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FAX COVER SHEET

This fax transmission consists of a total of 29 pages including this cover page. If you have not received all the pages, please call (914) 421-1200.

DATE: 8/13/96 TIME: 2:15 pm

TO: Mike Pendleton TITLE: Free Cypress Foundation

FAX #: 202 543-5605 RE: Coalition for Reform

FROM: Elena Sassower

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MESSAGE: As discussed — enclosed are

(1) ltr to Nan Aron w/ reform recommendations (non-partisan)

(2) current issue of ABA Journal w/ 5/2/96 hearing on role of ABA

(3) pp. 29, 34-5 of Judicial Roulette re constitutional ambiguity/flexibility in review of lower ct judges

Judicial Roulette: 20th C Task Force

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Politics and Judgeships

AS WITH MUCH ELSE, the Constitutional Convention in 1787 had to compromise on the process of appointing federal judges. Then, as now, opinion was divided over how to accommodate competing demands for judicial independence from those who appointed the judges and accountability to the public. The debates among the Founding Fathers culminated in giving the president the power to nominate and—with the advice and consent of the Senate—appoint members of the Supreme Court. As to lower federal court judges, the Constitution was—and remains—sufficiently ambiguous as to allow for a variety of options in making judicial appointments. In any event, partisan politics quickly came to control the appointment of all federal judges. As a result, the judiciary falls short of being either a meritocracy or representative of the American electorate.

The Appointment Power and the Founding Fathers

One of the grievances against the King, cited by Thomas Jefferson in the Declaration of Independence, was that "he has made judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries."[1] But though judicial independence was deemed important, there were those—like the anti-Federalists—who, out of concern for state and local interests, pushed for popular accountability of judges. (More recent court reformers and critics argue for accountability in terms of gaining direct representation of the electorate on the federal bench.)[2]

Circumstances conspired to have the president and the Senate share the appointment power. Initially, the delegates at Philadelphia considered the Virginia Plan, which gave Congress the power to choose an executive and members of the federal judiciary. Pennsylvania's delegate James

were so inclined, to attempt a controlling influence. Such an appointment is not a local matter, and the entire nation has an equal interest and responsibility."[14] Still, the Senate as a whole has the power to influence the selection of—and even to defeat—a president's nominee.

Because of partisan politics and the ambiguity of Article II, section 2 of the Constitution, the role of the Senate in judicial selection is far greater than envisioned by the Founding Fathers. Yet, the language of Article II allows for several methods of appointing lower-court judges. It provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law. . . ." But it also states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Based on the latter clause, Shartel and political scientist Harold Chase argue that lower-court judges are "inferior officers"—both in the sense of being judges of courts "lower than" the Supreme Court and in the sense that they are officers of "such inferior Courts as the Congress may from time to time ordain to establish."[15] They conclude, therefore, that Congress could (without amending the Constitution) give the president, the attorney general, the Senate, the Supreme Court, or a judicial selection commission the power to appoint lower-court judges.

Throughout most of our history, lower-court judges were assumed to be simply "inferior officers." Not until the Circuit Courts of Appeals Act of 1891, which created the courts of appeals as we know them today, did Congress specifically provide that "there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge." Only when the law was recodified in 1948 was it required that all federal judges be appointed by the president with the advice and consent of the Senate.[16]

The judicial appointment process is thus more firmly grounded in political norms than in the Constitution. The possibility of major confrontations undergirds these norms. In the past century, for example, Congress successfully both denied presidents additional appointments (in order to preserve the Court's policies) and increased the number of justices so as to change the ideological composition of the Court. In this century, Congress has withheld authorization of lower-court judgeships as well as approval of nominees so as to deny lame-duck presidents their judicial appointees. It did so in 1960 and, again, in 1975

in order to deny outgoing Presidents Eisenhower and Ford large numbers of lower-court judicial appointments. Because of the Senate's vested interests in district court judgeships, Congress is unlikely to give a president complete control over appointments. Further, were a president to seriously threaten the prevailing norms governing the appointment of lower-court judges, Congress might attempt to take away presidential prerogatives in the appointment of lower-court judges. There is little doubt that such a move could deprive a president of his influence over the appointment of lower-court judges. Congress has circumscribed the president's appointment power in the courts of the District of Columbia. By statute, the District of Columbia Nominating Commission provides the president with a list of candidates for judicial vacancies, and the president must nominate a judge from that list within sixty days. If he fails to do so, the commission may nominate and, with the advice and consent of the Senate, appoint a judge from its list.[17] Disagreements between the commission and the president have, thus far, been resolved—usually through compromise. In one instance, though, in 1986, a potential constitutional conflict was only narrowly avoided. Philip Lacovara, Reagan's representative on the commission, who was reappointed for a second term, decided to resign because of difficulties he had in dealing with the Department of Justice's "ideological litmus test" for judicial candidates.[18]

In sum, the compromise struck in Article II, section 2 provides a basis both for presidents to claim judgeships as a personal prerogative and for Congress to expand or take away presidential patronage in the lower federal courts.

Partisan Politics and Merit

Because partisan politics dominates the selection of judges, presidents make no effort to achieve a political balance in the judiciary. The party affiliations of those who have served on the Supreme Court largely reflect the politics of their presidential benefactors: thirteen Federalists, one Whig, eight Democratic-Republicans, thirty-nine Republicans, and forty-two Democrats.[19] Similarly, statistics show that between 1885 and 1940, almost 95 percent of lower federal court appointments were from members of the party in power.[20] Table 2.1 shows the party affiliations of judges appointed by presidents from FDR to Reagan.[21]

Despite a history of partisan appointments, the myth still circulates that judges should be selected strictly on the basis of merit. Attorney