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The Role of Lawyers in Social Change: United States

*Frank Upham**

I. THE SELECTION OF JUDGES

The American ideal of a "government of laws, not men" is grounded in the concept of an independent judiciary with lifetime tenure removable only by impeachment. Nonetheless, perhaps the most striking characteristic of judicial selection in America is its explicitly political nature. At the state level, many judges are elected, and the rest are appointed by the state's governor, usually on the basis of party affiliation. At the federal level, the President appoints all judges with confirmation by the Senate. The President limits judicial appointments almost exclusively to members of his own party, and the course of the confirmation process depends almost entirely on the personal power of particular senators or the political ideology of the nominee.

The politicization of judicial recruitment is defended on the basis of democratic accountability, and virtually no one argues that American judges should be selected solely on a narrow definition of technical competence. Americans expect their judges to have broad experience and knowledge of the world that is inconsistent with political innocence. It remains true, however, that one of the continuing issues in judicial selection at both the state and federal levels is how to structure an overtly political process to produce a judiciary that will be competent and independent as well as politically responsive.

Another distinctive aspect of judicial selection on both levels in the United States is the age and experience of judicial nominees. Judges at all levels from summary courts in local neighborhoods to the U.S. Supreme Court are chosen from among lawyers with extensive practical experience. The type of experience will vary with the type of judicial post - trial judges will normally have had extensive litigation experience as attorneys, whereas appellate judges are drawn not only from trial judges but also from business lawyers, politicians, or even professors. The ten to thirty years experience after completion of education means that American judges come to their positions as mature professionals, which has profound implications on other criteria for their selection and recruitment as well as for training and education.

* Professor of Law, Boston College Law School.

A. *Federal Judicial Selection*

1. Size and Background of the Federal Judiciary

Over the last three decades, both the caseload and the number of judges and other personnel in the district and appellate federal courts have risen sharply. For example, while the number of district court judges doubled between 1900 and 1960, it more than doubled again from 1960 to 1980, and by 1990 there were close to 650 active district court judges. In 1986, support staff was over 15,000, more than double the number in 1970. Besides the probation staff, bankruptcy judges, magistrates, and public defenders attached to each federal court, there were 1,700 law clerks, over 1,000 secretaries, 130 staff attorneys, and over 100 managers and other administrative staff.

Increasing numbers and the fear of "bureaucratization" of the judiciary have created problems in recruitment. One problem is salary. Because judges are chosen in mid-career, they often have family and other responsibilities that require substantial salaries. This factor is exacerbated by the practice of appointing private practitioners to the federal bench, especially partners in large corporate law firms where they will normally make over \$300,000 per year. Both of the last two Chief Justices of the Supreme Court have lobbied hard for increased judicial salaries, and there have been increases in the last decade. District Court judges now earn \$96,600 a year, appellate judges earn \$102,500, and associate justices of the Supreme Court \$118,600. While these salaries compare favorably to those of mid-career lawyers in government service, academic life, and many kinds of private practice, they still fall far short of being able to attract top corporate lawyers to join the judiciary, especially at the district court level.

2. The Process of Selection

Federal judges are appointed by the President and confirmed by the Senate. Depending on the political balance of power between the President and the senators on the Senate Judiciary Committee, which reviews presidential nominations, the President has had more or less the ability to pursue his own agenda. President Eisenhower, for example, was successful in resisting senatorial pressure and was able to appoint an unusually highly qualified group of judges that included a large number of Republicans. He did so by stressing professional competence as well as political affiliation and by involving the American Bar Association extensively in the screening of nominees. Presidents Franklin D. Roosevelt and Kennedy, on the other hand, were more politically dependent on powerful senators, particularly Southern Democrats. President Kennedy,

for example was forced by Senate Judiciary Committee Chairman James Eastland of Mississippi to appoint a large number of conservative and segregationist Southerners despite Kennedy's own commitment to civil rights and desegregation.

