be the next Associate Justice of the United States Supreme Court. We can all expect to be the subject of intensive lobbying over the next few months by our constituents and by organized interest groups, and the confirmation process is certain to be covered in the greatest detail by the national media. Already, I regret to say, things have reached an almost feverish pitch, and it has only just begun.

Regardless of our individual views on this question, therefore, I think we all share the sense that it is of the utmost importance that the process by which we decide this question be a fair one. It is of at least equal importance that the process be one which conveys to the American people, beyond any doubt, that we are being fair.

Mr. President, I know that my colleague from Delaware, the distinguished chairman of the Committee on the Judiciary, joins this sentiment, and wishes to see that Judge Bork receive a fair hearing. I take the floor today because I believe it will be impossible to convey to the American people the sense that our process is a fair one if the Senator from Delaware chooses to preside at Judge Bork's confirmation hearings. I think it is in

his interest, it is in the Senate's interest, and it is in the national interest that he relinquish that responsibility.

When this nomination was first announced, the Senator from Delaware stated publicly that he would not be making up his mind before the hearings began. One week later, however, he announced not only that he was opposed to the nomination, but that he would be leading the opposition. It is of course his right, as it is the right of any member of this body, to take such a position. But it is impossible to reconcile the role of the advocate -- indeed, the role of "leader of the opposition" -- with the responsibilities expected of a presiding officer at a hearing of the sensitivity and importance of this one.

Already, we are encountering widespread criticism of our confirmation process, and by no means has it been limited to supporters of this nomination. The Philadelphia Inquirer, for example -- a newspaper to which my friend from Delaware has spoken before -- has asked: "Why hold [hearings] at all if senatorial minds are already made up?" The Louisville Courier Journal has stated that the Chairman has "compromised his ability to preside objectively at the confirmation hearings." And the Washington Post, along with a Democratic colleague of ours, has compared our confirmation process to the trial in Alice in Wonderland: "Sentence first -- verdict afterward."

From all quarters, the questions are coming. Why are we waiting seventy days to hold hearings when, as the Congressional Research Service has documented, the average interval for the past sixteen Supreme Court nominations has been 17.6 days, and the longest has been 42 days? If the nomination is so complex that we must wait this long, why did members of the Judiciary Committee wait only days, or in some cases only hours, after the President's announcement to state their opposition? And given all this, can it really be that their quarrel with Judge Bork is that he "lacks an open mind?"

Mr. President, we all know Senator Biden to be as fair and honorable a man as any member of this body. He is someone who takes his responsibilities as a Senator and as Chairman of the Judiciary Committee with the utmost seriousness. I am sure he agrees that we must have a presiding officer at these hearings who not only is fair, but who presents the appearance of fairness as well. I admire the strength with which he holds his views, and I am confident that, upon reflection, he will come to feel the same unease as I do with the idea of the leader of the opposition wielding the gavel in a matter such as this.

Mr. President, I ask that the Washington Post editorial of July 10, 1987, from which I quoted earlier -- "Judge Bork and the Democrats" -- be included in the record.

THE WASHINGTON POST
Friday, July 10, 1987
editorial page

Judge Bork and the Democrats

SHOULD JUDGE Robert Bork be elevated to the Supreme Court? To answer the question intelligently you need to know a lot of things. Aside from the basic questions of what standards the Senate ought to apply in judging nominees and how Judge Bork's constitutional philosophy will play out on the court, there is a mountain of published work and court opinions to be read. It also usually helps to pose questions to the nominee in a public hearing and take account of his responses. Apparently this is too much to ask of the chairman of the committee that will consider the nomination. While claiming that Judge Bork will have a full and fair hearing, Sen. Joseph Biden this week has pledged to civil rights groups that he will lead the opposition to confirmation. As the Queen of Hearts said to Alice, "Sentence first—verdict afterward."

Sen. Biden's vehement opposition may surprise those who recall his statement of last November in a Philadelphia Inquirer interview: "Say the administration sends up Bork and, after our investigation, he looks a lot like Scalia. I'd have to vote for him, and if the [special-interest] groups tear me apart, that's the medicine I'll have to take." That may have been a rash statement, but to swing reflexively to the other side of the question at the first hint of pressure, claiming the leadership of the opposition, doesn't do a whole lot for the senator's claim to be fit for higher office. Sen. Biden's snap position doesn't do much either to justify the committee's excessive delay of the start of hearings until Sept. 15. If minds are already made up, why wait?

A whole string of contenders for the Democratic presidential nomination have reacted in the same extravagant way. Maybe Judge Bork should not be confirmed. But nothing in their overstated positions would persuade you of that. These Democrats have managed to convey the impression in their initial reaction *not* that Judge Bork is unqualified to be on the Supreme Court, but rather that they are out to get him whether he is or not. Judge Bork deserves a fair and thorough hearing. How can he possibly get one from Sen. Biden, who has already cast himself in the role of a prosecutor instead of a juror in the Judiciary Committee? If there is a strong, serious case to be argued against Judge Bork, why do so many Democrats seem unwilling to make it and afraid to listen to the other side?

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release August 15, 1987

RADIO ADDRESS
OF THE PRESIDENT
TO THE NATION

Rancho del Cielo
Santa Barbara, California

9:06 A.M. PDT

THE PRESIDENT: My fellow Americans, Wednesday evening I spoke to you from the Oval Office. And I'd like to take a moment today to discuss with you the importance of the message I delivered. After many weeks, the Iran-Contra hearings are over. The issues involved have been examined from every angle and in every light. The mistakes that were made have been dealt with. Now it's time for Americans to come together and move our nation forward.

Here at home, there is the urgent need to put the federal budget process in order, bringing runaway federal spending under control and achieving further reductions in the federal deficit. Delay after delay, missed deadline after missed deadline, the entire budget process is so chaotic it is providing a cover for those in Congress whose aim is to shift resources from the people's interest to the special interests. Not one appropriations bill has been passed by the Congress for the fiscal year which begins in less than 60 days. And just consider what this budget process produces. There's the federal program that will spend millions to help build luxury hotels, restaurants and condominiums. That's right -- fancy condominiums.

If Congress is serious about getting back down to work, serious about promoting our nation's economic growth, then Congress should pass a responsible budget that is credible and enforceable. The time has come to enact a line-item veto and a balanced budget amendment.

My nomination of Judge Robert Bork to the Supreme Court comes at the top of our nation's domestic agenda. Judge Bork is a distinguished judge, and a man of great intellect and broad experience. Like me, Judge Bork believes in judicial restraint, that courts should interpret the law, and that judges should not substitute their own personal views for those of legislators whose responsibility it is to make the laws. The former Chief Justice of the Supreme Court, Warren Burger, has said that he could not recall a nominee better qualified than Judge Bork.

Just five years ago, the Senate voted unanimously to confirm him as a judge on our nation's second highest court. I believe the Senate should now move expeditiously to confirm him as a Justice on the Supreme Court.

Abroad, our nation's business is no less pressing. We're pursuing intensive negotiations with the Soviet Union on arms control that actually hold out the hope of cutting both sides' nuclear arsenals. In the Persian Gulf and the Middle East, generally bringing about stability and a lasting peace remains one of the most important goals of my presidency. If we're going to make progress toward peace, we cannot permit extremists to set the agenda or coerce their neighbors. We have to show that efforts of intimidation, like Iranian threats against Kuwait and other nonbelligerent states in the Gulf, do not work. We're a tolerant people, but we do not bow to

intimidation, and we've consistently throughout our history been willing to defend ourselves. Our tolerance should not be mistaken for a lack of resolve. We will stand by the security commitments we've made to our friends in the Gulf and elsewhere in the region. Of course, we strongly favor the peaceful resolution of conflicts. We will continue our diplomatic efforts in the U.N. and elsewhere to diffuse tensions and pursue a prompt negotiated settlement to the Iran-Iraq war and we will press our efforts to resolve the Arab-Israeli conflict, recognizing that stalemate will strengthen those very forces most opposed to peace.

Permit me now to turn to Nicaragua where we're engaged in a crucial effort to promote human freedom. Last week, our administraton proposed a timetable for negotiations to bring peace to Nicaragua by opening the country to democracy. Just days later, the leaders of five Central American countries themselves put forward a plan for peace and democracy in Nicaragua. This plan differs from our own in certain regards, but it's important to understand that both insist upon opening Nicaragua to genuine democracy. We welcome the Central American initiative and are willing to work with our Central American friends as they perfect and implement it, consistent with our national interests and our commitment to those fighting for freedom in Nicaragua.

Our support for the freedom fighters should continue until a satisfactory peace plan is in place, a cease-fire has occurred and a verifiable process of democratization is underway. The principles that Speaker Wright and I agreed to are valid principles that we hope will assist our friends in Central America as they pursue the twin goals of peace and democracy in the region.

Well, enough talk, enough delay. In Central America, the Middle East, and yes, here at home, the time has come to move forward.

Until next week, thanks for listening and God bless you.

END 9:11 A.M. PDT

DRAFT

Judicial Selection Process

Some opponents of the Bork nomination have argued that "turnabout is fair play"--that if the Reagan Administration uses litmus tests, so can they. But let's be honest. The only litmus test at work these days is that being imposed against Judge Bork by special interest groups.

Let's lay the eye-for-an-eye myth to rest. For years special-interest groups have harped on President Reagan's purported use of litmus tests in selecting federal judges. And we've heard such allegations today. But where's the proof? The fact is that after Lord only knows how much looking nobody to date has been able to find any evidence whatsoever of inappropriate questioning of judicial candidates by Administration officials.

The truth is that from the very beginning President Reagan has appointed judges who will follow the Constitution and the written law. He explicitly campaigned on that theme twice. The only thing expected from Reagan judges is that they will follow the law. If there is any litmus test in the Reagan Administration judicial selection process, it is one that ensures that judicial appointees understand the difference between what the law is and what they believe the law should be. It is the litmus test of Marbury v. Madison.

Because this President is concerned about appointing judges who are committed to interpreting the law as it exists rather than usurping policy-making responsibility, a judicial

candidate's views on the merits of particular issues are irrelevant. Thus, there is no need to establish a candidate's views on the morality or desirability of such single issues as abortion, prayer, busing, or any other litmus test issue. And the best evidence that this is not done is in the candidates who were not selected. With numerous candidates applying and interviewing for most judicial positions, evidence of routine political or litmus test questioning would not be hard to come by among the disappointed applicants--were such questioning in fact taking place.

This is in stark contrast to the previous Administration, which subscribed to a judicial philosophy in which judges are not bound by the text of the Constitution and statutes, but rather are free to alter their meanings in accordance with what they believe is right for society.

Because the previous Administration expected its judicial appointees to further its policies from the bench, detailed political questioning was essential and occurred quite regularly. According to a 1980 study by the American Judicature Society, "applicants [during the Carter years] had often been questioned [by President Carter's judicial selection panelists] about nine contemporary social issues . . . . The four areas which received most attention were the Equal Rights Amendment, affirmative action, first amendment freedoms and defendants' rights. Candidates were also asked about abortion, capital punishment, busing, economic regulation, and a number of pending United States Supreme Court cases."

It appears that the Reagan Administration is not only being accused of doing something it is not doing. It is also being accused of doing the very thing its accusers practiced when their party was in power and are now attempting to practice here on the floor of the Senate.

