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Glenn R. Winters
American Judicature Society

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By Glenn R. Winters*

Introduction

Without law the democracy we all cherish would quickly degenerate to anarchy. The tremendous importance of law to the American people follows as a matter of course from this precept. Indeed, the much espoused theme that ours is a government of laws and not of men[1] is rooted in a deep respect for, and faith in, the rule of law. From this country's birth that trust has been embodied in the Constitution. It is the cornerstone and foundation of our legal structure. Even so, it and the laws enacted by Congress have no life or force separate from the people we choose to administer them.[2]

Because the continuing significance of our legal structure relies so heavily on its administrators, the quality of justice is directly related to the quality of those who are given the power to dispense it. Thus, the retention of the confidence and esteem of all who are subject to the laws of this country depends largely on the competence and character of our judges.[3] For this reason, the question of who is to assume the judicial role is one of vital concern to each citizen. Logically, the foremost means of assuring a sound, efficient and respected legal system is by protecting the integrity and responsibility of the method by which judges are selected. This paper will inspect the present selection process at the federal level.[4] In so doing, the basic concern will be an

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* Glenn R. Winters is executive director of the American Judicature Society and editor of Judicature, the Journal of the American Judicature Society. This article was prepared with the assistance of Richard P. Matthews, a research assistant in the Society and a student in the University of Chicago Law School.

[1] *See* The King v. Shipley, 4 Dougl. 73, 170, 99 Eng. Rep. 774, 824 (K.B. 1784) (opinion by L. Mansfield); Learned Hand in Irving, The Spirit of Liberty 287 (3d ed. 1960).

[2] In this context "administer" means the interpretation as well as execution of the laws. Specifically the term thus applies only to federal judges and magistrates.

[3] The words of Chief Justice Vanderbilt support this conclusion: "The basic consideration in every judicial establishment is the caliber of its personnel. The law as administered cannot be better than the judge who expounds it. . . ." A. Vanderbilt, The Challenge of Law Reform 11 (1955).

[4] For an examination of judicial selection procedures of the state and local

(Continued on next page)

evaluation of the merits of the present system. A comparison with the selection process at the state level and with past proposals for change will be made with a view to a remodeling of the current highly political process. Finally it will be suggested that a non-partisan judicial nominating commission working within the scope of the Senate's advisory powers under Article II would do much to insure the quality of the federal bench while also effecting greater impartiality and public confidence. It will not attempt to be exhaustive or specific. Rather, this paper is intended as food for thought with the hope that it will prove to be a catalyst to further thought and ultimately action by Congress.

THE CURRENT PROCESS

The present system of selecting federal judges is, on the surface, a very simple appointive scheme: the President appoints all judges with the "advice and consent" of the Senate.[5] The rationale, other than tradition, for granting such extensive appointive powers to the President with a reservation of the power to "check" given to the Senate is in theory very strong. It is based on the fact that the President is the only nationally elected officer; as such, he can lay claim to be representative of the nation's beliefs, desires and world view. In practice the system is far from the careful search for qualified candidates anticipated by the early founders.[6]

The greatest criticism of the present appointive system is its highly political overtones. From the time of President Cleveland

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levels *see* AMERICAN JUDICATURE SOCIETY, JUDICAL SELECTION AND TENURE (Rep. No. 7, 1971). There has been extensive discussion over the merits and demerits of judicial selection at the state-local level for some time. The American Judicature Society's report includes an extensive bibliography of that discussion. In comparison, very little has been written about the federal selection procedure and merit selection. For general examination, however, *see* Chase, *Federal Judges: The Appointing Process*, 51 MINN. L. REV. 185 (1966); Leflar, *The Quality of Judges*, 35 IND. L. J. 289 (1960).

[5] "He [the President] shall have Power, . . . by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not therein otherwise provided for, and which shall be established by law. . . ." U.S. CONST. art. II, § 2.

