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Commentary on the Selection of Federal Judges

BY THOMAS G. WALKER*

This conference on the Selection of Judges in the United States has shown, among other things, the rich variety of ways in which one can confront the topic of judicial selection. The two articles presented by Professors Peter Fish and Burton Atkins represent very different approaches to expanding our understanding of the judiciary. As such, the articles reflect the diversity that traditionally has been associated with research regarding the selection of judges. Because the articles are dissimilar in methodology and focus, separate consideration is given to each article rather than attempting to integrate the two into a single perspective.

The article by Professor Atkins compares the judicial selection system of the United States with that of England. It exemplifies truly comparative research. Unfortunately, well-executed studies that offer comparisons among the judicial systems of different nations are rare. As those employed in the field of judicial process are well aware, scholars attempted to establish a comparative research focus in the late 1960s following the early success of the judicial behavior movement.¹ However, the majority of those attempts were unproductive. Often the attempts were replications of a study previously conducted in the United States and merely applied to another nation. While such studies have a comparative gloss, in reality they are independent examinations of judicial phenomena in other countries. The results generally are disappointing. Consequently, the enthusiasm for research focusing on judicial systems outside the United States has waned.

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¹ See, e.g., *COMPARATIVE JUDICIAL BEHAVIOR* (G. Schubert & D. Danelski, eds. 1969).

Professor Atkins' study is significant because it avoids many of the problems that plagued earlier efforts. Two characteristics of his research make the study genuinely comparative as well as an appropriate guide for future efforts. First, Professor Atkins identifies specific characteristics, stages, and processes that can be examined in any judicial system and compared across nations. For example, he analyzes the "selectorate" and evaluates the "permeability" of the British and American systems. Rather than highlighting the idiosyncrasies of the systems studied, as previous comparative research projects have done, Professor Atkins focuses on shared, yet variable properties that may serve as a basis for comparing and contrasting judicial systems. Second, Professor Atkins offers comparative data. Such data allow a more rigorous and productive examination of the judicial systems. By evaluating the United States judiciary with systematically gathered data on the English counterpart, the research provides a mechanism for gaining a better appreciation of the U.S. judicial system.

Professor Atkins repeatedly demonstrates the relatively closed nature of the English judiciary system as compared to the American counterpart. The statistics regarding the judges who serve the British appellate courts reveal the closed nature of the English system. Eighty-seven percent of the English justices attended elite, fee-paying schools, and ninety-three percent received advanced education from Oxford or Cambridge universities. Of the English appellate justices, none had previous careers as professors, government officials, or solicitors. Rather, they were promoted exclusively from lower court positions. None of the justices were women or members of racial or ethnic minorities. In short, research reveals that the British appellate bench is quite homogeneous. The judicial system is a closed one. By contrast, the United States has of late placed a great deal of emphasis on diversifying its federal judiciary. The judiciary has been in a state of transition from a moderately closed system to one with expanded possibilities for women, minority members, and those with family and/or educational backgrounds that do not by tradition qualify for elite pedigree. Statistics based on law school enrollment patterns indicate that the proportion of persons with such characteristics and backgrounds within the pool of potential judges will continue to increase.

Research efforts such as those of Professor Atkins aid the understanding of the exceptional character of the U.S. judiciary. It has long been recognized that the U.S. judicial system differs from that of most other nations in terms of the amount of power wielded by the courts and the extent to which the decisions of justices affect the political process. Yet, the degree to which the American judicial system differs in other respects has not been clearly established. Only systematic, comparative research, such as that provided by Professor Atkins, can reveal the extent to which the U.S. judiciary is an exception to the patterns formed by the judiciaries of other countries.

When Professor Atkins turns his attention to the consequences of systematic differences in judicial selection, he tackles a much more complex question. In making direct comparisons between the decisions of British and U.S. courts, Professor Atkins sails in largely uncharted waters. As students of the American judiciary know, it is difficult to compare judicial behavior merely among state supreme courts or among federal circuit courts. Despite the fact that such comparisons are made within the same judicial system, differences in a host of variables that are difficult to control make valid comparisons a tricky enterprise. The difficulties are even greater when attempting comparisons of judicial behavior between nations. Professor Atkins, although fully aware of the relevant problems, undauntedly compares English and American judges on dimensions such as the extent of concurring and dissenting opinions and the tendency of judges to favor governmental and other high-status parties. The finding that both the elitist English judiciary and the more open American bench have pronounced patterns of ruling in favor of superior litigants is an intriguing discovery that deserves increased attention in well-controlled, follow-up studies. The finding also brings to the surface the larger issue of the extent to which differences in selection systems translate into differences in judicial decision-making and the specific kinds of cases in which this translation occurs.

