

1998

Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?

Panel Discussion

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Judges Commons](#)

Recommended Citation

Panel Discussion, *Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?*, 26 Fordham Urb. L.J. 33 (1998).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol26/iss1/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Fordham Urban Law Journal

Volume 26, Issue 1

1998

Article 8

Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?

Panel Discussion*

*

Copyright ©1998 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?

Panel Discussion

Abstract

A panel composed of Honorable John F. Keenan, Michael Armstrong, Otto Obermaier, Honorable Michael Schattman, and Stephan Kline discuss whether the vacancy rate in the judiciary threatens erosion of the quality of justice. The panelists discuss whether the problem involves the White House's inability to work with the Senate Judiciary Committee, people of different persuasions, to move judicial candidates along. They also discuss how our system is dependent upon people who are older (senior judges), who are retired, who are entitled to move on, having to fill the vacancies. The panel discussion was followed by a short ceremony to unveil the portrait of Judge Murphy and to have a few reflections about his life.

KEYWORDS: nominations, vacancy, judicial efficiency, federal judicial appointments, hearings, three-month pocket veto, Judge Murphy

**PANEL DISCUSSION IN HONOR OF
JUDGE THOMAS F. MURPHY**

**JUDICIAL EFFICIENCY: IS THERE A
VACANCY CRISIS THREATENING THE
NATION'S JUDICIAL SYSTEM?***

MODERATOR

*David Browde***

PANELISTS

*Honorable John F. Keenan****

Michael Armstrong†

Otto Obermaier††

Honorable Michael Schattman†††

Stephan Kline‡

MR. HANLEY: Good evening. My name is John Hanley, and I am from the Fordham Law Gavel & Shield Association. On behalf of Dean John Feerick, the Urban Law Journal and the Gavel & Shield Association, welcome to our program.

This evening is dedicated to the memory of a distinguished Fordham law graduate, the late Judge Thomas F. Murphy of the Southern District of New York. In honor of Judge Murphy, we will present a two-part program for you this evening. As Judge Murphy was a champion of judicial efficiency, the first part of our program is a panel discussion entitled, "Judicial Efficiency: Is There a Vacancy Crisis Threatening the Nation's Judicial System?" In part two of our program we will unveil a beautiful portrait of Judge Murphy donated by his family to the Law School.

Now allow me to introduce our moderator. He is a veteran correspondent presently with CBS news. Mr. David Browde.

* The discussion was held on April 29, 1998, at Fordham University School of Law. The remarks have been edited to remove the minor cadences of speech that appear awkward in writing.

** J.D. Candidate, Fordham University School of Law, 2000.

*** Senior United States District Court Judge, Southern District of New York.

† Partner, Kirkpatrick & Lockhardt; Member, Senator Alphonse D'Amato's Judicial Nominee Screening Committee.

†† Partner, Weil, Gotschal & Manges.

††† State Court Judge, Texas; Nominee to United States District Court.

‡ Legal Counsel, Alliance for Justice, Washington, D.C.

MR. BROWDE: Is there anyone here that does not remember the case of *Marbury v. Madison*?¹ One hundred and ninety-five years ago it was perhaps this country's first reported major political battle over a judicial nomination. You may recall that nominee lost.

Now, some have argued that we do not really need judges. They argue that the way to handle litigation problems is simply to lock the lawyers in a room for a couple of hours, come back in a few hours, see if anybody is standing and hence declare the winner. In light of the fact that Jerry Springer is not running the judiciary and, at this rate could be running from it, and given that this is a law school, I suspect we should come up with a better solution. To that end, welcome.

Joining me are five remarkable individuals with a full spectrum of opinions. I will introduce them in just a moment, but first let us look at why we are here.

About sixty eight years ago, there was a graduating student at Fordham Law by the name of Thomas Murphy, the grandson of a New York City police officer. Like many who learn the law, he took a job with a firm after graduation; there he spent the next twelve years. Tom Murphy learned his craft and later became an Assistant U.S. Attorney. He was, despite that honor, not the star of his family. His younger brother was pitching for the New York Yankees.

With a 99% conviction record in his first nine years as a prosecutor, Tom Murphy was named to prosecute Alger Hiss. He did and won a conviction. They say he delivered his two and a half-hour summation without ever once referring to his notes.

Later that year he was appointed police commissioner by then Mayor Vincent Impellitteri. This was a daunting task at the time because in 1950 the New York City Police Department was riddled with corruption. Murphy replaced every plain-clothes officer and made integrity the watchword.

One year later, President Harry Truman appointed him to the federal bench where he would preside over cases ranging from the trial of Teamster's boss Jimmy Hoffa to the landmark cases involving the First Amendment and its application to what we would now consider R-rated films. In addition, Judge Murphy also presided over the prosecution of the Yale University lecturer that concealed his past as a Nazi propagandist.

1. 5 U.S. 137 (1803).