[6] *See* THE FEDERALIST NO. 76 AND 77, at 494-98 (A. Hamilton ed. 1937) RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911).

to the present administration, over 90 percent of those appointed have been from the party of the President.[7] This does not necessarily mean the appointments are bad, but it does undermine impartiality, ruin the apolitical atmosphere expected of the bench, and cause otherwise well-qualified prospects to be passed over solely because of their political affiliation.[8]

It is a fundamental premise of our system of government that the judiciary functions best when it is non-partisan and unattached to either the executive or legislative branch. To the extent that it is enmeshed with politics or another branch of government its role in the proper resolution of disputes is tainted. The present process is so enmeshed, and even when it is not, it creates an impression of entanglement. The line between appearance and reality in the eyes of the public is often indistinct. For this reason alone the appointive system now employed contains undesirable features that undermine esteem for legal institutions and processes.

Some have said that, regardless of appearances, the President should have the same unqualified powers of appointment with regard to federal judges as he does for cabinet officers. But the differences between the two types of posts are extensive. For the sake of efficiency alone the President should be allowed to choose those who will work with him. His nominations to posts in the executive department are not given life tenure, nor are they to be independent of him. Members of the judiciary, on the other hand, are independent. They are not "his" people. They are not to work for him or with him. The judiciary is a separate branch by law; its members do not serve at the executive's discretion nor can they consult him in their decision-making.[9] These characteristics make it clear that the President's discretion

[7] *See* Scott, *The Selection of Federal Judges*, 24 WASH. & LEE L. REV. 205, 206 (1967). A table compiled by the ABA reveals, for instance, that 98.7% of President Wilson's nominees were Democratic, 97% of President F. D. Roosevelt's nominees were Democratic, 95% of President Eisenhower's nominees were Republican. The *lowest* percentages of party nominees were those of President Taft—82%, and President Kennedy—88.9%. The ABA committee report kept such figures until 1969 when it determined, *sua sponte*, that party affiliation was not a relevant criterion. ABA STAND. COMM. ON THE FEDERAL JUDICIARY, REPORT 439 (1956).

[8] *See* Scott, *supra* note 7, at 206.

[9] *See* Black, *A Note on Senatorial Considerations of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970). *See also* THE FEDERALIST No. 76 AND 77, *supra* note 6.

or pleasure should not be the primary criterion for judicial nominations.

Others concede the uniqueness of judicial selection processes but contend that the President has the right to inject his particular judicial philosophy into the judiciary through his nominations. Unfortunately, a corollary of this view is that only those who agree with the President are qualified. Thus a potential judge clearly superior to another nominee might be excluded because his interpretations are not as "close" to the President's. Allowed to go unchecked, this could result in a portion of the bench being beneath its potential in quality.[10]

If it can be assumed that the choice of one man for President includes a choice of his particular judicial philosophy (and this is disputed), it still need not be unqualified. There is a point beyond which that choice should no longer be acceded to. That point is reflected in the nation's greater concern for the best possible judiciary. Anything less reduces the public's esteem and confidence.[11] In short, the President's desire to have a particular viewpoint reflected on the bench should be limited when, as a consequence, quality is compromised.[12]

Closely related to this is the emphasis upon having ethnic, racial, religious and sexual groups represented. Likewise, certain regions or sections of the bar desire to be represented. Again, to the extent that these desires do not conflict with maintaining the highest quality bench, they should be respected. There is some question as to whether the present mechanism honors such a balance.

Article II grants the President the power to nominate federal judges, but is that power actually employed by him, or does he more often than not consent to the choices made by state or local politicians or by the Justice Department? No one would argue that judgeships should be dispensed as favors; yet, reliance on

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[10] *See* Black, *supra* note 9.

[11] Indeed this seems to be the root of the latest controversy over Supreme Court nominations. President Nixon asserted an absolute right to have a "strict constructionist" on the court while "concerned" liberals sought to protect the existing character of the court from erosion.

[12] *See* Black, *supra* note 9. The relation between judicial philosophy and party affiliation is also worth noting. It is possible that the executive could shadow actual political party motives behind the broad tag of "judicial philosophy." The merger of party affiliation and judicial philosophy is often evident; however, it is unlikely that it is present 90 percent of the time!

political machinery usually results in that very thing. Accepting a senator's choice without any independent search creates problems.[13] Followed blindly, it represents an abdication of presidential powers to backroom dealings. As a matter of policy, the judiciary must be removed from the possibility of such occurrences.