Professor Atkins' research begs for consideration of the more fundamental, long-term impact of differences in the judicial selection systems. The English system employs relatively closed procedures with a narrow selectorate drawing judges from a narrow recruitment base. In contrast, the United States has a

highly permeable system with a broadly based selectorate choosing judges from a rather large recruitment base. These selection system characteristics correspond closely with the scope of the judicial function in the respective countries. The decisional range of the American court system is much broader and more encompassing than that of the English judiciary. This difference poses an important developmental question: Does a broadly based judicial selection system encourage the judiciary to play a broadened role? Or, does a judiciary which plays a wide-ranging role in the governmental system require a more diversified set of judges to decide its cases? Like many questions of political development, this inquiry poses a classic chicken and egg problem. Nevertheless, it is an interesting and important inquiry. Continued work on such problems would provide rich potential for expanding the understanding of judicial phenomena.

Professor Peter Fish examines judicial selection in a much different manner. His work falls nicely into the tradition of fruitful American judicial selection studies that began three decades ago. Earlier work tended to fall into one of two classifications. The first category includes case studies of specific judicial appointments, such as David Danelski's classic work on Pierce Butler, *A Supreme Court Justice is Appointed*.² Such research efforts examine in rich detail the rise to the bench of a particular individual. The second category includes studies that examine the characteristics of judges or the patterns of the recruitment process over time. Works by John Schmidhauser³ and Sidney Ulmer⁴ are illustrative examples. Professor Fish's work falls squarely between the two categories. In the main, his paper focuses on President Herbert Hoover's nomination of Owen J. Roberts to the Supreme Court in 1930. However, Professor Fish employs the notion of "spite nominations" to compare historically the Roberts appointment with similar appointments.

Professor Fish explains that a spite nomination occurs when the president, immediately following a defeat by the Senate,

² D. DANELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964).

³ See, e.g., Schmidhauser, *The Supreme Court: A Collective Portrait*, 3 *MIDWEST J. POL. SCI.* 1 (February 1959).

⁴ Ulmer, *Public Office in the Social Background of Supreme Court Justices*, 21 *AM. J. ECON. & SOC.* 57 (January 1962).

sends the name of a second nominee to the Senate with a revenge factor playing a significant motivating role for the nomination. Rather than an exclusive focus on selecting the best qualified person, a secondary consideration, a revenge lust, becomes increasingly relevant. The nomination becomes a question of power or, in some cases, a matter of wounded pride. The 1987 nomination of Douglas Ginsburg provides an obvious example. President Ronald Reagan, stung and angered by the Senate's rejection of nominee Robert Bork, wanted his pound of flesh. Consequently, he nominated Ginsburg, who in many ways represented a Bork clone, only two decades younger.

Spite nominations characteristically consist of passion and emotion which encroach on rational decision-making. Consequently, the president risks nominating an individual whose qualifications are less distinguished than those of the first nominee. President Nixon's replacement of Clement Haynsworth with G. Harrold Carswell in 1969 and President Reagan's choice of Ginsburg following the rejection of Bork are examples. Nixon was resolved to elevate a Southerner to the Court. Reagan demanded a hard-line conservative appointee. When the Senate rejected their choices, both presidents refused to modify their priorities and consequently engaged in unsuccessful attempts to force the Senate to accept lesser qualified second nominees.

That presidents succumb to temptations of spite is unfortunate because, although wounded by an earlier defeat, presidents may actually find themselves in a fairly strong position. Most likely, the Senate's energy is depleted by the recent confirmation battle. The senators do not relish a second fight. Rather, they fear that the electorate may view them as obstructionists, spitefully blocking the confirmation of any candidate the president puts forward. The Senate hopes that the president will learn from the previous battle and nominate an acceptable candidate. Most senators want to be able to support the second nominee, especially if the Senate is controlled by the president's political party. For example, nominee Carswell, generally perceived as having only mediocre qualifications and whose public career later ended with morals charges brought against him, failed to receive Senate confirmation by only six votes. In making a spite nomination, the president demands a rematch and sends to the Hill

the name of an individual who potentially will provoke another conflict.

Spite nominations are not the norm. Generally, a president reacts to defeat in a more rational manner. For example, in 1811 when President James Madison nominated Alexander Wolcott to be an associate justice, he was handed an overwhelming defeat. Although Madison's party held 83 percent of the senate seats, Wolcott received favorable votes from only 27 percent of the senators. Madison did not react in a spiteful fashion. Instead, he nominated the clearly qualified John Quincy Adams who later declined the appointment after his nomination was confirmed. Again, President Madison acted responsibly by nominating the equally distinguished Joseph Story. Thus, Madison's second and third nominations were of improved quality as compared with his initial choice.

