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## Modern Federal Judicial Selection

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## BOOK REVIEW

### MODERN FEDERAL JUDICIAL SELECTION

Carl Tobias\*

PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN. By Sheldon Goldman. Yale University Press, 1997. Pp. xv, 365.

#### I. INTRODUCTION

The selection of federal judges is a critical responsibility which the United States Constitution assigns to the President. The Chief Executive nominates and, with the advice and consent of the United States Senate, appoints these life-tenured officials who resolve disputes that involve Americans' fundamental freedoms. *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan (Picking Federal Judges)*<sup>1</sup> by Professor Sheldon Goldman substantially improves comprehension of this crucial feature of modern governance.

Professor Goldman's extensive analysis of judicial appointments to the circuit courts of appeals and the district courts makes a valuable contribution for several reasons. The great symbolic and actual significance that attaches to the few openings which arise on the United States Supreme Court means that nominees for these vacancies receive intensive public scrutiny. Many authors have published books about numerous confirmation proceedings,<sup>2</sup> while considerable law review literature has evaluated the process for choosing justices.<sup>3</sup>

In contrast, the public and scholars have devoted comparatively little attention to lower court appointments. Observers have written few books or law review articles that examine selection for the appellate and

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1. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

2. See, e.g., MARK H. GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992); PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992); see also STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

3. See, e.g., Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146, 1146-1229 (1988).

district bench. To be sure, several recent books have touched on the inferior court selection process<sup>4</sup> and law review commentary occasionally explores this topic.<sup>5</sup> However, Professor Harold Chase completed the last comprehensive assessment of appointments to the appellate and district courts a quarter-century ago, and his work is now rather dated.<sup>6</sup> This situation has prevailed, even though these courts are integral to late twentieth century democracy. For example, the regional circuits are the courts of last resort for virtually all federal cases,<sup>7</sup> while district judges decide controversies that directly affect millions of individuals.

Public interest in the lower courts, nevertheless, has been increasing. Over the last two decades, Chief Executives have evinced growing appreciation of these appointments. Indeed, Senator Robert Dole made President Bill Clinton's choice of inferior court judges a major issue in the 1996 campaign. Despite, and perhaps because of, the Chief Executive's re-election, judicial selection has remained extremely controversial. For instance, the Clinton Administration and the Republican Party majority in the Senate sharply disagree about appointments. These differences led the first session of the 105th Congress to confirm only thirty-six judges for the appellate and district courts,<sup>8</sup> even though there are currently more than fifty vacancies on the federal bench.

In short, the present is a critical moment for federal judicial selection as traditionally practiced and a time when there is a compelling need for the type of exhaustive examination of the appointments process which Professor Goldman performed. These ideas suggest that *Picking Federal Judges* deserves analysis. This book review undertakes that effort. I first provide a descriptive evaluation of Professor Goldman's book. The review then assesses the benefits which *Picking Federal Judges* affords. I next offer several constructive criticisms that could improve the book and consider certain areas in which additional work may be warranted.

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4. See, e.g., DEBORAH J. BARROW ET AL., *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1995); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996).

5. See, e.g., Laura E. Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257.

6. See HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972). But see J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981); DAVID M. O'BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* (1988).

7. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *FINAL REPORT*, ix (1998).

8. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 953 (1998).

## II. DESCRIPTIVE ANALYSIS

*Picking Federal Judges* comprises nine chapters, the first of which examines "judicial selection in theoretical and historical perspective" and the last of which "sums up over fifty-six years." The middle seven chapters explore the appointments process in each of the presidencies from Franklin Delano Roosevelt to Ronald Reagan, although Professor Goldman combines treatment of the Kennedy and Johnson as well as the Nixon and Ford Administrations.

The seven chapters that analyze the selection of judges during specific presidencies include introductory overviews of each of the administrations. Every chapter also evaluates Chief Executives' participation in choosing judges; presidential policy agendas and judicial selection; and the involvement of senators in naming members of the bench. All of the chapters assess "other factors," such as political party and American Bar Association (ABA) participation, which implicate the appointments process. Moreover, each chapter scrutinizes the consideration, or lack thereof, accorded women and minorities, especially African Americans, for vacancies. The chapters conclude with summaries of judges' demographic profiles, including information on age, education, experience, occupation, political party, gender, race, and religious origin or affiliation.

## III. CONTRIBUTIONS

*Picking Federal Judges* makes a number of valuable contributions to the appreciation of judicial selection. Professor Goldman's assessment of the process of choosing judges for the appeals and the district courts is a tour de force. The book is premised on voluminous primary and secondary research, particularly involving the papers of every Chief Executive from Roosevelt to Reagan, and provides a wealth of important information on judicial selection over the course of a half-century. The author includes numerous perceptive insights that he derived from more than three decades of observing and writing about court appointments.