As much as possible, the President's nominations (including the complete process leading up to them) should be open and known to everyone. Currently the real process is often covert and beyond the reach of the public.[14]

The agency which has the largest role in federal judicial nominations is the Justice Department.[15] As the chief litigant in the federal courts, the Justice Department's prominent part in judicial selections is, to say the least, undesirable. The conflict of interest that can and does arise as a result of the Attorney General's functions necessarily reflects on the character of the bench. One criterion of qualification should not be whether the candidate pleases or is favorable to a primary litigant. The President's use of the Justice Department unfortunately creates such an anomaly, but under the present system there is no alternative.

In 1946 the criticisms voiced above led to the formation of a special committee in the American Bar Association. It evolved into what is now the A.B.A.'s Standing Committee on the Federal Judiciary. In recent years, this committee has played

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[13] *See* Chase, *supra* note 4, at 221. *See also* the discussion of the controversy over the nomination of Francis Morrissey by President Johnson in 1965, described by Professor Chase in *Judicial Appointments–1963-1966*, 52 MINN. L. REV. 965, 980-86 (1968).

[14] The Senate hearings are open but the procedures to that point are excessively secretive. *See* Chase, *supra* note 4.

[15] *See* Scott, *supra* note 7, at 207. Miller, *Federal Judicial Appointments: The Continuing Struggle for Good Judges*, 41 A.B.A.J. 125, 128 (1955). Senator Scott has said:

> What of the role played by the Department of Justice in the selection of judges? It is conceivable that the public may feel that factors extraneous to the legal merits may influence the decision of a judge when the Justice Department is a party to the suit and the Department plays such an important role in the changes of the presiding judge's promotion. Whatever the objective merits as to whether such factors influence to any extent–the result of the case, the necessary public confidence in the judiciary should not be undermined by a suspicion, no matter how unfounded, that the cards are stacked against them.

Scott, *The Selection of Federal Judges: The Independent Commission Approach*, 8 WM. & MARY L. REV. 173, 180 (1967).

an important role in the selection of federal judges.[16] The nominal function of this body is to protect the integrity of the federal bench by evaluating nominees for judicial vacancies.

The degree to which the A.B.A. committee participates in judicial selection depends entirely on the indulgence of the Senate and the President. The authority it exerts is a function of the esteem accorded its recommendations and findings. Furthermore, it serves primarily in a *post facto* capacity. That is, it does not attempt to seek out talented persons for the bench and bring them to the attention of the President. Instead, it limits itself to evaluating the candidates put forward by the Justice Department. Nonetheless, the A.B.A. committee does represent a healthy check upon the potential inroads on the competence of the federal bench.

The Senate was intended to be the foremost check on the character of the President's selections. However, it is itself a part of the political process. Its members are not divorced from the pressures attached to the advantages of securing a judicial post.

The present federal judicial selection mechanism can best be characterized as overly political. It is far from the anticipations of the Constitution. It is highly enmeshed in the politics of the executive and legislative branches. It is not conducive to impartiality or separation of governmental powers. More importantly, it does not assure the quality of justice each citizen has a right to expect. The majority of federal judges today are quite competent, but that does not suggest that we have the best bench or that future selections will be as good.

SOME ALTERNATIVE SELECTION METHODS

Not being complacent about the quality of those chosen to the federal judiciary is not enough. If we are concerned that the quality of the judges who administer the Constitution and federal laws not be diminished, it is incumbent upon us to delineate a

[16] The history of the ABA committee as described in Grossman, *The Role of the ABA in the Selection of Federal Judges: Episodic Involvement to Institutionalize Power*, 17 VAND. L. REV. 785 (1964). *See* Chase, *supra* note 4. *See also* Goldman, *Judicial Appointment to the U.S. Court of Appeals*, 1967 WIS. L. REV. 186 (1967); Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 MASS. L.Q. 138 (1961).

better selection process. It is suggested that the method employed by many states, most often referred to as the merit plan,[17] is such a process.