In practice, the President delegates the selection of most judges to his Department of Justice, and most presidents take a personal role only in Supreme Court nominations. Similarly, the Senate rubber-stamps all but the most controversial lower court nominees. It is estimated that the Judiciary Committee spends less than five minutes per district court nominee in most circumstances. Of 136 nominees sent to the Senate in 1985 and 1986, for example, only one did not receive Committee approval and later Senate confirmation. One reason for the lack of close scrutiny is the role that individual senators from the state of the judicial vacancy play in recommending or opposing nominees to the Justice Department and the Committee. Although the absolute veto power that "home-state" senators had in the past has declined, they still play a large role in selection behind the scene.

When the appointment is controversial, however, the hearings before the Senate Judiciary Committee can become the focus of national attention. The role of the confirmation process became especially visible during the Reagan administration. One reason was President Reagan's explicit vow to achieve his legal-policy goals through judicial appointments. Another was the entanglement of the Supreme Court and the judiciary in general in the most inflammatory political issues of the day so that even senators who were not on the Judiciary Committee became involved. At one point, conservative senators even sent out their own questionnaires seeking nominees' views on abortion, gun control, the death penalty, criminal procedure (especially the exclusionary rule), affirmative action, freedom of religion (especially the constitutionality of prayer in public schools), and other issues important to the "new right."

The peak (or nadir) of politicization of the confirmation process probably occurred with the nomination of Robert Bork. Bork's twenty-five year career as an outspoken and prolific law professor, Solicitor General, and Court of Appeals Judge gave his liberal opponents vast ammunition to use against him. Unlike previous controversial nominees like Louis Brandeis who had been similarly portrayed as radical (by the right in Brandeis' case) but who had refused to comment publicly or grant interviews, Bork met every challenge aggressively in the media and through interviews, which further fanned the flames and helped transform the televised Judiciary Committee hearings into a major media circus. At the hearings, individual senators extracted promises from Bork on specific issues likely to come before the Court during his tenure, including the First Amendment, equal protection, gender discrimination,

and abortion. Although nominees had appeared before the Committee as witnesses since the 1920s, previous nominees had refused to answer questions about their views on specific cases and controversies.

In the end, Bork's attempts to reassure senators about his controversial views were not successful, and he became the twelfth nominee to be rejected by the full Senate in a formal vote. The margin of defeat, fifty-eight to forty-two, was the largest margin ever and is probably attributable to his eventual identification with a "new right" agenda that frightened conservative Southern Democrats and moderate Republicans as well as liberals. Sixteen other presidential nominees, including Douglas Ginsberg, Reagan's nominee to replace Bork, have been withdrawn after opposition. Ironically, Ginsberg's defeat was due as much to a personal lifestyle that offended conservatives as to an ideology that offended liberals.

Since the political wars of Bork and Ginsberg, however, the process has returned to a less intrusive one. Two recent Supreme Court nominees, Kennedy and Souter, did not have to answer the same type of questions or undergo the intense political scrutiny of their two predecessors. Both were confirmed without serious opposition despite conservative views.

In contrast to the overly political role of the Senate itself, the American Bar Association has long been involved in judicial recruitment and selection under the banner of professional competence. At first, the ABA largely defined competence as the avoidance of progressive politics. On the state level, this meant opposing the election of judges; on the federal level it led the ABA to oppose the confirmation of Louis Brandeis in 1916. In the view of the six former ABA presidents who openly attacked Brandeis, his history as a progressive and legal reformer made him unfit to serve on the Supreme Court.

By the 1950s, however, the ABA had shifted from an assertive to a reactive role. In 1949, it created the Standing Committee on the (federal) Judiciary to review the qualifications of nominees from the non-political viewpoint of legal competence, and the relationship between the ABA and the Justice Department in judicial selection matters was formalized under President Eisenhower. The ABA now receives the name of prospective nominees early in the process and rates them on a four point scale: "exceptionally well qualified," "well qualified," "qualified," and "unqualified." The reaction to an "unqualified" rating has varied from administration to administration, but only under President Nixon's Attorney General Kleindienst did the ABA have anything close to a veto of "unqualified" nominees. In fact, in 1962 at its annual meeting after the Kennedy administration had named eight judges deemed "unqualified," Attorney General Nicholas Katzenbach "reminded" the ABA that

“the responsibility was the President’s and the Senate’s, and this Association does not have and would not wish to have veto power over the appointments to be made.”