Exhibit A on this litmus test issue is Bob Bork. We can talk about White House politicking all we want, but President Reagan has sent us a nominee who has spent thirty years arguing that judges should keep politics out of judging. Let's be specific: Judge Bork, with his sweeping knowledge of constitutional history, is well aware that judicial activism is a two-edged sword and that the Court not so long ago was striking down child labor statutes, minimum wage laws, and labor statutes in the name of the same constitutional clauses that are presently used by liberal activists to promote such novel ideas as a constitutional right to welfare. Judge Bork has strongly and repeatedly criticized such politically conservative judicial activism--and not just past examples of it. He has sharply opposed conservative academics and commentators whom he sees as urging conservative manipulation of the judicial process in response to liberal activism. And despite his view that Roe v. Wade was wrongly decided, he has testified that the Human Life Bill--designed to overcome that decision--was unconstitutional. Whether or not you agree with his views either of Roe or of the Human Life Bill, I think you have to agree that his stand showed total integrity and principle and total freedom from political or ideological bias.

Let's take further examples. Judge Bork has publicly criticized those who want the courts to take a more active role in invalidating unwise economic regulation of businesses. And he has opposed efforts to strip the Supreme Court of jurisdiction over specific social issues. Neither President Reagan nor I necessarily agree with his reading of the law in all these areas, but I do know that he reached his views on the basis of neutral, nonpartisan legal analysis--not a conservative political bias.

Judge Bork's record on the bench bears this out. Not a single one of more than 100 majority opinions he's written has been reversed by the Supreme Court. No judge in America has a better batting average than that with the Supreme Court. And his record on his own court, the D.C. Circuit, has been just as fine: in five years on the bench, during which Judge Bork heard literally hundreds of cases, he has written in those cases all of nine dissents and seven partial dissents. And that's on a court whose judges, when he first joined it, were in eight out of ten cases Democratic appointees. Five of the ten are now Democratic appointees, for that matter. And I should add that the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed. That's the record of a man solidly in the mainstream of our law, in fundamental agreement with his colleagues on the Court of Appeals and with the Supreme Court Justices who review his work.

That's why this Senate, just five years ago, confirmed him to our second most important court without a single dissenting vote. That's why Lloyd Cutler, President Carter's counsel and a

liberal Democrat, said Judge Bork was "neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues . . . . The essence of [his] judicial philosophy is restraint." Mr. Cutler went on to rank Bork with such noted Justices as Holmes, Brandeis, Frankfurter, Stewart--and Lewis Powell--as judges who subordinated their personal views to the law. The Washington Post a few days later compared him with one of our Nation's foremost civil libertarians, Justice Hugo Black.

So let's lay to rest the fable that Robert Bork is being put on the Court to push anybody's policies, extremist or otherwise. I think there's nothing wrong with special-interest critics disagreeing with Bob Bork's record--so long as they candidly admit that they're also disagreeing with the court he sits on and the Supreme Court that reviews--and, so far, approves--his work. We should recognize in all honesty that it is they, and not the respected judge they're attacking, who stand outside the mainstream of our law.

Another shopworn item offered by some critics is the claim that President Reagan's judicial appointees aren't well-qualified. It's rather funny to be discussing this canard during the debate on the qualifications of one of the Nation's foremost lawyers, but let's look at the President's record overall. Although there may be no entirely objective way to rate judges, the American Bar Association's rating is about as good a measure as is available. The ABA ratings show that President Reagan's judicial appointees are as qualified or better qualified than

those of previous Administrations. President Reagan has appointed more circuit court candidates rated "Exceptionally Well Qualified" than did Presidents Carter, Ford, Nixon or Johnson. Over half of President Reagan's appointees to all courts have been rated Well Qualified or Extremely Well Qualified. Speaking of the Reagan judges, ABA President William Falsgraf said that "the appointees are of the highest caliber." Sheldon Goldman, one of the nation's foremost authorities on the judicial selection process, said in the April-May 1985 edition of Judicature that "if the ABA ratings are taken as a rough measure of quality, the Reagan appointments may be seen as equaling the Carter appointees in quality, and marginally surpassing the appointments of Ford, Nixon and Johnson." I would like to ask for unanimous consent to include in the record an article by Sheldon Goldman, a leading scholar and historian in the area of judicial selection, which appeared in the April-May 1987 issue of Judicature.

The truth is, the present debate is not over the qualifications of the nominee President Reagan has asked us to confirm. No one has denied that Robert Bork is superbly qualified to sit on the Supreme Court.

Rather, this debate is about the appropriate role of judges under our Constitution. Many of Judge Bork's opponents are sincerely afraid that he will try to enact President Reagan's policies from the bench. Bob Bork's entire record, his judicial philosophy, and his personal integrity show that that's not the case. Take Roe v. Wade, for example. Overruling that case--

which Judge Bork, by the way, has never suggested--would not result in a ban on abortions. Rather, it would merely give the decision about their legality back to the states, where it's been for almost all our history. That's not judicial imposition of the Reagan agenda, and I'm confident that as that message sinks in we will see a lot of the confusion clear in this debate. And the people left opposing Judge Bork will not be those afraid that he'll impose the Reagan agenda from the bench--it'll be those afraid he'll stop imposing their agenda. It won't be people afraid that he'll usurp the Congress' role--it will be people afraid he'll stop doing so. Mr. President, that's an illegitimate fear. Let me borrow a phrase from a great Justice of the Supreme Court, who said about the Framers of our Constitution that the men who won our liberty by revolution were not cowards. They weren't afraid of what the American people would do without some unelected, unreversible proconsul to show us how to govern ourselves. And why should we be? This debate isn't about politicization--it's about depoliticization, and it's time we started saying so.

Reagan's second term judicial appointments: the battle at midway

President Reagan's attempt to reshape the federal bench continues, but the weakening of his presidency and Democratic control of the Senate may slow down the process.

by Sheldon Goldman

President Ronald Reagan began his second term with a major vote of confidence from the electorate and with a determination to continue the course of public policy begun four years earlier. His policy agenda included reshaping the federal courts by appointing men and women committed to a judicial philosophy of restraint in the interpretation of the Constitution, deference to the other branches of government in carrying out their constitutional tasks, and sensitivity to the principle of states' rights and responsibilities under the system of federalism envisioned by the framers of the Constitution. This was and is considered by the administration to be of particular importance when the actions of government are struck down by the federal courts because those acts are found to conflict with a judicially created doctrine or a right inferred from but not explicitly stated in the Constitution or intended by the framers.

Because much of the judicial activism against which the Reagan administration has reacted and which goes to the heart of its social agenda concerns civil liberties law, it is within this realm that there has been major controversy, putting civil liberties groups and their political allies in Congress against the administra-

tion. This controversy intensified during the first half of the second Reagan administration and is expected to continue in light of the results of the 1986 elections in which the Democrats gained control of the Senate for the first time during the Reagan presidency.

Leading the Justice Department during the second term is Edwin Meese III, an aggressive and outspoken attorney general whose style contrasts sharply with that of his immediate predecessor, William French Smith. Meese took the lead in initiating a public debate about the role of judges in interpreting the Constitution,[1] which in turn prompted vigorous and pointed public responses from, among others, Supreme Court Justices William Brennan[2] and John Paul Stevens[3] and the ranking Democrat on the Senate Judiciary Committee and now its chairman, Joseph Biden.[4] Meese energetically defended several controversial nominations, including that of Daniel A. Manion, which resulted in a bitter and close vote in the Senate after the President himself was brought into the battle. (See "Controversial nominations," page 336, for further details)

The first half of the second term was also marked by the appointment of a new chief justice and associate justice, and the appointment of 95 federal district judges and 32 appeals court judges to lifetime positions on courts of general jurisdiction. The Reagan administration during its first six years named 290 Article III judges to courts of general jurisdiction out of a total of 741 such positions. This is almost 40 per cent of the federal bench. By the end of his second term President Reagan should pass the 50 per cent mark, although that is not a certainty because not all judges eligible for senior status have chosen or choose to retire, and there is doubt concerning the number of vacancies that will occur as a result of personal reasons (e.g., dissatisfaction with relatively low judicial salaries, illness or death). Nevertheless, the Reagan appointees already account for a substantial portion of the federal judiciary and by the end of his second term President Reagan will have left an impressive and enduring judicial legacy.

By the end of his second term, President Reagan will have left an impressive and enduring judicial legacy.

Although revelations in late 1986 concerning administration foreign policy involving arms to Iran and funds (possibly illegally diverted) to the *contras* in Nicaragua have the potential to distract the administration from vigorously pursuing its goal of reshaping the judiciary, the administration has already established a record during the second term. It is this record that deserves examination and it is the purpose of this article to do so by discussing a variety of concerns (many dealt with previously[5]) concerning judicial selection and backgrounds. What changes in the selection process have occurred under Attorney General Meese? What is the professional, demographic, and attribute profile of the second term appointees and how do they compare to those from the first term and those of the preceding four administrations? How successful has the administration been in placing on the bench those sharing the administration's judicial philosophy? What can we expect during the remainder of the second term, particularly in light of Senate control by Democrats, the uncertainties of how the Iran-Contra affair will unfold, and the race for the presidency in 1988?

Data sources for the statistics reported in this article are varied. A major source was the questionnaires completed by judicial nominees for the Senate Judiciary Committee. Also of value were the confirmation hearings conducted by the Senate Judiciary Committee, personal interviews, various biographical directories including *The American Bench*, *Who's Who* (national and regional editions), *Who's Who in American Politics*, *Martindale-Hubbell Law Directory*, state legislative handbooks, and newspapers from the appointees' home states. Help in determining religious origin for several appointees was available in books by Benzion C. Kaganoff[6] and Elsdon C. Smith.[7]

Appointments during the first half of the second term were those confirmed during the 99th Congress. Only lifetime appointments to courts of general jurisdiction were considered because it is these courts that confront the wide range of constitutional and statutory law issues that are of special import for students of the judiciary and for the administration. Although 95 federal district judges were confirmed, two additional nominations were withdrawn by the White House after the Senate Judiciary Committee effectively killed them, while three more nominations were not acted on by the committee during the life of the 99th Congress. These five are not included in the statistics in Tables 1 and 2. All 32 nominations to the numbered federal circuits and the United States Court of Appeals for the District of

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1. Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985), which was initially delivered as an address before the American Bar Association on July 9, 1985.

2. Brennan, "The Constitution of the United States: Contemporary Ratification," address before the text and teaching symposium, Georgetown University, October 12, 1985.

3. Stevens, address before the Federal Bar Association October 23, 1985, Chicago, Illinois.

4. Biden, "The Role of Advice and Consent in Constitutional Interpretation," address at the Georgetown University Law Center, November 6, 1985.

5. See Goldman, *Reagan's judicial appointments at mid-term: shaping the bench in his own image*, 66 JUDICATURE 331 (1983) and *Reaganizing the judiciary: the first term appointments*, 68 JUDICATURE 313 (1985).

6. A DICTIONARY OF JEWISH NAMES AND THEIR HISTORY (New York: Schocken Books, 1977).

7. NEW DICTIONARY OF AMERICAN FAMILY NAMES (New York: Harper & Row, 1973).

Columbia Circuit were confirmed and are included in the statistics presented in Tables 2 and 3.

Selection under Meese

The more formalized and institutionalized selection process that emerged from the first Reagan administration[8] continued into the second term but with the special imprint of the new attorney general. The assistant attorney general heading the Office of Legal Policy, which is deeply involved in judicial selection, now reports directly to the attorney general rather than to the deputy attorney general. The attorney general has a special assistant handling judicial selection (no longer is there a special counsel for judicial selection based in the Office of Legal Policy). These changes highlight Meese's intense concern with judicial recruitment. As in the first term, however, a number of Justice Department lawyers participate in the selection process, including recommending names and interviewing candidates. Indeed, the Reagan administration has used interviews of prospective judicial nominees to an unprecedented extent.[9] This has had both advantages and disadvantages.