The merit selection method involves the use of a publicly visible panel that recruits, evaluates and recommends a list of qualified candidates for use by the executive in making his nomination. Ideally, it is empowered by statute or constitution and functions as a non-partisan, continuing, advisory body composed of members of the bar, the bench and the citizenry. In a number of states, however, governors have found it to their advantage to set up such a commission on their own initiative.[18] Its explicit purpose is to insure careful consideration so that each vacancy is filled by the best possible candidate. Thus it reassures the public that the judiciary is being selected on the basis of excellence and competence rather than party service or other irrelevant considerations. At the state level it has proven to be a method of making good appointments without transgressing on valid executive prerogatives. In short, merit selection commissions reduce suspicious appearances, secure the foremost candidates, engender public confidence and retain executive authority.[19]

In 1966 Senator Hugh Scott introduced a bill in the U.S. Senate which proposed the establishment of a panel to advise the President on judicial appointments.[20] According to Senator Scott:

> My bill would establish a seven-man Judicial Service Commission to be appointed by the President by and with the advice and consent of the Senate. At least three members would be present or former members of the American Bar Association's Committee on the Federal Judiciary, and at least two would be retired federal judges. No more than four members would come from the same political party. The Commission would examine the qualifications of prospective appointees to the federal bench and, whenever a vacancy occurred, would make recommendations to the President for the filling of such vacancy. My bill expresses the sense of Con-

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[17] Winters, *The Merit Plan for Judicial Selection and Tenure–Its Historical Development*, 7 DUQUESNE L. REV. 61 (1968). *See also* note 4, *supra*.

[18] *See* Lowe, *Voluntary Merit Selection Plans*, 55 JUDICATURE 161 (1971).

[19] *See* SELECTED READINGS: JUDICIAL SELECTION AND TENURE (G. Winters ed. 1968).

[20] S. 3579, 89th Cong., 2d Sess. (1966). *See* Scott, *Legislative Proposals for Reform of the Federal Judiciary*, 50 JUDICATURE 50 (1966).

> gress that, whenever the President appoints an individual to the federal judiciary who was not recommended by the Commission, he shall furnish the Senate with a statement explaining why he did not follow the Commission's advice.[21]

The bill was premised upon the principle of the merit plan. Unfortunately, the bill never got out of the judiciary committee and has not been proposed again.[22]

The foremost criticism of the idea embodied in Senator Scott's bill is that the A.B.A. committee already functions in much the same manner. This is simply not so. A legally recognized, continuing body would be much different in form, function and authority.

As was noted earlier, the viability of the A.B.A. committee is directly proportional to the regard its views are given. If the Senate or President solicits and relies on its views, it has some weight. But the stir created after the committee's unfavorable recommendations on President Nixon's recent choices for the Supreme Court reveals how tenuous its influence is. Furthermore, inspection of past reports by the committee shows that finding a nominee "unqualified" may have no effect on the ultimate choice made by the President.[23] The respect accorded a legally authorized body, on the other hand, would be much greater. As an authorized body, its recommendations would constitute in themselves a source of pressure. Because it would not be very convenient or simple to discard a commission's report, they would be important.

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[21] Scott, *supra* note 20, at 53.

[22] Senator Scott's proposal is by no means the only proposal for reform of the federal process. For instance, after the decision in Brown v. Board of Education no fewer than 14 proposals that would have altered the process were introduced in the 85th Congress. *See* H.R. Res. 408, 85th Cong., 1st Sess. (1957). In 1958 the ABA presented a resolution to the President which urged:

> Suggestions for nominations should originate in an independent Commission established as an agency of the President, to advise with the President on Appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointment as judges in their respective jurisdictions.

See 44 A.B.A.J. 1109-12. For reaction (most favorable) to the resolution *see* 42 JUDICATURE 91 (1958).

[23] Chase, *supra* note 13; Goldman, *supra* note 16. Up to February 1, 1972, President Nixon had not nominated a person who was not found qualified by the ABA committee. While each of his 164 nominees was qualified this was not the case under earlier Presidents. President Johnson, President Kennedy and President Eisenhower each nominated persons found "not qualified" in approximately 6% of their selections.