3. The Role of Presidential Politics

What made the battle around Robert Bork exceptional was the nature of the politics involved. Whether or not it was an accurate appraisal of Judge Bork and his record, he became the symbol of President Reagan’s promise to remake the federal judiciary in his political image. As such, the politics of the Bork nomination were unlike the normal politics of judicial selection, which tend to revolve around party affiliation, political involvement (and the need to reward past service to the President, a senator, or the party), regional issues (like racial politics in the South under Kennedy), or even the personalities of individual senators. While concerns about the political beliefs of the nominee and his or her conduct on the bench are part of the calculus, they are often subordinate to the selection’s indirect political benefit in maintaining party unity or rewarding the party faithful.

Judicial politics under Reagan, on the other hand, were meant not to use judicial selection as a political reward, but to reverse what Reagan saw as a drift toward a more and more liberal bench and to “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.”¹ From the outset of the Reagan administration, therefore, Justice Department appointments reduced the role of both senators, including moderate Republicans, and the Bar Association in investigation and confirmation. To many Reagan appointees within the Justice Department, the ABA was just another part of the liberal establishment whose rating system would never be fair to conservative nominees; in one justice official’s words, “we didn’t think one second about ABA ratings.”²

To be sure that potential nominees would hew the administration’s ideological line on issues of central importance, they conducted intensive interviews with candidates on how they approached touchstone issues of Reagan’s social agenda: abortion, school prayer, free market economics, and defendants’ rights. Candidates put forward by Republican senators were reportedly rejected, for example, for having supported the Equal Rights Amendment or having made charitable donations to Planned

¹ Attorney General Edwin Meese, *quoted in* D.M. O’Brien, *Meese’s Agenda for Ensuring the Reagan Legacy*, LOS ANGELES TIMES, *Opinion*, Sept. 28, 1986, at 3.

² Deputy Attorney General Bruce Fein *quoted in* DAVID M. O’BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* 62 (1988).

Parenthood or gun control groups. Whether phrased as inquiries into "judicial philosophy" or an "ideological litmus test," administration officials defended the interviews as a legitimate part of the President's constitutional prerogative to make judicial appointments and criticized previous Republican administrations for failing to take seriously enough judicial philosophy and relying too much on "a candidate's reputation and standing."³

President Reagan was not the first president to attempt to transform the judiciary into a political weapon, or at least to prevent it from being a weapon used against him. His most famous predecessor was Franklin D. Roosevelt, whose attempt to "pack" the Supreme Court with additional justices sympathetic to the New Deal, was also initially unsuccessful. As may be true with Reagan, at least with lower federal judges, Roosevelt was ultimately successful in fashioning a federal judiciary in his and his party's image.

4. The Representation Issue

Another President with an explicit agenda for the federal bench was Jimmy Carter. His goals, however, were neither strictly partisan nor ideological. He wanted to make the federal judiciary more representative of the population of the United States. Federal judges are overwhelmingly white male protestants, most of whom have followed a time honored path from established law schools through prestigious private practice to the federal bench. This path was totally unavailable to minorities, and women for most of American history and is one explanation for the lack of women and minorities on the bench until very recently.

President Truman appointed the first black man/person to the regular federal judiciary in 1949; Kennedy appointed the next more than ten years later. At the end of Gerald Ford's administration in 1976, there had been a total of twenty-two blacks appointed to the district (seventeen), appellate (four), and the supreme (one) courts. President Roosevelt appointed the first woman, but progress was even slower than with blacks, and by 1976 only eight women had entered the federal judiciary. In the eight years from 1968 to 1976, Presidents Nixon and Ford together appointed only two women, although Nixon did appoint the first Asian-American.

President Carter attempted to change this situation by instituting an affirmative action program for the federal judiciary as explicit and aggressive as President Reagan's ideological campaign. In four years, he appointed thirty-seven black judges, more than the total of all the presi-

³ *Id.* at 61.

dents before and after him and almost fifteen percent of his total appointments. He also appointed forty women, a five fold increase over the total appointed by his predecessors, and again over fifteen percent of total appointees. By the end of his term, the percentage of both women and minorities on the bench had risen considerably, although still below ten percent each. As would be expected given black political identification with the Democratic Party, Presidents Reagan and Bush have appointed far fewer blacks, but they have continued the trend toward more female appointees, including President Reagan's appointment of the first female Supreme Court Justice.