On the one hand, personal interviews with a candidate allow Justice Department officials to obtain a first-hand sense of the individual's intellectual ability, temperament, and judicial philosophy. There are some similarities to recruitment of faculty in academia. That is, Justice Department officials consider it relevant to read a candidate's writings, but they, like members of the academy, believe that face-to-face meetings with candidates aid in the assessment process.

A drawback of this process is that inevitably some of those not selected have attributed their nonselection to the views they may have expressed during the interviews. This may have given rise to the charge that Justice officials are employing a "litmus test" to evaluate candidates in terms of their specific responses to questions related to social policy issues important to the administration (e.g., abortion, school prayers, criminal procedures, affirmative action).[10] Justice officials deeply resent this charge and correctly believe it to be improper to question candidates as to how they would decide cases raising these matters. Rather, they are concerned with an individual's overall judicial philosophy and concept of the judicial role. Of course, Justice officials have an interest in an individual's track record as a judge if the candidate has judicial experience, or the scholarly writings or public speeches, if any. But it is a candidate's general philosophy, not how he or she will decide a particular issue, that is of principal concern.

The Justice Department under Meese has made, perhaps, an even stronger stand than under Smith in favor of appointing judges who share the administration's judicial philosophy.

It may be difficult for some candidates to accept that there are often many qualified persons for each vacancy. The ultimate choice may be a result of the administration's evaluation, for example, as to who is *best* qualified in terms of intellect and judicial temperament, or who would add to the bench a special dimension or perspective not represented or underrepresented, or whose judicial philosophy is most in tune with the administration's, or even which of several qualified and acceptable candidates has the most potent political backing. Previous administrations have used these and other criteria in the selection process but, because they relied less on personal interviewing at the Justice Department as a central element of recruitment, these administrations were less vulnerable to criticism from those not selected and from the political opposition, particularly concerning the "litmus test" charge.

Interestingly, the judicial selection commissions in operation during the Carter administration were open to just such "litmus test" charges, but the charge was generally not directed at the Justice Department itself.[11] In sum, while the Reagan administration has been engaged in the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration, and it is possible that this has even been intensified during Meese's tenure at Justice, there is no objective evidence that a "litmus test" in terms of specific policy views has been employed to accept or reject candidates.

Although previous administrations engaged in extensive negotiations with senators of the President's party on district court judgeships, the Justice Department under Meese has made, perhaps, an even stronger stand than under Smith and the previous four administrations in favor of appointing judges who share the administration's judicial philosophy. But this can be costly to the administration if it alienates Republican senators or undermines a Republican senator's political standing. Although Justice Department officials under Meese are not inflexible when dealing with Republican senators, there is the potential for conflict particularly when the priorities of senators concerning judicial selection differ from those of the administration.[12]

8. Goldman, *Reagan ing the judiciary*, *supra* n. 5 at 315-16.

9. According to a position paper prepared by the Office of Legal Policy, "The Reagan Justice Department interviews a number of candidates for each position, sometimes ten or more." *Myths and Realities—Reagan Administration Judicial Selection* 6 (1987).

10. *See, for example*, the argument in Lacovara, *The Wrong Way to Pick Judges*, New York Times, October 3, 1986, at A-31.

11. Berkson & Carlson, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates, 98-101 (Chicago: American Judicature Society, 1980). Also see, Slotnick, *The U.S. Circuit Court Judge Nominating Commission*, 3 Law & Pol. Q. 465 (1979).

12. See the discussion and citations in Goldman and Jahnige, The Federal Courts as a Political System, 3rd ed., 39-51 (New York: Harper & Row, 1985).

13. In contrast, the administration's usually sympathetic handling of New York Republican Senator Alfonse D'Amato's recommendations of well qualified candidates, including several judicial moderates, was perhaps due to the senator's persistence and clout in the Senate but also in part due to the recognition that to alienate D'Amato would seriously undermine his personal standing. D'Amato was overwhelmingly reelected in 1986 even though he is more judicially conservative than the state he represents. The administration's willingness to go along with D'Amato probably helped to assure his reelection success.

The President's Committee on Federal Judicial Selection continues its innovative role in the judicial selection process but, unlike the first term, when the head of the committee, presidential counselor Fred Fielding (who resigned in 1986), was a dominant figure, Meese now appears to be the key person. The committee membership includes the presidential counsel, who chairs the committee, the assistant to the President for personnel, the assistant to the President for legislative affairs, and the White House chief of staff, who usually has more pressing business and does not ordinarily attend the meetings.[14] From the Justice Department, members include the attorney general, the deputy attorney general, the deputy assistant attorney general, and the assistant attorney general for legal policy. The committee meets at the White House, which continues to symbolize the importance the Reagan administration places on judicial selection and its central role in furthering administration goals.

The assistant to the President for personnel informally checks out prospective candidates for judgeships as to their political acceptability to party officials in the candidate's home state. The committee, with its high concentration of White House staff, considers a variety of factors (for example, patronage and political) before recommending a nominee. The committee, like the Justice Department, is committed to placing on the bench, insofar as it is possible to do so, those compatible with the administration's overall ideological and judicial philosophical perspective.

Justice officials during the second term have had a more ambivalent attitude than during the first term concerning the rating system of the American Bar Association Standing Committee on Federal Judiciary. There has been unhappiness about the marked increase in the number of second term appointees given the split rating of *Qualified Not Qualified* (that is, a majority or a substantial majority of the ABA committee voting a *Qualified* rating with a minority voting *Not Qualified*). This has left the administration open to the charge that its second term appointees are of a lower quality than those from the first term. We will examine this issue shortly.

The U.S. Attorney's office proved to be a direct stepping stone to the federal bench for almost 13 per cent of the appointees.

At this point, however, it can be observed that the administration has been sensitive to the split ratings but has not considered developing an alternative mechanism to professionally rate the credentials of potential appointees.[15] As noted in a previous article[16] the Reagan administration is the first Republican administration since the ABA standing committee was established not to have had a close working relationship with the committee during the pre-nomination stage, when the committee provided Justice officials with preliminary ratings of the leading candidates. Were Meese to reestablish that practice, the administration might be able to avoid nominations of those with controversial legal credentials, and strengthen the hand of the department in dealing with senators (unless the senators' preferred candidates were given higher ABA ratings than the candidates preferred by the administration). The disadvantage, of course, would be to give even greater influence to the ABA Committee and its apparent rating biases, such as lower ratings for law school professors despite records of impressive scholarship.

District court appointments

Table 1 offers the findings for selected attributes and backgrounds of the 95 Reagan appointees to the federal district courts confirmed by the 99th Congress during the first half of President Reagan's second term. They are compared to the 129 Reagan first term appointees and to comparable findings for the appointees of the Carter, Ford, Nixon, and Johnson administrations.

Occupation. The occupation at time of appointment of the second term appointees differs in some respects from the first term appointees in that a smaller proportion were members of the judiciary[17] and almost 20 per cent were government lawyers or held other governmental positions. Unlike the pattern in the first term and that during the Carter administration, the U.S. Attorney's office proved to be a direct stepping stone to the federal bench for almost 13 per cent of the appointees. This is consistent with the record of administrations before Carter. It would seem, in retrospect, that there was no opposition in principle by the first term Reagan administration to promoting U.S. Attorneys, but that the administration evidently was waiting for them to gain experience and to demonstrate their ability before considering them for the bench. The small proportion of law professors was also in line with that of previous administrations, but represents a small marginal proportional increase over first term professorial appointees.

Second term appointees whose occupation at the time of appointment was an active law practice accounted for about 44 per cent of all appointments, down from 48 per cent during the first term. There were proportionately more appointees from very large firms as well as small firms, with proportionately fewer from the moderate size firms. It is

14. Interview with Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, December 23, 1986.

15. One interesting exception to this repeatedly arose during the second term. The administration was interested in nominating Lino A. Graglia, a University of Texas Law School professor and an outspoken opponent of busing to desegregate public schools, but the ABA committee indicated that its rating would be *Not Qualified*. The Justice Department asked former Attorney General (from the Carter administration) Griffin Bell to conduct an informal investigation of Graglia's qualifications. Bell's report was apparently unfavorable and Graglia's candidacy was dropped by the Justice Department. See the story in *New York Times*, August 7, 1986, at A-1.

16. Goldman, *Reaganizing the judiciary*, *supra* n. 5, at 316.

17. That is, members of the state bench or occupants of the position of United States magistrate or bankruptcy judge.

Table 1 How the Reagan second term appointees from the 99th Congress to the district courts compare to his first term appointees and to the appointees of Carter, Ford, Nixon, and Johnson

	Reagan (second term) % N	Reagan (first term) % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation						
Politics, government	18.9% 18	7.8% 10	4.4% 9	21.2% 11	10.6% 19	21.3% 26
Judiciary	33.7% 32	40.3% 52	44.6% 90	34.6% 18	28.5% 51	31.1% 38
Large law firm						
100+ partners/associates	3.2% 3	3.1% 4	2.0% 4	1.9% 1	0.6% 1	0.8% 1
50-99	6.3% 6	3.1% 4	6.0% 12	3.9% 2	0.6% 1	1.6% 2
25-49	8.4% 8	5.4% 7	6.0% 12	3.9% 2	10.1% 18	— —
Moderate size firm						
10-24 partners associates	8.4% 8	12.4% 16	9.4% 19	7.7% 4	8.9% 16	12.3% 15
5-9	4.2% 4	13.2% 17	10.4% 21	17.3% 9	19.0% 34	8.6% 8
Small firm						
2-4 partners associates	10.5% 10	8.5% 11	11.4% 23	7.7% 4	14.5% 26	11.5% 14
solo practitioners	3.2% 3	2.3% 3	2.5% 5	1.9% 1	4.5% 8	11.5% 14
Professor of law	3.2% 3	2.3% 3	3.0% 6	— —	2.8% 5	3.3% 4
Other	— —	1.6% 2	0.5% 1	— —	— —	— —
Experience						
Judicial	45.3% 43	50.4% 65	54.5% 110	42.3% 22	36.2% 63	34.4% 42
Prosecutorial	45.3% 43	43.4% 56	38.6% 78	50.0% 26	41.9% 73	45.9% 56
Neither one	23.2% 22	28.7% 37	26.2% 57	30.8% 16	38.2% 66	33.6% 41
Undergraduate education						
Public-supported	34.7% 33	34.1% 44	57.4% 116	48.1% 25	41.3% 74	38.5% 47
Private (not Ivy)	53.7% 51	48.8% 64	32.7% 66	34.6% 18	38.5% 69	31.1% 38
Ivy League	11.6% 11	16.3% 21	9.9% 20	17.3% 9	18.6% 33	18.4% 20
None indicated	— —	— —	— —	— —	0.6% 1	13.9% 17
Law school education						
Public-supported	40.0% 38	44.2% 57	50.5% 102	44.2% 23	41.9% 75	40.2% 49
Private (not Ivy)	48.3% 44	47.3% 61	32.2% 65	38.5% 20	36.9% 66	36.9% 45
Ivy League	13.7% 13	8.5% 11	17.3% 35	17.3% 9	21.2% 38	21.3% 26
Gender						
Male	91.6% 87	90.7% 117	85.6% 173	98.1% 51	99.4% 178	98.4% 120
Female	8.4% 8	9.3% 12	14.4% 29	1.9% 1	0.6% 1	1.6% 2
Ethnicity or race						
White	92.6% 88	93.0% 120	78.7% 159	88.5% 46	95.5% 171	93.4% 114
Black	3.2% 3	0.8% 1	13.9% 28	5.8% 3	3.4% 6	4.1% 5
Hispanic	4.2% 4	5.4% 7	6.9% 14	1.9% 1	1.1% 2	2.5% 3
Asian	— —	0.8% 1	0.5% 1	3.9% 2	— —	— —
A.B.A. ratings						
Exceptionally Well Qualified	3.2% 3	6.9% 8	4.0% 8	— —	5.0% 9	7.4% 9
Well Qualified	50.5% 48	43.4% 56	47.0% 95	46.1% 24	40.2% 72	40.9% 50
Qualified	46.3% 44	49.6% 64	47.5% 96	53.8% 28	54.8% 98	49.2% 60
Not Qualified	— —	— —	1.5% 3	— —	— —	2.5% 3
Party						
Democratic	7.4% 7	3.1% 4	82.8% 167	21.2% 11	7.3% 13	94.3% 115
Republican	89.5% 85	96.9% 125	4.4% 9	78.8% 41	92.7% 166	5.7% 7
Independent	3.1% 3	— —	2.9% 6	— —	— —	— —
Past party activism	57.9% 55	62.0% 80	60.9% 123	50.0% 26	48.6% 87	49.2% 60
Religious origin or affiliation						
Protestant	64.2% 61	58.9% 76	60.4% 122	73.1% 38	73.2% 131	58.2% 71
Catholic	25.3% 24	34.1% 44	27.7% 56	17.3% 9	18.4% 33	31.1% 38
Jewish	10.5% 10	6.9% 9	11.9% 24	9.6% 5	8.4% 15	10.7% 13
Total number of appointees	95	129	202	52	179	122
Average age at nomination	48.2	48.6	48.7	48.2	48.1	51.4

not clear that this will necessarily hold for all the second term appointments and, even if it does, its significance.