Another point of difference is that the A.B.A. committee only attempts to "exclude". It is negatively oriented in that it is designed to keep out unqualified judges.[24] Because it works in an after-the-fact manner (i.e. having no ability to seek out qualified nominees), the A.B.A. committee cannot be positively oriented. The true goal, however, should be to attain quality in a direct manner. Judge Samuel Rosenman emphasized this concept several years ago in a speech to the American Judicature Society when he said:

> Most of the agitation to change methods of selection comes from a desire to keep out [an unqualified] judge.
>
> But it is not enough for a system of judicial selection to aim at exclusions. It should not be designed negatively as a 'keep out' system. It should be affirmative and positive—providing a means of bringing to the bench, not haphazardly or occasionally but as consistently and routinely as possible, the very best talent available and willing to serve.[25]

A merit selection process authorized by Congress would be positive. A continually serving body with built-up expertise and a willingness and ability to search out the very best talent would not have to be concerned negatively. The difference in attitude alone is tremendously significant and is reason enough to seek a reform of the present system.

As the A.B.A. committee is presently composed, the public exercises no power over its composition. While its members are among the most prestigious and esteemed lawyers in the country, there is no assurance that they are the best persons to undertake such a role. Although its members presently represent a broad cross section of the country this may not always be the case.[26] Too, is it necessarily true that only the bar can judge? Is it possible that only certain sections of the bar are represented? It is likely that a committee appointed by the President might be less representative or less professionally knowledgeable than the A.B.A. committee; but at least representatives of the public would have some part in the process.

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[24] Grossman, *supra* note 16, at 809.

[25] Rosenman, *A Better Way to Select Judges*, 48 JUDICATURE 86-87 (1964).

[26] However, committee selection procedures do seem to attempt to preserve a cross-sectional grouping. At the same time, they are not assured of doing so.

Closely related to this last point is the unacknowledged status of the A.B.A. committee. The position of a statutorily empowered selection commission would be legitimized. A public forum acknowledged by law to advise the Senate and the President would create much more awareness and sensitivity. Many people are not aware that the A.B.A. committee serves in an advisory capacity with respect to appointments to all lifetime federal judicial posts other than the Supreme Court. For instance, since his inauguration President Nixon has nominated 164 persons to vacancies in various District Courts, Courts of Appeal, the Court of Claims, Court of Customs and Patent Appeals and the U.S. Customs Court.[27] On all but one of these the A.B.A. committee first reported to the Justice Department on the qualifications of the nominee before submission to the Senate. This function is important and it should be recognized and made known.[28]

It is argued that the use of a nominating commission whose members are appointed by the President would only serve to shift the area of politics to that sphere. It is to be noted that the commission is formulated on a non-partisan basis. While it would be unrealistic to expect everyone involved to put politics completely out of mind, if the membership is balanced politically opposing forces would be neutralized so that criteria other than politics would become the foremost issues. Furthermore, the system could be set up as in most state systems so that vacancies on the commission could not all occur at the same time. Other safeguards could be formulated to protect against the commission's becoming another political arena. Thus, the argument that a commission would change nothing could be silenced by safeguards that could be provided against politicizing it.

CONCLUSION

Two material factors lend special impetus to the need for law reform in general and reform of the federal judiciary in particular. The increasingly complex nature of our society with its conse-

[27] ABA STAND. COMM. ON THE FEDERAL JUDICIARY, REPORT 4-5 (1972).