As was Reagan's unabashed introduction of ideology into the selection process, Carter's overt use of race and sex as criteria for judicial appointments was considered illegitimate by many commentators on the selection process. Aside from the propriety of using race or gender as criteria for any governmental action - the "reverse discrimination" issue - the main concern of critics was that female and black judges would be less qualified. This concern was undoubtedly partly due to the different backgrounds of these judges, who were considerably less likely than their white male colleagues to have long experience in corporate private practice. Instead, they were more likely to have had careers in public service, criminal law, or, especially for women, legal academics. Given the rather small role that technical legal competence has placed in judicial selection in the past, the use of criteria such as race and sex seem unlikely to have seriously affected the merit, however defined, of Carter's appointments. In fact, one commentator has concluded that his non-traditional appointments had superior credentials to the overall credentials of his and his predecessors' white male appointees⁴

The representation issue did not begin with nor does it end with the currently topical issues of race and gender. For most of American history, geography greatly influenced Supreme Court appointment decisions. During the nineteenth century, regional representation aimed at assuring respect for the distinctive cultural values of different sections of the country was vital to the legitimacy of the court. Religion, on the other hand, has more frequently been a barrier to appointment rather than a basis for it. Of 104 Supreme Court justices, ninety-one have been Protestant, with only eight Catholics and five Jews. Representation on lower federal courts has been similar, with regional variations. In recent years, however, neither religion nor geography has figured as strongly as political compatibility with the President's views.

⁴ Sheldon Goldman, *Should There be Affirmative Action for the Judiciary?* 62 JUDICATURE 489, 493 (1979).

B. State Judicial Selection

Many of the issues involved in the selection of federal judges are comparable in nature if not scale for state judicial selection as well. Problems with adequate salaries, racial, religious, and gender representation and even regional representation arise in similar ways in many states as they do on the federal level. The tension between political accountability and professional competence, on the other hand, appears in a very different guise at the state level. One reason is that in many states judges are elected not appointed; another is that the campaign for the "merit" selection of judges has gone farther in many states than it has at the federal level.

The dominant mode of selection of state judges has swung back and forth from appointment to election and back to appointment since the eighteenth century. In the early years of the Republic, judges were either appointed by the Governor or by a select group of legislators. Dissatisfaction with these systems arose quickly, however, and reached national scope before the election of Andrew Jackson as President in 1828. Critics contended that an elite bench was inconsistent with popular government and that judicial appointment had deteriorated into a political spoils system to reward loyal party stalwarts.

In 1832 Mississippi became the first state to have a completely elected judiciary. New York followed suit in 1846, and by the first half of the twentieth century, over seventy percent of the states were elective. In most of these, especially at the beginning, judicial candidates were elected in the same partisan manner as those for other offices. By 1900, however, concern with the dominance of partisan politics and the quality and operation of the judiciary led many states to replace partisan elections with systems of nonpartisan nomination and election.

Leading the campaign for such reforms were the bar associations, which had formed at the end of the nineteenth century and were jealous of the parties' control over the judiciary. Nonpartisan elections, however, were not enough for the legal profession, and in 1937 the American Bar Association proposed the "merit selection" system, which was argued to combine the merits of appointive and elective systems. The plan was first adopted by Missouri (and has generally been known as the "Missouri Plan" since) in 1940 and then by three more states in the 1950s. It was not until the 1970s, however, that the merit plan gathered significant momentum. By 1983 some form of the merit plan applied to at least part of the judiciary in thirty-five states.⁵

⁵ MARIA N. GREENSTEIN, *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* (1964)

Although there are many variations, the typical merit plan has three fundamental characteristics: a nominating commission composed of both lawyers and laypersons; appointment of judges by the governor from a list of qualified nominees, often three, created by the commission; and an uncontested "retention" election after a year of service whereby the electorate can remove the appointee or grant him or her a full term in office. Terms vary from six to sixteen years at which point there is another retention election. Interim vacancies are filled by gubernatorial appointment in most states, but there is often involvement by the judicial commissions at this point as well. Even in approximately half of the states that retain some form of judicial elections, there is frequently some variant of the merit plan for interim appointments.