Experience. Like the first term appointments, more than 70 per cent of the second term appointees had either judicial or prosecutorial experience. In fact, as Table 1 shows, the proportion of district court appointees with neither judicial nor prosecutorial experience fell to about 23 per cent, down from almost 29 per cent for the first term appointees. If we consider previous judicial or prosecutorial experience significant preparation for a federal district judgeship, then the second term Reagan appointees were the best-prepared group of appointees of all the administrations surveyed.

The first term appointees had more previous judicial than prosecutorial experience, and this appeared to continue a trend begun with the Carter administration. But the second term appointees thus far show the same proportion of those with previous judicial or prosecutorial experience. Judicial experience is the advantage of providing Justice Department officials the opportunity to examine a track record to determine the professional ability as well as the judicial philosophy of a potential appointee. It is doubtful that the somewhat lower proportion of second term appointees with judicial experience represents a significant departure from the pattern established in the first term and by the Carter administration.

Education. Like the first term appointees, a majority of Reagan's second term appointees have had their undergraduate and law school education at private schools. In my previous article on the first term appointees it was suggested that, as a group, the Reagan appointees might have had a marginally less distinguished legal education than the appointees of four previous presidents.[18] However, the proportion of second term appointees with an Ivy League law school education rose to almost 14 per cent—still below the proportion of the four previous administrations but close enough to hold in abeyance even a tentative determination of the quality of legal education of the second term appointees. However, it should be noted that even if several distinguished non-Ivy League

18. Goldman, *Reaganizing the judiciary*, *supra* n. 5, at 317-20.

law schools are included, such as Michigan, Virginia, Berkeley, Stanford, Chicago, Duke, and N.Y.U., the proportion of second term appointees with a prestige legal education rises to only 20 per cent.

Affirmative action. The Reagan administration has made clear its opposition to the principle of affirmative action but also its commitment to a society without discrimination against women, blacks, hispanics, and other minority ethnic groups. Civil rights proponents, however, have strenuously argued that only by vigorous action to seek out those who are members of groups that historically have been the victims of discrimination can there be an end to the vicious cycle of overt or subtle racism and sexism.

Insofar as the judiciary is concerned, the first term record of the Reagan administration was second only to that of the Carter administration in the history of the nation in appointments made to women and hispanics, but the worst since the Eisenhower administration in terms of appointments to blacks. The second term record for women and hispanics thus far shows a continuation of these trends. As for black appointments, there has been a modest increase. In proportional terms, the Reagan second term record is approximately the same as that of the Nixon administration but still markedly lower than that established by the Carter administration.

ABA ratings. The ratings of the ABA Standing Committee on Federal Judiciary for the second term reveal a lower proportion than the first term appointees given the highest rating of *Exceptionally Well Qualified*, but a higher proportion of the next highest rating, that of *Well Qualified*. As Table 1 shows, the proportion of those rated *Well Qualified* exceeded those of the previous four administrations. If the top two ratings are combined, and if the ABA ratings are considered a rough measure of "quality," the second term appointees can be seen as marginally surpassing the first term appointees as well as surpassing the appointees of Carter, Ford, Nixon, and Johnson. Assuming that the ABA ratings are a reasonably accurate assessment of the credentials of appointees, the second term appointments, on the whole, may well turn out to be the most professionally qualified group of appointees over the past two decades.[19]

A majority of Reagan's second term appointees have had their undergraduate and law school educations at private schools.

There is another side to the ABA ratings, however, that has been raised by critics of the administration. Of the 44 second term district judges given the lowest *Qualified* rating, fully one-fourth (11 appointees) had split ratings with a minority of the ABA Standing Committee voting *Not Qualified*. The proportion of the entire group of appointees with such split ratings was more than 11 per cent. During the first term, in contrast, only about 2 per cent (or 5 appointees) had split ratings. But no Reagan appointee has ever received an ABA majority rating of *Not Qualified*. The Carter administration appointees, it should be noted, contrasted markedly with the Reagan first term record and more than 10 per cent of its appointees (21 appointees) were given the split *Qualified Not Qualified* rating. To this must be added the three Carter appointees who were voted *Not Qualified* (including one because of age) and one who had a split rating of *Well Qualified Not Qualified* (those who voted *Not Qualified* did so on account of age) for a total proportion in excess of 12 per cent. Ironically, the judge rated *Well Qualified Not Qualified* was Harry E. Claiborne, who was impeached by the House and convicted and removed from office by the Senate in 1986.

Does this mean that a small proportion of second term Reagan appointees had questionable professional credentials? While it is not the purpose here to answer this question, there is reason to believe that certain biases on the part of some members of the ABA committee may have been responsible for at least some of the split ratings.

For example, seven of the 11 were under the age of 40. Indeed, half of those under 40 had split ratings as compared to only 5 per cent of those age 40 and above. None of the lawyers from large law firms were given split ratings. One fourth of the female appointees but only 10 per cent of the male appointees were given split ratings.

The administration and the ABA committee itself emphasize that a rating of *Qualified*, even with a minority voting *Not Qualified*, must be interpreted to mean that the ABA committee deems the individual to be fully qualified to hold the position of federal district judge. This, of course, does not end the matter, and both Democratic and Republican critics of the ABA committee believe it would be more responsible for the ABA to issue reports explaining the basis for the ratings and the source of any disagreement among committee members. Without more, a split rating may serve as a signal that there is some doubt about the qualifications of a nominee. But the split rating might also reflect certain biases (e.g., age, gender, ethnicity, occupation) of one or more committee members.

Other considerations. In terms of party affiliation, the record for the second term district court appointees differed from that for the first term. The group of second term appointees had proportionately fewer Republicans (just under 90 per cent) than the Nixon but not the Ford administrations. The proportion of Democrats more than doubled over the first term appointees. By reaching out to a limited extent to Democrats and independents, the first term image of narrow partisanship was blunted. Also, a slightly smaller proportion of second term appointees had records of prominent party activism. Nevertheless, a num-

19. The proportion of Eisenhower appointees in the top two categories was 61.7 per cent, the proportion of Kennedy appointees in the top two categories was 62.2 per cent. These figures, which combine both district and appeals court appointments, are from Chase, Federal Judges: The Appointing Process 119 (Minneapolis: University of Minnesota Press, 1972).

ber of second term appointees had noteworthy political *and* professional credentials (see "The appointees' political and legal credentials," page 332).

The religious origins or religious affiliation of the appointees is given in Table 1. This attribute is an increasingly difficult one to determine from the sources consulted in the several instances where judges have not indicated their religion or given meaningful clues as to their religious origins. The difficulty is that religious intermarriages and conversions have become more commonplace in American society, so that family name, maiden name of mother, name of spouse or children are questionable indicators of religious origins. Every effort has been made to be accurate but the possibility exists that there are some misclassifications of religious origins. With this caveat in mind, the findings in Table 1 suggest that compared to the first term appointees, proportionately fewer Catholics and more Jews were appointed. The proportion of Catholic appointees was still a modern record for Republican administrations and so was the proportion of Jewish appointees. This suggests that more Catholics and Jews were part of the pool of Republicans from which potential judges were chosen. This also suggests an absence of subtle or subconscious religious discrimination in the judicial selection process.

The average age of the second term appointees to the federal district courts at the time of nomination was 48.2 years, down from 49.6 years for the first term appointees. The second term appointees were the youngest group of appointees of all those studied. If those under the age of 40 are examined, the proportion of *first* term Reagan appointees was about seven per cent, similar to the eight per cent of the Carter appointees. The previous study of Reagan's first term appointees concluded that there was not much difference in the age of the Reagan appointees as compared to the appointees of Reagan's four predecessors in office.[20] However, the findings for the second term suggest that a new pattern may be emerging. The proportion of those under 40 more than doubled, to almost 15 per cent. Indeed, the proportion *under* the age of 45 was 40 per cent (compared to 26 per cent in the first term and about 20 per cent for the Carter appointees). The administration may, in some instances, be giving preference to qualified younger candidates for judgeships with the hope that their probable extended tenure on the bench will prolong the Reagan judicial legacy. But this must be considered a tentative conclusion and must await analysis of all the second term appointments.

Table 2 Net worth of Reagan appointees from the 99th Congress compared to his first term appointees and to the net worth of the Carter appointees

	Reagan (Second term)		Reagan (first term)		Carter (96th Congress)	
	District	Appeals	District	Appeals	District	Appeals
	% N	% N	% N	% N	% N	% N
Under $100 000	7.4% 7	9.4% 3	6.2% 8	3.3% 1	12.8% 18	5.1% 2
100 000-150 000	8.4% 8	6.2% 2	8.5% 11	3.3% 1	14.9% 22	12.8% 5
150 000-199 999	4.2% 4	— —	3.9% 5	3.3% 1	8.1% 12	15.4% 6
0-199 999 total	20.0% 19	15.6% 5	18.6% 24	10.0% 3	35.8% 53	33.3% 13
200 000-399 000	27.4% 26	37.5% 12	25.6% 33	23.3% 7	29.7% 44	28.2% 11
400 000-499 000	9.5% 9	3.1% 1	11.6% 15	13.3% 4	11.5% 17	10.3% 4
500 000-999 999	21.0% 20	31.2% 10	21.7% 28	30.0% 9	18.9% 28	17.9% 7
200 000-999 999 total	57.9% 55	71.8% 23	58.9% 76	66.7% 20	60.1% 89	56.4% 22
1 to 2 million	17.9% 17	— —	17.0% 22	20.0% 6	2.0% 3	7.7% 3
Over 2 million	4.2% 4	12.5% 4	5.4% 7	3.3% 1	2.0% 3	2.6% 1
1+ million total	22.1% 21	12.5% 4	22.5% 29	23.3% 7	4.0% 6	10.3% 4
Total %	100.0%	99.9%	100.0%	100.0%	99.9%	100.0%
Total number of appointees	95	32	129	30[3]	148	39

1 Net worth unavailable for one appointment. Source for all other Reagan appointees was the questionnaires submitted to the Senate Judiciary Committee and or financial disclosure forms reviewed by the author.