One significant way in which *Picking Federal Judges* enhances comprehension is by enabling readers to compare and contrast the practices for choosing judges followed in nine presidential administrations with perspectives that ranged across a broad spectrum. For example, Professor Goldman shows how the differing policy, partisan, and personal agendas as well as the diverse management styles of each Chief Executive influenced the naming of judges. More specifically, he demonstrates that Presidents Roosevelt and Reagan similarly viewed

appointments as a means of advancing their very different policy objectives.<sup>9</sup>

*Picking Federal Judges* offers many instructive ideas regarding the responsibilities of numerous people and institutions, such as individual senators, as well as, Department of Justice and White House officials, who participate in judicial selection. For instance, Professor Goldman provides a valuable account of the role that the ABA has played. He traces the origins and early development of ABA activity and the increasing interest which administrations evinced in Bar Association input. *Picking Federal Judges* explains how President Dwight Eisenhower first officially recognized ABA involvement in rating nominees<sup>10</sup> and how every subsequent Chief Executive relied upon these rankings to choose judges.<sup>11</sup> Professor Goldman concomitantly analyzes how the Bar Association's efforts became controversial over the half-century after their formal recognition. This comprehensive examination of ABA activity assumes additional significance in light of the recent decision by Senator Orrin Hatch (R-Utah), chair of the Senate Judiciary Committee, to terminate the Bar Association's official role as committee adviser.<sup>12</sup>

Professor Goldman also affords helpful insights on the Senate's responsibilities. He emphasizes the importance of the Judiciary Committee and its chair in investigating, conducting hearings, and voting on each of the nominees—essentially controlling their fate. Moreover, *Picking Federal Judges* shows the continuing vitality of senatorial courtesy and patronage, whereby senators who represent locales in which district court vacancies occur exercise substantial power over recommendations of nominees to fill those seats.<sup>13</sup> In contrast, Professor Goldman illustrates how appeals court openings accord presidents greater flexibility because senators from specific states have less influence over the nomination process.

*Picking Federal Judges* increases understanding of the appointment of women and African Americans. The book examines how Presidents Franklin Roosevelt, Harry Truman, and Dwight Eisenhower expressly instructed their aides responsible for judicial selection to find highly qualified men while displaying disinterest in, if not hostility to, the idea

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9. See GOLDMAN, *supra* note 1, at 30-38, 296-307.

10. See *id.*, *supra* note 1, at 114-15.

11. See *id.*, *supra* note 1, at 165-66, 205, 247, 309-10.

12. See, e.g., Terry Carter, *A Conservative Juggernaut: Judicial Attacks Push Debate to Right, Put Hatch in Middle*, 83 A.B.A. J. 32 (June 1997); N. Lee Cooper, *Standing Up to Critical Scrutiny*, 83 A.B.A. J. 6 (Apr. 1997). See generally ABA, *STANDING COMMITTEE ON FEDERAL JUDICIARY—WHAT IT IS AND HOW IT WORKS* (1991).

13. See GOLDMAN, *supra* note 1, at 38-44, 79-81, 131-34, 173, 209-11, 260-64, 307-19.

of seriously considering African Americans.<sup>14</sup> Professor Goldman demonstrates that Presidents John F. Kennedy, Lyndon Johnson, Richard Nixon and Gerald Ford made essentially token appointments of female and minority judges, even as each achieved breakthroughs.<sup>15</sup> *Picking Federal Judges* illustrates how President Jimmy Carter was the first Chief Executive who treated naming many women and minorities as a significant policy priority. The book explores practices, such as merit-based nomination commissions, which the Carter Administration employed to attain its objective.<sup>16</sup> President Reagan dismantled most of these panels, although he did appoint numerous women to the bench.<sup>17</sup> President George Bush correspondingly instituted special efforts to appoint female judges and succeeded in placing unprecedented numbers of women on the federal courts.<sup>18</sup>

The chapters that analyze particular presidential administrations retell a plethora of fascinating stories relating to the selection of judges for specific vacancies. Professor Goldman scrutinizes in exquisite detail the machinations which attend the appointments process. He skillfully explores the complex constellation of phenomena that alone or synergistically can conspire to make or doom a candidacy. These include minuscule twists of fate; accidents of timing; predilections of presidents, members of Congress, attorneys general, and other national, state, and local political figures; and considerations, as momentous as world wars and as apparently innocuous as education, occupation, age, geography, and religious affiliation.

Readers learn of aspirants whose hopes were dashed by one senator's opposition, of vote trading over nominees, and of package deals which created openings for favored candidates by elevating district judges to the appellate bench. Illustrative are the concerted efforts of Senator Edward Kennedy (D-Mass.), chair of the Senate Judiciary Committee, to facilitate Professor Archibald Cox's appointment in 1978 which eventually failed because Cox was sixty-seven years old. However, the Senator's efforts were later successful in securing Professor Stephen Breyer's confirmation after President Reagan won the 1980 election.<sup>19</sup> Professor Goldman's assessment will disabuse anyone who ever doubted that judicial selection is a complex, subtle, fortuitous, and highly politicized process.