[28] This suggests another alternative. Have a statutory authorization of the ABA committee. Some fear that the bar group might be afraid to criticize those whom they practice before, but, to date, this has not proved to be a valid assumption. Recognition of the ABA along with a grant of more positive powers might be a sound compromise.

quent "law explosion"[29] and the heightened sensitivity to judicial conduct[30] should be cause enough to take a second glance at our judiciary and the manner in which it is chosen. Senator Scott spoke on this point quite eloquently when he said:

> . . . with the need for qualified judges in the Federal courts greater today than ever before due to the increasing number, diversity, and complexity of cases, we . . . must be the leaders in answering the challenge to ensure that the most competent and qualified men available—and recognized as such by the public—serve in the Federal judiciary.[31]

Instituting merit selection procedures would alleviate many of the more serious criticisms of the federal nominating process, but such procedures are no panacea. One noted authority went to the crux of the matter quite succinctly by noting:

> No judge was ever great because he was selected in a certain manner, but the manner of his selection may cause him to be less great than he could have been had he been free of the limitations imposed upon him by the circumstances of his selection. . . . It is certainly fair to ask, as to any method of selection that already exists or is proposed: Will it achieve, or at least will it move in the direction of achieving, the designation of judges solely from among those of our number who will really make good judges?[32]

What is the aim of any selection process? What should be the standards and how should they be applied? Perhaps the words of a past president of the American Judicature Society and the American Bar Association, Chief Justice Arthur T. Vanderbilt of New Jersey give some indication:

> [An] essential of a sound judicial system is, of course, a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution, thoroughly grounded

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[29] *See* COURT CONGESTION AND DELAY: SELECTED READINGS (G. Winters ed. 1971).

[30] This is evidenced by the extensive debate over President Nixon's recent Supreme Court nominations, accusations against leading federal judges and the action of the Judicial Conference in setting rigid standards of conduct for federal judges.

[31] Scott, *supra* note 7, at 176.

[32] Leflar, *supra* note 4, at 300-01.

> in his knowledge of the law and of human nature including its political manifestations, experience at the bar in either trial or appellate work and preferably in both, of such a temperament that he can hear both sides of a case before making up his mind, devoted to the law and justice, industrious, and, above all, honest and believed to be honest.[33]

Incorporating his standards into the guidelines currently employed by the A.B.A. committee on the Federal Judiciary[34] would do much to increase the standing of the federal bench in the mind's eye of the public—if those standards were employed under the imprimatur of Congress by a body of respected citizens. Such a mechanism would make known to the President in a *timely* and *impartial* manner those persons who were exceptionally qualified for the federal bench. It would have several advantages: it would insure that the choice was not made by the chief litigant of the federal courts; it would limit the role of politics; it would create an atmosphere of impartiality and expertise; it would be able to function in a *positive* manner to seek out qualified men and women; it would mean few judges would need to remove public suspicions about their partisanship or abilities.

Mr. Justice Miller ninety years ago made a point that is particularly applicable here. In one case he posited:

> [The] power and influence [of judges] rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights

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[33] Vanderbilt, *The Essentials of a Sound Judicial System*, 48 NW. U.L. REV. 1, 3 (1953).

[34] The statement of standards applied according to the most recent committee reads:

> For its part, the Committee has determined to apply very high standards. After its report on Judge Harrold Carswell in 1970, the Committee re-evaluated its function. It concluded that mere absence of specific fault was not enough to justify its lack of opposition to a Supreme Court nomination—that excellence was required as measured against a national standard rather than a local standard. As to sitting judges, it decided that more than pedestrian judicial experience was required. In the absence of judicial experience, the Committee concluded that only a record of exceptional professional accomplishment and national prominence in the legal profession could justify an appointment to the Supreme Court. It was the view of the Committee that a community reputation for excellence was not enough and that a broader national standard should be applied. Particularly in the absence of significant judicial experience, this would require experience of sufficient public or professional importance to expose its incumbent to national professional scrutiny.

ABA STAND. COMM. ON THE FEDERAL JUDICIARY, REPORT 3 (1972).

> guaranteed by the Constitution and by the laws of the land, *and on the confidence reposed in the soundness of their decisions* and the purity of their motives.[35]

It is suggested that the use of a federal judicial nominating commission to advise the President would increase the confidence of the people. It would go far to insure the purity of the bench's motives and (because of the probable increase in quality) the soundness of their decisions.

No reason other than the protection of the political benefits now enjoyed exists for retaining the present federal selection process. We can not afford to postpone action any longer. This one small but significant reform would do much to bolster confidence in our institutions of law and the men who administer them.

[35] United States v. Lee, 106 U.S. 196, 223 (1882) (emphasis added).