2 Professor Elliot Slotnick generously provided the net worth figures for all but six appointees for whom he had no data.

3 There were five additional judges appointed by Carter for whom no information was listed in the source consulted: Legal Times of Washington, October 27, 1980, at 25.

Table 2 reports the net worth of the second term appointees compared to those from the first term as well as the Carter appointees. The net worth of the second term appointees was approximately the same as that for the first term appointees. More than one in five appointees was a millionaire. This becomes significant in light of recent efforts to raise the salary of federal judges.[21] It appears to signal a tendency for only qualified individuals who are wealthy to be willing to serve on the federal bench. And this appears to be unrelated to age. There was virtually no correlation between age and net worth of the second term, first term, and Carter appointees to the federal district courts.[22] If it is thought desirable that financial considerations should not provide obstacles to recruiting the best legal talent for the federal bench and if the federal bench is not to become dominated by the wealthy, then it is necessary to substantially raise judicial salaries over their current levels.

Appeals court appointments

The Reagan administration has energetically sought to place on both the district and appeals courts those sharing the administration's ideological philosophical perspective. Appeals court appointments, however, have traditionally offered Justice officials more opportunity than district court appointments to appoint those preferred by an administration. I turn now to the 32 second term appointees to the appeals courts and compare them to the 31 first term appointees and to the 56 Carter, 12 Ford, 45 Nixon and 40 Johnson appointments. Percentage differences reported in Table 3 must be treated carefully because of the relatively small number of judges in each of the six columns.

20. Goldman, *Reaganizing the Judiciary*, *supra* n. 5, at 323.

21. The Commission on Executive, Legislative and Judicial Salaries recommended that the salaries of federal district judges be raised to $130,000, federal appeals court judges to $140,000, associate justices on the Supreme Court to $150,000, and the Chief Justice of the United States to $160,000. See New York Times, December 12, 1986, p. A-30. President Reagan, however, rejected the recommendations and instead approved increases raising the salary of district judges to $89,400, appeals judges to $95,000, associate justices of the Supreme Court to $110,000, and the Chief Justice to $115,000. See, New York Times, January 11, 1987, at 1, col. 1.

22. The correlation coefficient between age and net worth for the second term appointees to the district courts confirmed by the 99th Congress was .128, for the first term appointees .176 and for the Carter appointees .146.

Table 3 How the Reagan second term appointees from the 99th Congress to the courts of appeals compare to his first term appointees and to the appointees of Carter, Ford, Nixon, and Johnson

	Reagan (second term) % N	Reagan (first term) % N	Carter % N	Ford % N	Nixon % N	Johnson % N
Occupation						
Politics/government	6.2% 2	3.2% 1	5.4% 3	8.3% 1	4.4% 2	10.0% 4
Judiciary	40.6% 13	61.3% 19	46.4% 26	75.0% 9	53.3% 24	57.5% 23
Large law firm						
100+ partners/associates	6.2% 2	— —	1.8% 1	— —	— —	— —
50-99	3.1% 1	3.2% 1	5.4% 3	8.3% 1	2.2% 1	2.5% 1
25-49	9.4% 3	6.4% 2	3.6% 2	— —	2.2% 1	2.5% 1
Moderate size firm						
10-24 partners associates	6.2% 2	3.2% 1	14.3% 8	— —	11.1% 5	7.5% 3
5-9	6.2% 2	6.4% 2	1.8% 1	8.3% 1	11.1% 5	10.0% 4
Small firm						
2-4 partners associates	3.1% 1	— —	3.6% 2	— —	6.7% 3	2.5% 1
solo practitioners	— —	— —	1.8% 1	— —	— —	5.0% 2
Professor of law	15.6% 5	16.1% 5	14.3% 8	— —	2.2% 1	2.5% 1
Other	3.1% 1	— —	1.8% 1	— —	6.7% 3	— —
Experience						
Judicial	43.8% 14	70.9% 22	53.6% 30	75.0% 9	57.8% 26	65.0% 26
Prosecutorial	25.0% 8	16.1% 5	32.1% 18	25.0% 3	46.7% 21	47.5% 19
Neither one	53.1% 17	25.8% 8	37.5% 21	25.0% 3	17.8% 8	20.0% 8
Undergraduate education						
Public-supported	15.6% 5	29.0% 9	30.4% 17	50.0% 6	40.0% 18	32.5% 13
Private	56.2% 18	45.2% 14	50.0% 28	41.7% 5	35.6% 16	40.0% 16
Ivy League	28.1% 9	25.8% 8	19.6% 11	8.3% 1	20.0% 9	17.5% 7
None indicated	— —	— —	— —	— —	4.4% 2	10.0% 4
Law school education						
Public-supported	34.4% 11	35.5% 11	39.3% 22	50.0% 6	37.8% 17	40.0% 16
Private (not Ivy)	37.5% 12	48.4% 15	19.6% 11	25.0% 3	26.7% 12	32.5% 13
Ivy League	28.1% 9	16.1% 5	41.1% 23	25.0% 3	35.6% 16	27.5% 11
Gender						
Male	90.6% 29	96.8% 30	80.4% 45	100.0% 12	100.0% 45	97.5% 39
Female	9.4% 3	3.2% 1	19.6% 11	— —	— —	2.5% 1
Ethnicity or race						
White	100.0% 32	93.5% 29	78.6% 44	100.0% 12	97.8% 44	95.0% 38
Black	— —	3.2% 1	16.1% 9	— —	— —	5.0% 2
Hispanic	— —	3.2% 1	3.6% 2	— —	— —	— —
Asian	— —	— —	1.8% 1	— —	2.2% 1	— —
A.B.A. ratings						
Exceptionally Well Qualified	9.4% 3	22.6% 7	16.1% 9	16.7% 2	15.6% 7	27.5% 11
Well Qualified	37.5% 12	41.9% 13	58.9% 33	41.7% 5	57.8% 26	47.5% 19
Qualified	53.1% 17	35.5% 11	25.0% 14	33.3% 4	26.7% 12	20.0% 8
Not Qualified	— —	— —	— —	8.3% 1	— —	2.5% 1
No report requested	— —	— —	— —	— —	— —	2.5% 1
Party						
Democratic	— —	— —	82.1% 46	8.3% 1	8.7% 3	88.0% 36
Republican	96.9% 31	100.0% 31	7.1% 4	91.7% 11	83.3% 42	8.0% 2
Independent	— —	— —	10.7% 6	— —	— —	— —
Other	3.1% 1	— —	— —	— —	— —	— —
Past party activism	78.1% 25	58.1% 18	73.2% 41	58.3% 7	60.0% 27	57.5% 23
Religious origin or affiliation						
Protestant	43.8% 14	67.7% 21	60.7% 34	58.3% 7	75.6% 34	50.0% 24
Catholic	40.6% 13	22.6% 7	23.2% 13	33.3% 4	15.6% 7	25.0% 10
Jewish	15.6% 5	9.7% 3	16.1% 9	8.3% 1	8.9% 4	15.0% 6
Total number of appointees	32	31	56	12	45	40
Average age at nomination	49.3	51.5	51.6	52.1	53.6	52.2

The second term Reagan appointees had less judicial experience than the first term appointees.

Occupation and experience. A dramatic difference between the second and first term appointees is evident in Table 3 with respect to occupation at the time of appointment. Whereas more than three in five of the first term and more than half the Ford, Nixon, and Johnson appointees were members of the judiciary at the time of their elevations to the appeals courts, only two in five of the second term appointees were members of the bench. Of the 13 judges elevated to the appeals bench, nine were federal district judges (and seven of these were first term Reagan appointees to the district bench), one was a Reagan appointee to the U.S. Court of Claims, and three were on the state court bench. Only one more second term appointee had previous judicial experience (but was not serving on the bench when appointed to the appeals court). Thus the second term Reagan appointees had the least judicial experience of all four previous administrations and the Reagan first term appointees.

This finding is of special interest when we consider that a previous judicial track record is especially helpful when an administration (such as this one) is concerned with the judicial philosophical orientation of its appointees. If the Reagan Justice Department under Meese relied less on judicial track records than during the first term, it is probable that personal knowledge (on the part of the attorney general) of the appointees' orientation played a greater role than during the first term. This is hinted at in the figures for past party

activism, which for the second term appointees was almost 4 out of 5. The views of several appointees who had no judicial track records or were not law professors were surely known. For example, two appointees were members of the administration at the time of appointment, another was a former U.S. Senator, another the chairman of the Conservative Party of the State of New York, another was chairman of his state's Republican party, and another was a former official in Republican administrations.

By not relying as much on the promotion of lower court judges to the appeals bench as during the first term, the Justice Department under Meese can be seen as moving away from the concept of a career judiciary. This also had consequences for the ABA ratings, which (as will be discussed shortly) were markedly lower for the second term. It will be of interest to see whether the remainder of the second term appointments follow this pattern or whether the administration returns to the practice of elevating more lower court judges. Surely with more than 200 Reagan district court appointments and many conservative district judges appointed by previous administrations, the administration can find well-qualified and philosophically compatible individuals to promote.

Six of the first term appointees to the appeals courts were in law firms at the time of their appointments (three in large firms and three in moderate-sized firms). In contrast, 11 of the second term appointees were in private practice (six with large firms, four with moderate-sized firms and one with a small firm). This was a proportional increase from about 19 per cent for the first term to more than 34 per cent for the second term.

Interestingly, the number and proportion of those who were law professors at the time of appointment remained at the same relatively high level as that of the

The appointees' political and legal credentials

The following are some of the Reagan appointees confirmed by the 99th Congress who had noteworthy political *and* legal credentials. There were, of course, several appointees with outstanding legal credentials who did not have a prominent political background, and they are not included here.

• Morris S. Arnold was state chairman of the Republican Party of Arkansas in 1982-83. He earned masters and doctoral degrees from Harvard Law School, had a distinguished academic career, and was dean of the school of law at Indiana University at the time of his appointment to the federal district bench in Arkansas.

• Danny J. Boggs had been active in Kentucky Republican politics in the 1970s and in 1980 was active in the Reagan presidential campaign. He was a graduate of the University of Chicago Law School where he was a law review editor. He served in several key positions in the Reagan administration and at the time of his appointment to the U.S. Court of Appeals for the Sixth Circuit was deputy secretary of the Department of Energy.

• Garrett E. Brown, Jr. had been active in New Jersey Republican politics and had served as counsel to the Union County Republican Committee in 1981. He was an assistant U.S. Attorney from 1969-1973, served as chief counsel for the Maritime Administration and at the time of his appointment to the district bench in New Jersey was the acting deputy maritime administrator.

• Robert J. Bryan was active in Washington state Republican politics, including serving as a Republican precinct committeeman for six years. In 1967 he became a superior court judge and served in that capacity until 1981, when he left the bench to join a major Seattle law firm. He remained a partner in the firm until his appointment in 1986 to the federal district bench in Washington, western district. He was rated *Exceptionally Well Qualified* by the ABA.

• John E. Conway served as a Republican New Mexico state senator and was minority leader from 1972 to 1980. He was a graduate of the U.S. Naval Academy, graduated first in his law school class (Washburn University), where he was editor-in-chief of the law journal, served as a city attorney for six years, and at the time of his appointment to the New Mexico federal district bench was a partner in a major Albuquerque law firm.

• Joseph J. Farnan, Jr., was active in Delaware Republican politics and had run unsuccessfully for the state house of representatives. He worked in the office of the public defender for four years and in 1981 was named by the Reagan administration to be U.S. Attorney for Delaware, the position he held at the time of his appointment to the district bench.