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14. See, e.g., *id.* at 54-57, 98-101, 143-46.

15. See, e.g., *id.* at 182-87, 222-26.

16. See *id.* at 238-50, 269-74.

17. See *id.* at 286-96, 329-34.

18. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1238-39 (1993).

19. See GOLDMAN, *supra* note 1, at 261.

Finally, the best aspects of *Picking Federal Judges* appear to be Professor Goldman's reflections on judicial appointments gleaned from observing the selection process over the course of his career. For example, he traces, descriptively evaluates, and summarizes the federal judiciary's gradual professionalization, whereby increasing numbers of appointees have brought prior judicial experience to service on the federal bench.<sup>20</sup>

#### IV. CONSTRUCTIVE CRITICISMS AND AREAS WARRANTING ADDITIONAL EXPLORATION

Notwithstanding all of the valuable contributions to comprehension of selection for the federal appellate and district courts that *Picking Federal Judges* makes, I have some suggestions which are primarily in the nature of minor or technical constructive criticisms. Moreover, there remain certain areas that may profit from elaboration or in which additional research would apparently inform understanding of judicial appointments.

Professor Goldman could have examined more critically the different presidents' selection processes and the decisionmaking of the judges chosen. Both phenomena defy felicitous analysis principally because they require rather subjective judgments. Nonetheless, attempts to compare and contrast the various administrations' appointment practices, in terms of criteria, such as the time required to submit nominations, ABA rankings, and confirmation rates, may prove productive. Substantive judicial decisionmaking is equally, if not more, difficult to assess. However, evaluators might consult several factors, including reversal rates and speed of dispositions, or invoke studies in addition to the work which *Picking Federal Judges* mentions.<sup>21</sup> Illustrative is a recent comparison of the voting records compiled by appointees of every president since Nixon which shows that the determinations of judges whom the Clinton Administration named most closely resemble those of Ford appointees.<sup>22</sup> Moreover, it would have been beneficial had Professor Goldman applied the vast knowledge which he has accumulated over a lifetime of scrutinizing selection to posit constructive recommendations for improvement.

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20. See *id.* at 347-51, 353; cf. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 745-46 (1997) (noting that Clinton appointees have also had prior judicial experience before serving on the Federal bench).

21. Professor Goldman does observe that specific judges had liberal or conservative voting records by relying on his earlier work and bar surveys. See, e.g., GOLDMAN, *supra* note 1, at 166, 306-07. It would be helpful to have analysis that is at once more extensive and specific.

22. See Ronald Sidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16 (1996). See generally ROWLAND & CARP, *supra* note 4.

Professor Goldman could also have attempted to impose a more systematic organizational scheme on his presentation of stories that recounted how each presidential administration filled openings. Too little logic and occasional disjunctures seemingly attended the essentially chronological order in which the vignettes appeared. Several stories may even have remained unfinished. The insufficiently clear organizational structure can complicate readers' efforts to follow Professor Goldman's ideas. Perhaps reliance on geography or additional themes, such as appointment patterns, would have better unified the enormous mass of material canvassed.

*Picking Federal Judges* might have assessed the persistent vacancies problem, whereby recent Presidents and Congresses have experienced increasing difficulty in filling all of the authorized judgeships, and afforded suggestions for ameliorating this conundrum of contemporary judicial selection.<sup>23</sup> Several astute federal courts observers have found that the dilemma is intractable,<sup>24</sup> but it would be helpful to have the benefit of Professor Goldman's expert thinking on this matter. The author could concomitantly have evaluated, and provided recommendations for addressing, the recent impasse over court appointments which resulted in the confirmation of fewer than forty judges during 1997.<sup>25</sup> In fairness, *Picking Federal Judges* was published as these developments were unfolding, and this timing probably precluded their inclusion. Public officials in the federal government's three branches and scholars must also articulate a more refined theory and practice of judicial selection and develop a blueprint for improving selection in the future, although the intrinsically political character of the appointments process may impede these efforts.

## V. CONCLUSION

*Picking Federal Judges* by Professor Sheldon Goldman immeasurably enhances understanding of federal judicial selection throughout the half-century that spanned the presidencies of Franklin Roosevelt and Ronald Reagan. The book increases comprehension of the process as well as the individuals and entities involved in choosing judges, while it offers informative insights which should improve judicial appointments in the twenty-first century.

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23. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); see also Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

24. See Bermant et al., *supra* note 23.

25. See Tobias, *supra* note 8; see also Tobias, *supra* note 20.