Merit plans were sold to state legislators on the basis of three criticisms of an elective judiciary: elections did not recruit the best legal talent available; they impaired the independence of the judiciary; and they were ineffective as instruments of popular control. Whether and to what extent the trend toward merit selection has ameliorated these problems is unclear.⁶ The degree to which politics has been eliminated in the process, of course, depends on the identity of the persons serving on the judicial nominating commissions. In some instances, they are all appointed by the governor for terms concurrent with the governor. In others, the state bar appoints lawyer members and the governor the rest. In most instances, however, the partisan identification of the majority of appointees has remained that of the sitting governor.

It does seem likely, however, that the institutionalization of the role of the profession in judicial selection has shifted the criteria for selection more toward what lawyers themselves see as ideal judicial characteristics. In this context it may be of interest to note what the American Judicature Society has included as prime judicial characteristics in its *Handbook for Judicial Nominating Commissioners*.⁷ Desired qualities for all judges included suitable age, good health, impartiality, industry, integrity, professional skills, community contacts, and social awareness. The *Handbook* urges commissioners to seek further in appellate judges the qualities of collegiality and writing ability and in trial judges decisiveness, judicial temperament, and speaking ability. What is notable is the non-technical nature of these criteria - except for professional skills, all would be as valuable in any public servant as in a judge. Even in its

(tables I through III at 5-20 provide a schematic presentation of all state merit plans in force in 1984).

⁶ Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (1980) (the only empirical study that might be available).

⁷ GREENSTEIN, *supra* note 5, at 65-82.

breakdown of professional skills, the *Handbook* stresses experience over specialized knowledge or particular education or training.

II. THE EDUCATION OF JUDGES

Because of the pattern of judicial selection from among mid-career practitioners, the educational needs of American judges are quite different than they would be if judges entered the judiciary at a young age with little or no practical experience. Given that American judges have had ten to thirty years of extensive practical experience before going on the bench, they are initially as familiar with new technologies, changing social arrangements, and current developments within the profession as are practicing lawyers. Trial judges have usually been experienced litigators and are very familiar with the specific problems facing trial courts. Appellate judges usually have extensive experience in either business practice, which often means close involvement with business strategy as well as purely legal questions, or in public service as bureaucrats or politicians. As such, most are familiar and comfortable with commercial, business, or economic issues and with the considerations that enter into the policy related litigation that has increased in recent years.

The formal education of judges is identical to that of all legal professionals. Prospective lawyers first complete a four year general university education, then enter a three year postgraduate course at a law school, usually attached to a university. The majority of students contemplating law school concentrate their undergraduate education in fields such as political science (or another social science), history, or English, but some major in the sciences and engineering, and some in business or accounting. About half of entering law students have had some practical experience after university, usually two to three years of work, but there are also many students who enter law school in their thirties or even forties. Very few if any of these students are likely to hold any strong intention to become judges as opposed to any of the other career paths available to the legal profession.

Law school education requires three years. The curriculum makes no attempt to prepare students for a career in the judiciary, and there is no perceived need to do so. There are usually elective courses which address issues concerning the judiciary and perhaps an externship program that places students within judges' chambers, but these courses are intended to familiarize students with the legal system, not prepare them to become judges. Since virtually all American judges will have served as practicing lawyers for extended periods before taking the bench, law faculties feel that any special preparation for a judicial career would be misguided. Furthermore, since appointment to the bench is subject to political fortune as well as training, capability, or ambition, special at-

tention to those students who expressed an interest in a judicial career would be misplaced. Also, most American law professors feel that the case method of instruction, which still dominates the law school curriculum, is excellent preparation for the legal reasoning skills called upon by the judiciary.

Education aimed specifically at the judiciary, therefore, begins after lawyers become judges. Because of the wide diversity of backgrounds and the fact that the students are also full time judges, education is generally confined to short conferences, workshops, or mini-courses similar to the continuing legal education courses available to practicing lawyers. These programs began on a national scale in the 1950s with the first Appellate Judges Seminar jointly sponsored by the Institute of Judicial Administration and New York Law School. In the 1990s, a host of programs are available: Judicial College, the Federal Judicial Center, the Institute for Court Management, the American Academy of Judicial Education, and the ABA's Appellate Judges Seminars. In addition to national efforts, most states have some type of on-going judicial education programs. In Arizona, for example, all judges and judicial personnel are required to receive sixteen hours of training each year. The topics covered in such sessions vary widely, from litigation management techniques to the treatment of scientific evidence to metaphysical inquiries into when a judge should depart from the statutes and precedents and rely on considerations of justice.