• Duross Fitzpatrick was active in Georgia Republican politics and had run unsuccessfully for the state legislature in 1976. He was active in the Georgia bar association and served as President of the State Bar of Georgia in 1984-1985. At the time of his appointment to the federal bench in Georgia, middle district, he was practicing law at his small law firm in Cochran.

• Ralph B. Guy, Jr., had once been active in Detroit Republican politics, including being a Republican candidate for Wayne County Commissioner in 1968. He served on the board of directors of a neighborhood legal services office. He was an assistant U.S. Attorney and then U.S. Attorney, a position he held from 1970 to 1976, when named by President Ford to the district bench, a position he held at the time of his appointment to the U.S. Court of Appeals for the Sixth Circuit. The ABA rated him *Exceptionally Well Qualified*.

• Barbara K. Hackett was active in Republican politics, particularly in 1984. She had served as an assistant prosecuting attorney in Detroit and in 1975 she was appointed to the position of U.S. magistrate, a post she held until 1984, when she returned to private practice and political activity. She was appointed in 1986 to the federal bench in Michigan, eastern district.

• Karen LeCraft Henderson was very active in South Carolina Republican politics, including service as state co-chair for Women for Reagan-Bush in 1984 and campaign work for Senator Strom Thurmond. She was a state assistant attorney general for five years, served as director of the criminal division, and at the time of her appointment to the district bench of South Carolina was practicing law in

first term appointees. Indeed, that proportion would increase to more than one in five if two former full-time law professors were included in the statistics. As with the first term law school professors, these scholars had a track record of published works so that their judicial philosophy could be discerned by administration officials. Their appointments could be expected to provide new or additional conservative intellectual leadership on their circuits. It is significant that when President Reagan elevated William Rehnquist to the chief justiceship, he filled the associate justice vacancy with former law professor Antonin Scalia, a first term appeals court appointee. If there is a vacancy or vacancies on the Supreme Court to be filled during the remainder of Reagan's second term, it is likely that one or more of the first or second term appointees who were law school professors at the time of appointment will be leading candidates.

As mentioned earlier, the second term appointees had the least judicial experience of all the groups of appointees surveyed. As for prosecutorial experience, the second term appointees were closer to the Carter and Ford administration appointees and had a marginal proportional increase over the first term appointments. But the proportion of second term appointees with neither judicial nor prosecutorial experience was twice as high as the first term appointees and was dramatically higher than the proportions for the Carter, Ford, Nixon, and Johnson appointments. It would seem that the Justice Department under Meese was less concerned with the more traditional professional credentials of prior judicial and prosecutorial experience than was the department under Meese's predecessors. Compared to its second term district court appointments, it might not be an exaggeration to suggest that the Meese Justice Department

a small firm in Columbia. She was rated *Well Qualified* by the ABA.

• Edith H. Jones served as general counsel to the Republican Party of Texas in 1982-1983. She was an honors graduate of the University of Texas Law School and at the time of her appointment to the U.S. Court of Appeals for the Fifth Circuit, at age 35, was a partner in a large, prestigious Houston law firm.

• Ronald R. Lagueux was a close political ally of then-Governor (now Senator) John Chafee of Rhode Island, serving as his executive counsel for a period of three years. Lagueux also was a Republican candidate for the U.S. Senate in 1964. He was appointed associate justice of the superior court by Governor Chafee in 1968, a post he held at the time of his appointment to the federal district court.

• Richard B. McQuade, Jr. had played a leadership role in several Republican campaigns in Ohio. He was an assistant county prosecutor and then prosecuting attorney for Fulton County for ten years before going on the state bench, the position he held at the time of his appointment to the federal district bench of Ohio's northern district.

• Roger J. Miner had once been active in upstate New York Republican politics, occupying leadership positions. He was an assistant district attorney and then district attorney, served on the state bench for five years before his appointment by President Reagan to the federal district bench, the position he held at the time of his elevation to the U.S. Court of Appeals for the Second Circuit.

• Alan Eugene Norris was active in Ohio Republican politics, including service for 14 years as a member of the Ohio House of Representatives. He had been a Root-Tilden Scholar at New York University Law School, where he received his law degree. Prior to his legislative service he had been assistant law director and then city prosecutor for the city of Columbus. At the time of his appointment to the U.S. Court of Appeals for the Sixth Circuit he was serving on the state bench.

• Alan H. Nevas was a Republican state representative in the Connecticut General Assembly for six years. He was appointed U.S. Attorney for the district of Connecticut, the position he held at the time of his appointment to the federal district bench.

• James M. Rosenbaum was closely associated with the campaigns of Minnesota Republican Senator Rudy Boschwitz, chairing the steering committee. In 1981 Rosenbaum was named U.S. Attorney for the district of Minnesota, a position he held at the time of his appointment in 1985 to the federal district court.

• Jane R. Roth, wife of Republican Senator William Roth of Delaware, was active in her husband's campaigns. After graduating from Smith College, she served for six years in the Foreign Service. She is a graduate of Harvard Law School and was a member of a major Wilmington law firm at the time of her appointment to the federal district bench.

• Walter K. Stapleton had been active in the 1960s in Delaware Republican politics, including service as secretary and legal counsel to the second district Republican committee from 1964 to 1970. He was appointed to the federal district court by President Nixon in 1970 and was serving on the federal bench at the time of his elevation to the U.S. Court of Appeals for the Third Circuit. He was rated *Exceptionally Well Qualified* by the ABA. Stapleton's elevation created the vacancy that was filled by Jane Roth.

• Roger L. Wollman had held a leadership position in the Young Republicans organization in South Dakota. He graduated from the University of South Dakota Law School, where he was editor-in-chief of the law review. He served as a state prosecuting attorney for two years before being elected to the Supreme Court of South Dakota in 1970, the position he held at the time of appointment to the U.S. Court of Appeals for the Eighth Circuit.

• William G. Young had been chief counsel to Massachusetts Republican Governor Sargent from 1972-1974. He is a graduate of Harvard College and Harvard Law School. He was appointed to the Superior Court in Boston in 1978, the position he held at the time he was appointed to the federal district bench of Massachusetts. He was unanimously rated *Exceptionally Well Qualified* by the ABA.

—*Sheldon Goldman*

has used a double standard in assessing qualifications for the district courts as opposed to the appeals courts. It will be of interest to see if the balance of the second term appointments to the appeals courts continues this pattern.

Education and affirmative action. Like the first term appointees, a majority of the Reagan second term appointees attended private schools for their undergraduate and law school education. This was consistent with the backgrounds of appointees from previous administrations. The Reagan second term appointees had the lowest proportion attending public undergraduate as well as public law schools. The proportion with an Ivy League law school education increased over the first term appointees and, if prestigious non-Ivy League law schools are included, the proportion of second term appointees with a distinguished legal education rises to about 58 per cent, an impressive proportion.

In terms of the appointment of women to the appeals courts, the second term is a major improvement over the first. Only the Carter administration had a superior record. The Reagan administration has appointed more women to all levels of the federal bench than any other Republican administration in the history of the country. The same cannot be said for the appointment of blacks, although the one appointment to the appeals court during the first term stands as the only such appointment by a Republican President (Nixon appointed more blacks to the district bench). The second term appeals court appointees, however, were all white.[1]

ABA ratings. The ABA ratings of the second term appointees are dramatically different than those of the first term. Whereas the first term appointees had the highest proportion since the Johnson administration of appointees designated *Exceptionally Well Qualified*, the second term appointees had a *lower* proportion than the four previous administrations. There was also a dramatic increase over the first term appointees in the proportion given the lowest *Qualified* rating. None of the other four administrations had such a high proportion (more than 50 per cent) with that rating. Furthermore, more than half of those with the *Qualified* rating received a split *Qualified Not Qualified* rating.

In terms of the appointment of women to the appeals courts, the second term is a major improvement over the first.

This is not to suggest that those given split ratings necessarily had marginal qualifications (both the ABA committee and the administration take vigorous exception to such a characterization). But the appointment of those who have been given split ratings nevertheless has raised questions as to why the ABA committee was split on particular appointments.

Just as with our discussion of ABA ratings and the district court appointments, it behooves us to examine the ratings in terms of possible biases on the part of the committee that may have tended to result in lower ratings of the nominees. One such bias that has been noted previously for the first term appointees was the tendency to give low ratings to law professors.[23] Again, this proved to be true. Of the five appointees who were law professors at the time of appointment, four were given a split rating of *Qualified Not Qualified*. Of the three women appointees, two were given the split rating. All five appointees under the age of 40 were given the split rating. However, none who were members of the judiciary at the time of their appointments were given the split rating. If the administration is concerned with improving its second term record of ABA ratings, it would seem that a simple remedy would be to elevate to the appeals bench more federal district court judges or state court judges of distinction.

Other considerations. Like the first term appointees, no Democrat received an appointment. Not since the administration of Warren G. Harding have no members of the opposition political party been chosen for the appeals courts.[24] The Reagan administration's appeals court appointments thus have a hard edge of partisanship associated with them that is not as evident with the district court appointments. The second term appointees have a record of partisan activism that surpasses that of the first term appointments and is the highest of the previous four administrations. This, no doubt, has added to the controversy over the selection process and the criteria used by the administration (with the split ABA ratings fueling that controversy). Appointment of Democrats who share the judicial philosophy favored by the administration might well defuse, at least to some extent, the controversy, particularly if those appointments were elevations of district judges. Of course, elevation of a district judge gives the administration the opportunity to fill the newly created district court vacancy.

The religious origin or affiliation of the second term appointees is shown in Table 3 and is rather startling. Thirteen of the 32 appointees, or about 40 per cent, were Roman Catholic. This was such an unexpected finding that religious affiliation was double-checked by reference to one or more biographical sources and the questionnaires. This is a modern record for any administration, Democratic or Republican. Of course, this may simply point up that considerably more Catholics than in previous decades are in the potential candidate pool, which in turn is a reflection of a shift of Catholic voters to the Republican party. This may also demonstrate the absence of any subtle religious discrimination in the recruitment process, a proposition that is buttressed by the high proportion of Jewish appointees (more than 15 per cent, a record for Republican administrations). But those with a conspiratorial view of the Reagan administration's judicial selection process might interpret this as evidence for the proposition that the abortion issue dominates the selection process. Thus, according to

23. Goldman, *Reagan ing the judiciary*, supra n. 5, at 326.

24. *See*, LEGISLATIVE HISTORY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND OF JUDGES WHO SERVED DURING THE PERIOD 1801 THROUGH MAY 1972 U.S. Senate, Committee on the Judiciary, 92nd Cong., 2nd Sess. 2 (1972).

this line of reasoning, anti-abortion Roman Catholics, whose church vigorously opposes abortion, were actively recruited. Although this explanation might be intuitively satisfying to the political opponents of the administration, there is no objective evidence independent of religious affiliation to support it; therefore that explanation must be rejected.

The average age at nomination for the second term appeals court appointments was lower than that for the first term appointees and for the previous four administrations. The average age was 48.3 years, about the same as the second term *district* court appointees. This appears to be unprecedented. The proportion of second term appeals court appointees under the age of 40 was almost 16 per cent. For the first term it was about 6 per cent and for the Carter appointees it was about 5 per cent. The proportion of second term appointees under the age of 45 was more than one third (34.4 per cent), whereas the proportion was less than half that (16 per cent) for the first term appointees and about 18 per cent for the Carter appointees. These figures strongly hint that under the leadership of Meese, there is an active effort to recruit younger people who presumably share the administration's philosophy and can be expected to remain on the bench longer than older appointees, thus prolonging the Reagan administration's judicial legacy. It will be of great interest to see if this age pattern holds for the remainder of the second term appointees.