What situations tend to produce a spite nomination? The historical record and the research presented by Professor Fish indicate three conditions that seem to be commonly associated with a spite response. First, a spite response generally occurs when an individual feels that he or she has been wronged. In the case of a judicial appointment, the president loses a nominee who he judged to be well qualified and deserving of confirmation. When the Senate brands the president's choice as unacceptable, the chief executive may feel frustrated, angry, and prone to counter attack. Consequently, the stage is set for a possible spite nomination. Professor Fish discusses in great detail three historical examples in which this was the case. In failing to confirm Judges Parker, Haynsworth, and Bork, the Senate rejected candidates of substantial ability. Most modern scholars would agree with President Hoover that John J. Parker generally was qualified to serve on the Supreme Court. Also, the Senate's rejection of Clement Haynsworth is regarded by many as a mistake. For example, the Judicial Conference of the United States responded to the attacks on Haynsworth's ethical standards by appointing him as chairman of the organization's ethics committee. And Congress, in a rare expression, allowed the Greenville, South Carolina, federal building to be named in honor of Haynsworth, a long-time appellate court judge. Robert Bork, too, may be judged more favorably by history than he is viewed today. It was not a lack of qualifications that kept Bork

off the Supreme Court. A substantial portion of his opposition was spawned by the fear that his persuasive intellectual abilities might be enough to convince others on the Court to embrace his "original intent" philosophy of constitutional interpretation. To those who opposed his jurisprudence, Bork's qualifications, in effect, made his potential appointment especially dangerous.⁵

Second, spite nominations can occur only when the president has an opportunity to react in a spiteful fashion. For example, when President Andrew Johnson's 1866 choice of Henry Stanbery was fatally delayed by the Senate, Johnson did not have a chance to react spitefully. The Senate not only refused to confirm Stanbery, but also abolished the judicial seat by passing legislation that would have reduced the Court's size.⁶ In addition, a president's expiring term of office may not allow sufficient time to propose a second nominee, as was the case with Lyndon Johnson's nomination of Abe Fortas. Also, spite is a tempting course only when the president has the opportunity to exact revenge on the senators who thwarted the president's nominee. Such revenge is not possible if a president's second nomination occurs after intervening congressional elections have changed the membership and party control of the Senate.

Finally, the president must view the defeat of the original candidate not as the fault of the White House but rather, as the result of unwarranted and unreasonable opposition by political enemies. In effect, this means that spite nominations are more likely to occur when the White House and the Senate are controlled by opposing political parties. Presidents tend not to act spitefully when rebuffed by members of their own political party. Presidents are more likely to acknowledge their own mistakes, as well as give some credence to the opposing position, when defeat comes at the hands of their political allies. Furthermore, the president will not behave in a particularly vengeful manner when dealing with supporters, especially if they are continuing members of the Senate who may be of assistance in future political battles. Spiteful behavior under such circumstances can be viewed only as counter productive. Citing to the Owen J.

⁵ Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1167 (1988).

⁶ See H. ABRAHAM, *JUSTICES AND PRESIDENTS* (2d ed. 1985).

Roberts nomination as an example, Professor Fish notes that such behavior is worth considering only when the defeat is the result of a party apparatus beset with feuding factions. Yet, even in such situations presidents generally will temporize their behavior if dealing with a Senate controlled by members of their own political party, as President Hoover did in 1930 reacting to the John J. Parker defeat. When successful opponents are not members of the president's political party, the situation is much different. The president is likely to perceive the defeat of the first nominee as a politically inspired, unjustified personal affront. The temptation to launch a counter attack, even if doomed to failure, can be irresistible.

Professor Fish's analysis is particularly important given the indications that the future promises increased possibilities for spite nominations to enter the judicial selection process. First, the importance of the Supreme Court has increased dramatically during the past fifty years, as a greater proportion of the Court's agenda has been devoted to extremely significant political and social issues. Consequently, judicial appointment struggles have become more intense. Simply put, the stakes are greater. Second, the number of cases decided by a one or two vote margin has soared, thereby making each Supreme Court appointment crucial, as evidenced by the Bork hearings. Third, the electorate has been increasingly willing to give control of the White House and the Senate to different political parties. Fourth, the confirmation process has become more public.⁷ Early in the nation's history, an indirectly selected president nominated candidates to be confirmed by senators who were elected by the state legislatures. Until the last fifty years, confirmation hearings were held in private. Judicial nominees did not testify. Today all aspects of the selection process are publicized. Elite politics have become mass politics. Press coverage is intense. The parade of interest group representatives making bold and sometimes unfounded claims is seemingly endless. This fanfare gives rise to the increased probability that senators will play to the crowd, that attacks on the nominee will become public attacks on the pres-

⁷ See Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

ident, and that presidents will be goaded into reacting with a spite nomination. Such reaction is especially likely when combative advisers, such as former Attorney General Edwin Meese, are advising the president on appropriate ways to respond to initial defeats.

Spite nominations typically are unproductive. Presidents would be well advised to avoid them. Fortunately, a combination of sanity and exhaustion normally sets in following the defeat of a spite nomination. Presidents tend to nominate more acceptable candidates, such as Harry Blackmun and Anthony Kennedy, as a third nominee and thus, the situation once again stabilizes. Yet, in the meantime the entire system is placed under extreme pressure. Such pressure is not advantageous to the institutions involved nor in the best interests of the people served by the judicial system.