III. THE TASKS OF JUDGES

In an article published in 1982, Chief Justice William Burger of the Supreme Court of the United States referred to the "litigation explosion" afflicting the courts and reflected that:

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlement." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.⁸

A series of empirical assumptions are implied in this comment. The first is that American courts are overburdened. The second is that they are overburdened because there has been a rapid increase in the use of

⁸ Warren E. Burger, *Isn't There a Better Way?* 68 ABA J. 274 (1982) quoted in Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

the courts by Americans. The third is that Americans use courts because they are abnormally litigious. Usually the last assumption is implicitly made relative to both American society of the past and to other contemporary societies. To a large extent these assumptions are shared by foreign observers of the American legal system.

Despite almost virtual unanimity among commentators, there is some doubt as to whether and to what degree these assumptions are empirically valid. What empirical work that has been done appears to indicate that there has been a dramatic increase in the use of federal courts, but that the situation for state courts, which handle almost ninety-eight percent of all cases, may be substantially different.⁹ Indeed, there is some indication that Americans were more litigious in the early 19th century than they are today. Nonetheless, Chief Justice Burger's view is almost universally accepted by the general population and drives much of the discussion of the problems of the judiciary today.

A. *Alternative Dispute Resolution within the Court System*

One of the responses to perceived overcrowding and litigiousness has been the attempt to provide a wider array of dispute resolution alternatives to litigants and prospective litigants within the framework of the traditional court system. Growing numbers of jurisdictions have begun to encourage or require litigants to participate in some variation of mediation or arbitration before they may go to trial. Courts in several large cities, with the encouragement of the American Bar Association, have instituted "multidoor courthouse" programs modeled after a suggestion made by Professor Frank Sander of Harvard Law School in 1976. Instead of just one "door" leading to the courtroom, a multidoor courthouse has many doors through which individuals might pass to get to the most appropriate "room." Among the doors might be one labeled "arbitration," "mediation," and "ombudsman." Provisions would also be made for channeling disputes into existing specialized tribunals such as medical malpractice screening boards, small claim courts, or juvenile courts.¹⁰

In most of these schemes, ADR is not meant to replace litigation but make it more efficient and effective. One goal is to increase the chance of settlement at an early stage. It is thought that ADR can enhance the effectiveness of settlement by providing an opportunity for a neutral assessment of the case without any unilateral concessions. After

⁹ The best work on this general question of litigiousness and the use of the courts is Galanter, *supra* note 8.

¹⁰ See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 225-43, 514-17 (1985).

both sides are forced to consider compromise and what might happen if the case went to full adjudication at an early stage of the litigation, the chances of a workable settlement are increased dramatically. Court-annexed arbitration is one such device that is being adopted in many jurisdictions. Unlike voluntary arbitration, the result may be appealed to a *de novo* trial by either party, but actual use of this option has been infrequent. Even when the arbitration award itself has been rejected by one of the parties, studies have shown that the process of arbitration has led to eventual settlement in over ninety percent of the cases.

Addressing court congestion through limiting jurisdiction and requiring resort to alternative dispute mechanisms are not without their critics, however. Some argue that it will result in diminished access for groups like minorities, the poor, or prisoners. Others, like Yale Professor Owen Fiss, argue that viewing litigation as dispute resolution, and thus replaceable by ADR, misses litigation's more important role of creating social values and norms.¹¹ As a result of these concerns, the majority of ADR schemes are most often used to resolve private disputes rather than difficult public law issues. Indeed, proponents argue that by diverting relatively minor private disputes from the courts, court-annexed ADR enables the courts to spend more time on the difficult policy questions now frequently brought before them.