The net worth figures for the second term appeals court appointees show that there were proportionately fewer millionaires than for the first term appointees. The second term proportion was close to the proportion of the Carter appointees. There was also a low (.3) positive correlation between age and net worth for the second term appointees in contrast to no correlation (.0) for the first term appointees and for the Carter appointees. Of course, the second term appointees were generally well off financially and the points made earlier in the discussion of net worth and district court appointments hold true here. If financial considerations should not be an obstacle to recruiting the best judicial talent, it may be essential that judicial salaries be substantially increased. Ironically, there is the distinct possibility that some of the younger appointees without a substantial net worth might not make the judiciary their life's work, and when financial demands of their families so demand, they might resign from judicial office to take advantage of the three, four, or five times the earnings that await them in private practice. Therefore, it is assuredly in the administration's interest, assuming it wishes its younger appointees to remain on the bench, to take the leadership in substantially increasing judicial salaries.

The figures suggest that under Meese there is an effort to recruit younger people who can be expected to stay on the bench longer.

Judicial performance

The success of the administration in placing those sharing its judicial philosophy can only be measured by an analysis of the judicial decisional behavior of its appointees. This requires a systematic analysis of voting and opinion behavior of district and appeals judges that is a separate and major undertaking from that conducted for this study. However, since the last report of the Reagan appointments covering the first term, which found some fragmentary evidence that the Reagan appointees are conservatizing their courts,[25] some additional empirical work has been reported in several studies that appear to confirm this earlier observation.

One major study by Jon Gottschall of the Reagan appointments to the courts of appeals concluded that the Reagan appointees voted considerably more conservatively than did the Carter appointees and those of previous Democratic presidents (notably Kennedy and Johnson).[26] This was particularly true for civil rights and civil liberties issues. But Gottschall also found that the Reagan appointees were similar in their voting behavior to the appointees of previous Republican presidents (Nixon and Ford). He also found that the differences were a matter of degree, not sharp polarities, so that, for example, the Reagan appointees' average score in support of the civil rights or civil liberties claims was 31.5 per cent, the Nixon Ford appointees' average score was 34 per cent, the Kennedy Johnson judges' average support score was 46 per cent, and the Carter appointees' average score was 53.[27]

Another empirical study was conducted by C.K. Rowland, Robert A. Carp, and Donald Songer, focusing on both district and appeals courts and particularly concerning criminal justice policy. They looked at the Nixon, Carter, and Reagan appointees in cases decided between 1981 and 1984.[28] Here, too, the Reagan appointees decided cases in a more conservative fashion than did the Carter appointees, and, unexpectedly, even the Nixon appointees. For the courts

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25. Goldman, *Reaganizing the judiciary*, *supra* n. 5, at 327-28.

26. Gottschall, *Reagan's appointments to the U.S. courts of appeals: the continuation of a judicial revolution*, 70 Judicature 48 (1986).

27. *Id.* at 51.

28. Rowland, Carp and Songer, "The effect of presidential appointment, group interaction and fact-law ambiguity on lower federal judges' policy judgments: the case of the Reagan and Carter appointees," paper presented at the 1985 annual meeting of the American Political Science Association, and the revised version prepared for publication, *Presidential effects on criminal justice policy in the lower federal courts: the Reagan judges* (1987).

29. Rowland, Carp, and Songer, *Presidential effects*, *id.* at 23.

30. Hensley and Baugh, *Impact of the 1978 Omnibus Judgeships Act* in Nagel ed., Research in Law and Policy Studies 112 (Greenwich, CT: JAI Press 1987).

31. Stidham and Carp, *Judges, Presidents and Policy Choices: Exploring the Linkages*, Soc. Sci. Q. (in press, June 1987).

32. In particular, a paper prepared by Ira Goldman, "A Survey of the Tenth Circuit Court of Appeals," found that the proportion of civil liberties decisions by the U.S. Court of Appeals for the Tenth Circuit favoring the civil liberties claim fell from 52 per cent to about 32 per cent between 1981 and 1986. Papers by Joshua B. Kalish on the District of Columbia Circuit and Barbara Curtis on the Second Circuit also suggested a generally conservatizing effect of the Reagan appointments.

of appeals, the researchers found that in non-unanimous decisions, the Carter appointees were "almost five times more likely than the Reagan appointees to support the criminal litigant."[29] A study by Thomas Hensley and Joyce Baugh of the nonunanimous criminal justice policy decisions of the appeals courts decided in 1982 also found that the Carter appointees were more liberal than the Reagan appointees. The Reagan appointees were more conservative than the Nixon and Ford appointees.[30]

Ronald Stidham and Robert A. Carp conducted a study of federal district judge decisional behavior and concluded that the Reagan appointees gave the *least* support and the Carter appointees the *most*

Controversial nominations

Perhaps an unprecedented number of controversial lower court nominations were considered by the 99th Congress. Several of them resulted in roll-call votes on the floor of the Senate. Certainly it is hard to recall when so much national attention was given by the media to lower court judgeships. In part, this was a result of the participation of interest groups such as People for the American Way, which mounted a major campaign against two Reagan administration nominees, Jefferson B. Sessions, III, to a federal district judgeship in Alabama, and Daniel A. Manion to the U.S. Court of Appeals for the Seventh Circuit.

Sessions, serving as U.S. Attorney for the southern district of Alabama since 1981, was actively backed by Alabama Republican Senator Jeremiah Denton. Sessions received a split rating from the ABA, with a substantial majority voting *Qualified* and a minority voting *Not Qualified*. Although that in itself would not seriously undermine a nomination during the 99th Congress, the opposition of Alabama blacks to the nomination did. In 1985, Sessions prosecuted on voting fraud charges three black civil rights leaders, but the trial ended in acquittals. Alabama blacks saw Sessions as insensitive if not hostile to the rights of blacks. The investigator for the Democrats on the Senate Judiciary Committee uncovered evidence of Sessions' insensitivity that produced unfavorable publicity for Sessions, the Reagan administration, and Senator Denton. Sessions was called back for further hearings. In his defense, he argued that the damaging remarks attributed to him were said in jest or taken out of context. He denied being racially prejudiced. The administration claimed that opposition to Sessions was political and was essentially grounded in Sessions' conservative views. The Senate Judiciary Committee, at the urging of Senator Biden, finally voted 10 to 8 against the nomination, with Alabama's other senator, Democrat Howell Heflin, voting with the majority. With the Sessions nomination effectively killed, the nomination was formally withdrawn on July 31, 1986. In November, Denton was narrowly defeated for reelection. His defeat was widely attributed to the heavy black vote against him.

The fate of the Manion nomination was ultimately different, but only after a bitter national debate in which the President himself vigorously defended the nomination and campaigned for senatorial votes—unprecedented for a president on behalf of a lower court nomination. The supporters of Manion argued that Manion was attacked because of his conservative views and because of his previous activities with his late father, Clarence Manion (dean of the law school at the University of Notre Dame), a founder of the extremist John Birch Society. Although not a member of the Birch Society himself, Manion, according to his supporters, was being smeared in a manner that smacked of McCarthyism at its worst, guilt by association. Manion's opponents, on the other hand, argued that he lacked a record of distinction and achievement that was expected of appointees to the courts of appeals. They questioned his ability to be an unbiased judge. Furthermore, they doubted his legal competence on the basis of briefs that Manion had submitted to the Judiciary Committee as representative of his legal ability. Manion, like Sessions, received a split vote from the ABA with a substantial majority voting *Qualified* and a minority *Not Qualified*. The Senate Judiciary Committee was evenly split (9-9) on the nomination but voted to send it to the Senate floor without a recommendation.

Lobbying by the administration was fierce, and one Republican senator, Slade Gorton of Washington, who had indicated his intention to vote against Manion, switched sides and suggested that he did so after the administration agreed to nominate Gorton's moderate Democrat candidate for a federal district judgeship in Washington. Other stories emerged of Republican senators extracting from Justice officials sympathetic treatment for their preferred candidates for district judgeships. On June 26, 1986, the Senate voted on the Manion nomination. The vote was 47-47, with Vice President Bush ready to break the tie by voting for Manion. But in a parliamentary maneuver, Senate Minority Leader Robert Byrd switched his vote from a vote against confirmation to a vote for confirmation. This made the confirmation vote 48 to 46, but gave Byrd the opportunity to immediately move for reconsideration of the vote.

Technically, Manion was confirmed, but there was doubt because the Senate had on its table the vote to reconsider. Finally, after weeks of political jockeying and continued nationwide media coverage, the Senate voted on July 23 to defeat the motion to reconsider by a vote of 49 to 50. The administration won, but at the cost of a bruising battle. Gorton was hurt politically in his home state of Washington, where he had been favored to win reelection, and in November he was narrowly defeated. Gorton's candidate, William L. Dwyer, was nominated by Reagan in September, and the nomination was given a rating of *Exceptionally Well Qualified* by the ABA. His nomination, however, was not acted upon by the Senate Judiciary Committee. As of this writing, Dwyer has not been renominated, although he has the backing of Washington's remaining Republican Senator, Daniel Evans.

Reagan made other controversial nominations, including three others that wound up on the Senate floor for roll call votes by the full Senate. Sidney A. Fitzwater was nominated to the federal district bench in Texas at the age of 32. He had been serving as a state district judge since 1982 and had been very active polit-

support to the claims of disadvantaged minorities and other civil rights and civil liberties claims, with the appointees of other presidents falling between the two extremes.[31] Work by students in a seminar at the University of Massachusetts also suggested a conservatizing effect of the Reagan appointees to the three courts of appeals that were studied.[32]

Although the evidence is accumulating, it is by no means conclusive, only suggestive. Continued quantitative as well as qualitative analyses concerning the contribution of the Reagan appointees to their courts is necessary before it is possible to determine the extent to which the administration has been successful in identifying those with the judicial

ically before going on the state bench. Allegations that he behaved improperly during one particular election campaign by discouraging blacks and hispanics from voting caused controversy. Fitzwater's youth and relative lack of experience along with the split *Qualified* (majority) *Not Qualified* (minority) ABA rating were also troublesome. The nomination was approved by the Senate Judiciary Committee by a vote of 10 to 5 and sent to the floor of the Senate, where there was a heated debate before a roll call vote resulted in a 52-42 confirmation.

Alex Kozinski, widely acknowledged to possess a brilliant legal mind (he graduated first in his class at UCLA Law School, had been a law clerk to Chief Justice Burger, and had a meteoric rise in his legal career, resulting in an appointment to the U.S. Court of Claims at the age of 32) was 34 when nominated by the Reagan administration to the U.S. Court of Appeals for the Ninth Circuit. Kozinski received a split *Qualified* (majority) *Not Qualified* (minority) rating from the ABA. Questions arose about his judicial temperament on the basis of a number of allegations concerning his behavior when he served as special counsel to the Merit Systems Protection Board. As a result, further hearings were held. The full committee voted to recommend the nomination and sent it to the full Senate, where a debate on Kozinski's qualifications ensued. A roll call vote was taken and Kozinski was confirmed by a vote of 54 to 43.

Former Republican U.S. Senator James L. Buckley (who was elected in 1970 from New York on the Conservative Party line) was nominated to the U.S. Court of Appeals for the District of Columbia. Originally, the administration had hoped to place him on the U.S. Court of Appeals for the Second Circuit, but insurmountable opposition arose from the New York bar and Republican Senator Lowell Weicker of Connecticut, from whose state Buckley now claimed legal residence. The ABA gave Buckley a split *Qualified* (substantial majority)/ *Not Qualified* (minority) rating. Although Buckley was widely conceded to be a man of intelligence and great accomplishment, there were questions raised by his opponents as to his judicial temperament and qualms about his lack of experience in the practice of law. At the time of his nomination he was president of Radio Free Europe, a position he had held since 1982. Buckley was approved by the Senate Judiciary Committee and the nomination was sent to the floor of the Senate, where it was eventually approved by a vote of 81 to 11.

