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The Bork nomination was amazing to me. I collected the unsolicited information which I received about that nomination, most of which opposed the nomination. The anti-Bork propaganda that I received during the Senate confirmation hearings measured fifteen inches high. Some of the material was well researched and very sophisticated—obviously a professional job. There was even an issue of a law review devoted to the Bork nomination. There was an extraordinary mobilization of resources against the nomination.

As a legal educator, and as a person who is interested in the law as a profession and, of course, concerned about the courts, I have grave reservations about the political aspects of the appointment of the federal judiciary. As has been pointed out, it has become a public court, and it has become an increasingly important court. The very concept of a spite nomination is appalling. This does not serve the interests of the United States. It does not serve the interests of the public, and it certainly does not serve justice. Fortunately, I take heart in Professor Fish's statement that the third nominee usually has extensive and highly professional qualifications. The spite nominations apparently are not accepted by the Senate. The Senate does not lie down and accept the spite nomination merely because it is tired. But this is a potentially serious problem. There is a need for much further study in this area. It is to be hoped that publication of this Symposium will have an influence on decision-makers.

There are two major concerns when federal judges are selected primarily on the basis of their personal and political philosophy or ideology. First, there is a very real problem with communication relating to the adequacy of the information con-

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cerning the nominees. To what extent are the majority of us victims of those who process information (whether it be the media, or the staffs of various organizations, or whomever)? It is distressing that so many people failed to understand who Justice Roberts was and exactly whom they were confirming. Why did not the Senate realize that Justice Roberts was not the man it thought he was prior to confirmation of his appointment? If the Senate did not know, then surely the public did not know. This should be an ongoing concern.

The second concern in the appointment of the federal judiciary when ideology is a major factor is the premise that one's ideology will affect the outcome in cases before the court. This assumption ignores the judge's obligations to apply established legal principles and to follow precedent. I question the validity of an assumption that judges are free to elevate their personal ideology above established legal concepts. This may be a much more serious problem in the lower courts than it is on the Supreme Court level. A number of the federal district court judges who are appointed are young; they are in their early to mid-forties. This means they are going to be on the bench for a long time, and they may have a possibly disproportionate impact on the development of the law. On the other hand, there have been numerous articles about the impact of becoming a federal judge and the socialization process of serving on the bench. Perhaps that process prevents extremes from developing at either end of the spectrum. Perhaps it prevents the judiciary from becoming either too liberal or too conservative as a whole. There is no reason to believe that the judiciary does elevate ideology above legal precedent or legal principles.

I join my colleague, Professor Walker, in not attempting to combine the two papers of Professors Fish and Atkins. One of the great strengths of American jurisprudence is that it is pragmatic. It is therefore responsive to society and to the needs of society as those needs develop. It is responsive to changing legal perspectives as well as changing social perspectives. That pragmatism, coupled with our diversity, is our great strength and is what makes our judicial system work. As a proponent of pragmatic jurisprudence, I believe that any judicial decision should reflect current aspects of society. I am very pleased that we do not have a closed system such as that of England. For obvious

reasons I am not particularly supportive of either a legal system or a judiciary that is limited to "well-connected" white males. In terms of the development of American jurisprudence and of our selection of the judiciary, the development of a more diverse judiciary is important and significant. Women are entering the legal and judicial fields in increasing numbers. In the United States today, 45% of the law students enrolled are female. Only about 12% of the enrollment consists of minority students, but that percentage is growing. This will develop a pool that will enable us to increasingly diversify the composition of the judiciary.

Professor Atkins discussed the fact that the two systems converge ultimately. He discussed the socializing process that being a member of the judiciary appears to have. I submit that there are some other factors that should be taken into account when one considers the lack of conflict among the opinions from the appellate courts.

First, there is an increasing concern about administration on the part of the judiciary. Judges are spending an increasing amount of time on administration. Further, they are being held responsible for prompt decision-making, for control of their dockets, and for processing cases as expeditiously as possible without in any way abrogating the rights of the parties. Second, there is a much larger number of cases to be processed. The lack of additional opinions in the form either of concurring or dissenting opinions at the appellate court level is in part a function of the limited amount of time available.

I don't know whether there has been an extended study of the amount of conflict among the circuits. It should be noted, however, that although there are few multiple opinions in cases, there are many areas in which there is a conflict, not among the three judges on a panel but among the circuits. For example, the Court of Appeals for the Fifth and Eighth Circuits may reach diametrically opposed positions on essentially the same question of law with the same fact pattern.

While there is a tendency, increasingly, to see the government as a winner in cases, there are some factors that should be taken into consideration in evaluating this tendency. One factor is the great resources that are available to the government in the selection of their cases. There are very good reasons why the govern-

ment should win more often than it loses at the appellate level. The government, since it is involved in a number of cases on any given issue, may choose very carefully which cases to appeal. There is no reason to appeal a case which it anticipates losing. The government has the resources to choose to settle any case. Further, in the event that an appeal is anticipated from the other party, the government has the resources to tender to the other party an acceptable settlement. Since the government generally has substantially greater resources than the other litigant, the government can afford to limit appeals to cases which it is likely to win. It should also be noted that the government is generally party to a number of cases involving the same issue and can therefore select the best possible fact situation to support its position. The lack of resources, or the cost of an appeal, is a major factor in the individual's decision as to whether an appeal should be filed. This is not a limitation for the federal government. Litigation is expensive. It is incredibly expensive to the individual. Obviously the government has substantially greater financial resources and has a vast pool of attorneys and personnel to handle litigation. Further, the extended period of time involved in an appeal as well as the amount of energy consumed in litigation is much more detrimental to the individual litigant than to the government. I respectfully submit that these factors are critical in evaluating the reasons the government prevails in more cases than not.