Senior Judge Tom Murphy heard cases both in Connecticut and on the Ninth Circuit bench. His record shows that he was a fierce advocate of pure justice. By that, I mean justice free of any taint, and free of limitation, encouraged by lack of access to courts. In short, Tom Murphy stood for efficient administration of the courts. It is entirely fitting that we honor him today with this discussion focused on access to justice. Let us now turn our attention to some facts.

As of August 1997, a mere eight months ago, the American Bar Association heard statistics that made it easy to understand what its members have known intuitively, that there was a problem getting cases heard before a court. Out of 846 seats on the federal bench, and that includes the Courts of Appeal, 101 were vacant according to the Attorney General.² Currently, within the Second Circuit Court of Appeals, there are five vacancies out of the thirteen judicial positions.³ The Southern District has five vacancies out of twenty-eight positions — and that is with five senior judges hearing cases.⁴ As we speak, more judges are expected to take senior status in the coming months. Judge Winter has declared an unprecedented judicial emergency in the Second Circuit authorizing three judge panels of his court to include just one actual Second Circuit judge with other members being visiting judges. In the Ninth Circuit they have canceled oral arguments in some 600 cases in the past year.

Now this is the way the process is supposed to work. The President nominates the judges, and then the Senate advises and consents on the nomination. The reality is that the Senators of the respective states recommend candidates. The President accepts some of them and the Senate may or may not advise and consent. Some seats on the federal bench have been vacant for years. This year, there were twenty-six positions vacant for eighteen months or more. In an unusually blunt *New York Times* article, the Senate was criticized for failing to move quickly on judicial appointments,

2. See Steven Keava, *Coming to the Judiciary's Defense: Political Attacks Threaten Separation of Powers, ABA and Reno Agree*, 83 A.B.A. J. 98 (Oct. 1997).

3. See Deborah Pines, *Long Standing Vacancies Called Threat to Circuit*, N.Y. L.J., June 2, 1998, at 3.

4. See Deborah Pines, *'Westchester's No Siberia' Says Bar Seeking Judges*, N.Y. L.J., April 9, 1998, at 1.

while the Clinton Administration was criticized for not making its appointments soon enough.⁵

The Administrative Office states that the federal court backlogs have grown by 25% in the past ten years and 15% on the criminal side.⁶ Administration officials, including the Attorney General, said the Republican-dominated Judiciary Committee has not given hearings at all to some nominees and not given them a fair chance to have qualifications publicly debated. Even Chief Justice Rehnquist said that the vacancy rate threatens erosion of the quality of justice.⁷ The Chairman of the Senate Judiciary Committee, Senator Orin Hatch, responded to the Chief Justice that the courts are not significantly overburdened and that his committee has moved promptly on nominations. Senator Hatch believes there is "little or no reason to complain" and notes that the fault lies with the Administration for sending up "bug-eyed liberal nominees."⁸

We are fortunate to have five distinguished lawyers here to debate this issue and to make new suggestions. First, a 1954 graduate of Fordham Law School, Senior U.S. District Court Judge John Keenan was appointed to the Southern District bench in 1983 after two decades of distinguished service in the Manhattan District Attorney's office, and seven more years in positions ranging from New York City Criminal Justice Coordinator to Special Prosecutor; and then he took some time to be President of OTB in the middle. It would take every minute of the time we have for this panel just to list about half of his honors. So we will just say we are delighted that he could be back in order to share his expertise and experiences on the court.

For almost eighteen years, Michael Armstrong has been on Senator Alphonse D'Amato's Judicial Nominee Screening Committee. A 1950 Harvard Law Graduate, he is perhaps best known not in his current position as a partner of a great firm in New York City but for his former service as counsel to the Knapp Commission which looked into police corruption during the early 1970s.

President George Bush appointed Otto Obermaier to the Office of the United States Attorney in 1989. He is a 1960 Georgetown

5. See John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. Times, Jan. 1, 1998, at A6 (para-phrasing Chief Justice Rehnquist's year-end report on the state of the judiciary).

6. See Peter J. Ausili, *Federal Court Statistics for Fiscal Year 1997*, N.Y. L.J., April 28, 1998, at 4.

7. See Cushman, *supra* note 5, at A6.

8. Neil A. Lewis, *Hatch Defends Senate Action in Judgeships*, N.Y. TIMES, Jan. 2, 1998, at A1.

law graduate. Mr. Obermaier served as a clerk in the U.S. District Court and as Assistant U.S. Attorney. He is now a partner of Weil, Gotshal & Manges.

Judge Michael Schattman also clerked in the U.S. District Court — a little further south and west though. A 1971 graduate of the University of Texas Law School, Judge Schattman has spent the better part of his professional career as a County and then State Court Judge. He was nominated by President Clinton to the U.S. District Court bench in December of 1995 and nominated again in 1997, but he has yet to hear a case and indeed he has yet to have a hearing before the Senate Judiciary Committee.