The nomination of Albert I. Moon, Jr., to a federal district judgeship in Hawaii foundered on the vigorous opposition of the Democratic Senators from Hawaii who, while not explicitly invoking the formula used for senatorial courtesy, implied as much. Senator Daniel Inouye took the lead in opposition, based not on Moon's credentials but on the process Moon used to obtain his nomination. Inouye argued in the hearings that in 1978 Moon, a leading Honolulu attorney, had persuaded Inouye to establish a bipartisan judicial selection panel to recommend candidates for federal district judgeships. But in 1985, according to Inouye, Moon made an end-run around the panel to obtain the nomination for himself. Inouye's unrelenting opposition eventually led to the nomination being withdrawn by the White House.

Mention should also be made of a different kind of political controversy that surrounded one Reagan nominee and which soon caused the administration and the Republican senators involved much embarrassment. At the urging of Republican Governor Thomas Kean, the Reagan administration nominated Joseph H. Rodriguez for a federal district judgeship in New Jersey. Although a Democrat, Rodriguez had taken a leadership role in Kean's election campaign. He was appointed public advocate of New Jersey in 1982. Rodriguez had a distinguished legal career, was a former president of the New Jersey Bar Association, and was unanimously rated *Exceptionally Well Qualified* by the ABA. Republican Senators Hatch, John East, and Denton, all members of the judiciary committee, devised and sent to Rodriguez an eight page questionnaire with 26 questions designed to elicit in detail the nominee's views on a wide variety of issues, including abortion, affirmative action, equal rights for women, prayers in the public schools, the death penalty, various criminal procedural guarantees, busing for the purpose of desegregating the public schools and the like. This questionnaire was apparently sent without the knowledge of Senate Judiciary Committee Chairman Strom Thurmond, who was angered when it came to his attention. Other members of the judiciary committee were also outraged. The administration claimed, and there is no reason for doubt, that it had nothing whatsoever to do with the questionnaire. The national publicity was overwhelmingly unfavorable and the questionnaire seemed to give substance to the charge that nominees for federal judgeships were being given litmus tests for their views on matters of public policy. Hatch agreed to withdraw the questionnaire on April 17, 1985, the day of the hearing on the nomination. But Hatch's defense of the questionnaire as a "fact-finding" tool and his leadership in devising and sending it may come back to haunt him if he is ever nominated to the Supreme Court.

—Sheldon Goldman

philosophical orientation desired by the administration.

The key, however, to the turnaround in constitutional law and American jurisprudence desired by the administration lies with the Supreme Court. Thus far the administration has made three appointments (Sandra Day O'Connor to an associate justiceship, William H. Rehnquist to the chief justiceship, and Antonin Scalia to the associate position vacated by Rehnquist upon his elevation). While it is too early to evaluate Justice Scalia's record on the Court, Justice O'Connor and surely Chief Justice Rehnquist are promoting the judicial philosophy favored by the administration. In raw empirical terms, Justice O'Connor was either the second or third most conservative justice on the Burger Court, rejecting the civil liberties claims in 71 per cent of the cases decided with full opinion in the 1981 term, rejecting 75 per cent of the claims in such cases in the 1982 and 1983 terms, and rejecting 66 per cent of the claims in the 1984 term and 70 per cent in the 1985 term. Justice Rehnquist was the most conservative justice on the Court, typically rejecting the civil liberties claims in more than 80 per cent of the cases during those same years.[33]

On balance and with few exceptions, the Reagan administration during the second term appears thus far to have been successful in recruiting qualified individuals who share the administration's judicial philosophy. Again, with few exceptions, appointees to both the district and appeals courts have been men and women of accomplishment, and although there are some distinctive differences in the attribute profile of the second term appointees compared to those from the first term, they generally compare favorably with the appointments of previous administrations.

A look to the future

Two years ago in my previous article in *Judicature*, I suggested that there was no reason to believe that the second term appointees would be markedly different from the first term appointees. In large part we have seen this to be true, though not entirely (recall, for example, the ABA ratings of the appeals court judges, their relative lack of judicial experience, their relative youth, and the findings for religious origin or affiliation). In general, we can speculate with a large degree of confidence that most of the appointees to the district and appeals courts will continue to be white male Republicans, many of whom are at the upper end of the socioeconomic spectrum. I think it probable that the second term trend to appoint more relatively younger judges will continue. We can also anticipate, I believe, a continuation of the good record of women appointments (although not at the level achieved by the Carter administration).

We can speculate that future appointees will continue to be white male Republicans at the upper end of the socioeconomic spectrum.

The second term record of the appointment of black Americans surpassed the first term record but still has not equalled in absolute numbers that of the Nixon administration. As the 1988 election year approaches, it is possible that some Republican senators up for reelection in states where the black electorate can provide the margin of victory or defeat, cognizant of the 1986 results where some Republican senators in such states lost by small margins, will promote the candidacies of qualified blacks for district judgeships. Were this to occur, the Justice Department can be expected to be accommodating. Indeed, the Reagan Justice Department may even take the initiative in recruiting qualified blacks. It remains to be seen, however, if the administration will appoint another black American to an appeals court.

Judicial experience should continue to provide a reasonably reliable indicator of a prospective appointee's judicial philosophy. Similarly, law school professors with publications that illuminate their potential judicial orientation can be expected to receive some appointments in the effort to build a strong intellectual base for a conservative jurisprudence on each of the circuits. It will be of particular interest to see whether there is a continuation of the trends for the second term appeals court appointees that differed from that of the first term. It will also be of interest to see if Democrats will continue to be excluded from appeals court positions.

In June of 1986, Chief Justice Burger announced his retirement. By elevating Rehnquist and appointing Scalia, the Reagan administration clearly indicated the seriousness of its commitment to a major change in direction of American jurisprudence. It is possible that the Reagan administration will have one or more vacancies to fill before the second term ends. But the filling of those vacancies may be more difficult the closer they occur to the 1988 presidential elections.

Historically, it has been difficult for a lame duck president in his last year, particularly with the Senate in control of the opposition party, to successfully make an appointment.[34] Another unknowable is what will occur as a result of the special prosecutor's investigation of the Iran *contra* affair. One or more indictments of former or current administration officials and their trials in a presidential election year could seriously undermine the President's authority and prestige. If the Democrats believe they have a good chance at winning the presidency, it might be impossible for President Reagan under those circumstances to have a Supreme Court appointment approved in 1988.

Because of anticipated difficulties in filling a Supreme Court vacancy in 1987-1988, there has been speculation that

33. *See*, Goldman, CONSTITUTIONAL LAW 160 (New York: Harper & Row, 1987).

34. *See*, Segal and Spaeth, *If a Supreme Court vacancy occurs, will the Senate confirm a Reagan nominee?*, 69 JUDICATURE 180 (1986); and Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, J. of Pol. (in press, 1987).

were a vacancy to occur, Republican Senator Orrin Hatch of Utah would be a leading candidate. Were Hatch to be nominated, it has been speculated that his senatorial colleagues would be loathe to reject one of their own. However, Hatch has served as a lightning rod in promoting the President's agenda and he has earned the political opposition of many groups that are key constituents in the states of many senators. There will surely be a campaign mounted against him, probably based on his alleged lack of judicial temperament because of the extreme partisanship he has displayed and his unequivocal stands on a variety of constitutional issues including abortion, prayers in the schools, affirmative action, busing for the purpose of desegregating school systems, etc. No doubt the administration and its supporters will counter by drawing the analogy between Hatch and Hugo Black, who was a vigorous New Deal Senator at the time of his nomination by President Roosevelt to the Supreme Court and who had taken clear positions on a host of economic and social welfare issues that were then before the federal courts. It is probably fair to say, however, that were Hatch to receive a nomination, it would not be smooth sailing.

Alternatively, were a vacancy to occur, the administration could turn to one of its distinguished appeals court appointees who came to the bench with a well-known scholarly reputation, such as Robert Bork or Richard Posner. These jurists could bring to the Court a scholarly brilliance and a conservative jurisprudential vigor that Hatch perhaps could not. Again, depending upon the timing, filling of a vacancy might prove difficult. A well-qualified conservative woman jurist or a well-qualified southern conservative Democratic senator might have fewer obstacles to confirmation. Of course, speculation along these lines is premature, as none of the current justices has indicated an intention to retire.

What is not premature, however, is speculation about the relationship between the Democratic controlled Senate Judiciary Committee and the Reagan administration over the appointment of lower court judges. Committee chairman Biden has indicated that he does not intend to adopt a confrontational mode, but of course cooperation must be a two-way street. That means that the administration will have to be even more careful than it has been about sending to the Senate nominations destined for controversy (such as discussed in "Controversial nominations," page 336).

If ideology were to become the basis for opposition, the result would be a continuing series of battles, with the judiciary held hostage.

If the administration sends highly qualified non-controversial conservatives to the Senate with *Well Qualified* or *Exceptionally Well Qualified* ABA ratings, it is not likely that the liberals will oppose the nominations simply on grounds of ideology. As a practical matter, ideology alone cannot be the basis for turning down a lower court nominee because liberals are not in a majority in the Senate. Also, liberal Democrats, by using ideology as the sole basis for opposition, would provide a precedent for Republicans to oppose liberal Democratic nominees sent by a future Democratic president.

If ideology were to become the basis for opposition to lower court nominations, the result would be a continual series of battles between liberals and the administration, with the federal judiciary held hostage during an inevitably prolonged confirmation process. It is doubtful that either side desires such an outcome. Were the administration to send to the Senate controversial nominees about whom there was serious question about legal competence, judicial temperament, or fidelity to the principle of equal protection under the law, even were the administration satisfied that such concerns were groundless and that it could muster the votes to win on the Senate floor, a continual series of such battles surely would be draining and costly politically. If there are to be fights, both sides must pick their battles wisely, and the weaker side (on the merits of a nomination) should be politically astute enough to know when to make a strategic withdrawal.

The Iran/*contra* affair, serious economic difficulties in America's industrial heartland, farm belt, and oil producing states, and the narrow senatorial victories that gave the Democrats solid control of the Senate call into question whether the cycle of Republican domination of presidential politics will be in at least temporary abeyance in 1988. Although it might be stretching the historical analogy a bit, we can nevertheless observe that Franklin Roosevelt also faced similar problems six years into his presidency. He suffered setbacks in the 1938 senatorial elections, the country was still experiencing economic difficulties, he was preoccupied by foreign affairs (although there were no prosecutorial investigations under way), and he still had yet to name enough justices to the Supreme Court to assure the permanent triumph of his policy agenda. Nevertheless, the Democrats went on to win the White House again in 1940.

Although Reagan will not be on the ballot in 1988, his and his administration's accomplishments will be judged by the American electorate. The electorate, among other concerns, will see a judiciary that, if not dominated numerically by Reagan appointees, will come close. It will see a Supreme Court with a Reagan-appointed chief justice and at least two Reagan-appointed associate justices. It will be generally aware of the Reagan social agenda and to what extent that has been achieved by the Reagan appointments to the federal courts. And the electorate, among other questions, will in effect be asked if it wishes that agenda to be pursued by another Republican administration's appointments to the federal courts. The future of the Constitution and of the Reagan administration's vision of American federalism rests upon the electorate's answer. □

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