Whatever the reservations, state legislators are rapidly enacting legislation to encourage, require, or regulate ADR in disputes ranging from determining child custody to siting hazardous waste facilities to foreclosing on farm property. One 1988 survey of state laws listed over 200 statutes dealing with non-labor ADR, two-thirds of which dated from 1980.¹²

B. Judicial Reforms Aimed at Reduction of Expense and Delay

The second prong of the response to perceived excessive expense and delay in litigation is the more efficient handling of cases that do go to full adjudication. As with the institution of ADR techniques, there are many variations among the fifty-one jurisdictions in the United States, but many include some or all of the litigation management techniques incorporated in the "civil justice expense and delay reduction plans" required for federal district courts by the Civil Justice Reform Act of 1990 (Title I of the Judicial Improvement Act of 1990).

One element of each plan is case tracking, which encompasses

¹¹ Owen Fiss, *Against Settlement* 93 YALE L.J. 1073-90 (1984).

¹² LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 166 (1990).

categorizing cases and then giving them differential treatment based on their complexity. The State of New Jersey has experimented with a three-track system that increased the number of civil cases disposed of within six months of filing from seven to eighteen percent. During the same period, eighty-seven percent of cases were terminated within a year of filing, comparable to the ABA's goal of disposing of ninety percent within one year. A second section of the 1990 Act provides additional techniques for the control of discovery and of pretrial motions and the setting of firm trial dates. The Act also establishes advisory committees made up of attorneys and other representatives of major litigant categories to assess the status of the court's civil and criminal dockets and make recommendations for the expense and delay reduction plans.

BIBLIOGRAPHICAL NOTE

Judicature, the journal of the American Judicature Society and *The Judges' Journal*, the quarterly of the Judicial Administration Division of the American Bar Association, are both informal "trade journals" for the American judiciary. They publish articles of general concern to judges and are an excellent way to determine what issues are of importance to the judiciary at a given time.

In the section on the selection of federal judges, I drew heavily from David M. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection*. It provides a concise (106 pages), well researched, and very readable overview of the selection process with a critical emphasis on its political character and concrete suggestions for reform. It is also an excellent bibliographical source. For a firsthand account of the confirmation process by one of its most famous victims, see Robert Bork, *The Tempting of America: The Political Seduction of the Law* (1965), although somewhat outdated, remains a standard critical work on the role of the ABA in judicial selection.

Maria N. Greenstein, *Handbook for Judicial Nominating Commissioners* (1984) offers a blueprint for the operation of judicial commissions in the merit selection of state judges. It is published by the American Judicature Society and gives several suggestions for emphasizing merit over politics in judicial selection. Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan* (1969), and Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (Texas: 1980), are thorough empirical studies of merit selection in one state and state judicial elections, respectively. Bertram Harnett, a New York state judge, provides an entertaining account of

judicial election campaigns in *Law, Lawyers, and Laymen* 217-21 (1984). Doris Marie Provine, *Credentials: Nonlawyer Judges and the Politics of Professionalism* (1986), presents an interesting account and defense of the lay judges' role in the United States.

Although out of date for this fast moving subject, perhaps the best place to start for a comprehensive discussion of alternative dispute resolution in America is Stephen B. Goldberg, Eric D. Green, and Frank E.A. Sander, *Dispute Resolution* (1985) and its 1987 *Supplement*. It is intended as a textbook and contains excerpts from the leading works on ADR presented in a well edited and intelligent manner. It also includes an extensive bibliography. A more up to date, but less comprehensive source is Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* (1990). Thomas E. Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds* (1989) presents a different point of view. *Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government* (1988), edited by Fine and Plapinger and published by the Center for Public Resources, is not immediately relevant to judicial ADR, but it contains a wealth of short articles introducing ADR programs used by companies, law firms, and governments.

The best place to begin for discussion of the "litigation explosion" and the question of litigiousness in the United States is Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society", 31 *UCLA Law Review* 4 (1983). Its companion article by Professors David Trubek, Austin Sarat, William Felstiner, Herbert Kritzer, and Joel Grossman of the Civil Litigation Research Project, "The Costs of Ordinary Litigation," 31 *UCLA Law Review* 4 (1983), is also excellent.

Detailed information on the backgrounds of individual judges is available in *The American Judiciary* (state and federal) and *Almanac of the Federal Judiciary* (federal circuit and district court judges).