Stephan Kline is the legal counsel for the Alliance for Justice. He was awarded his J.D. by American University Law School in 1992, and is an advocate of faster action on judicial nominations as well as a critic of the ongoing battle over the nomination process.

Our format will include a five-minute opening statement by each panelist, followed by rebuttal from our panel. Then we will open up for questions from the floor. First let us turn to Judge Keenan. If a circuit is canceling hearings, and the Ninth circuit is canceling oral arguments in 600 cases a year, it would seem as though things are pretty tough. Are they?

JUDGE KEENAN: Things are very tough in the Second Circuit. And, from what I have read, things are tough in the Ninth Circuit as well. When I say "Circuit" here today, I mean in the Court of Appeals unless I refer to all the district courts in a particular circuit.

David, with your careful and thoughtful initial presentation, you have left me very little to say. You have covered all the notes that I have here. I will point this out though right off the bat - there is enough blame in this situation to go around for everybody. You can blame Hatch, and the Republicans if you want to, and you can also blame the Clinton Administration because, in spite of the statistics that you gave us, there is a little change since the first of the year.

Right now there are eighty Article III vacancies in the United States and the President has done nothing about forty-three of them. When I say he has done nothing, he has not proposed anybody. So forty-three out of eighty are strictly at the White House's door, and thirty-seven are pending. Out of those forty-three, twenty-two of the vacancies are in the courts of appeals around the country and there are thirteen nominees pending in the court of appeals.

Now in the Second Circuit, the fault — if we want to assess blame — does not seem to lie with the White House, because of the five vacancies in the Second Circuit, there are four names proposed. So they are just hung up. Now Judge Winter did announce that he was considering, as I understand it, canceling sitting but, so far as I know, that has not happened yet. He is making emergency plans, however, and just this afternoon I answered an invitation to sit on the Circuit next fall in November and early December.

He is bringing in senior district judges from all around the Second Circuit and other parts of the country and he is having panels consisting of primarily one active Circuit judge, one senior Circuit judge, and one either district judge from somewhere in the Second Circuit or a visiting district judge. It is not as efficient for the Circuit, but the cases are being heard. I think it would be a misstatement to suggest they were not being heard. If the five vacancies are not filled, there becomes a limit on how many district judges can be pulled from the district courts because, as you pointed out, we do have five vacancies in the Southern District.

If you look at the front page of today's New York Law Journal, in the lower left quadrant, you will find the annual filing statistics for the year.⁹ Now statistics are pretty dry, but the bottom line is that in the whole Second Circuit — Connecticut, New York and Vermont — criminal filings for 1997 were up by 4%; but in the Southern District of New York, my court, they are up by 9%.¹⁰ That means there are 1,252 indictments. Now everybody says that these statistics do not mean anything because of the plea bargains due to the sentencing guidelines. Yet, the fact of the matter is that you spend more time on a sentence now than you used to spend on some trials. Indeed, last Monday — and my two law clerks are here and they will confirm this — with all the objections and mini-hearings accompanying sentencing nowadays, it took me two and a half hours to sentence one person. So the existence of the guidelines do force many more pleas. Nevertheless, while there is not a real crisis yet, we are getting awfully close to one.

MR. BROWDE: Mr. Armstrong, you are in the interesting political position of being a Democrat working for a Republican Senator who chairs a screening committee that does political work. Is the problem that the nominations are not getting to the White

9. See Ausili, *supra* note 6.

10. See *id.*

House or is it that Senator Hatch and the Judiciary Committee are sitting on them?

MR. ARMSTRONG: Well, I have to confess, maybe the reason why as a Democrat I can work for Republican senators is that I really have nothing to do with politics. As such, I do not know what is going on down there. I mean to say, that having been doing it for eighteen years, this situation is not unique. The situation is not something that has suddenly come upon us with Clinton in the White House and Orin Hatch of the Judiciary Committee. It has been the same.

There is something about the system that makes it work this way. In New York you have, since I have been here, a Republican and a Democratic Senator; and the convention has been that the Senator who has a party member in the White House gets three district court appointees while the other Senator is granted one — one which he really does not have. Another way Senator D'Amato could potentially nominate somebody now, in accordance with the convention, would be if Senator Moynihan were to give him one of his four. As you can imagine, that can take a long time.

I can remember once when we got behind. There was no particular reason; things were going on and we got behind. Judges got on us and said to speed up the process. Then it goes down to the White House and to the Justice Department. Then once D'Amato or Moynihan makes a suggestion to them, they look at it. Then they send it to the Bar Association. Only after that process does it go to the Judiciary Committee. Ultimately the whole process, with respect to each individual, seems to take months. It takes months and months and months, and it is not a new phenomenon.

One thing that happens when you come to a Presidential election year and the Judiciary Committee happens to be in the opposite party from the President, is that everything stops about a year prior to the election, or even more. The fall prior to the election everything just stops because, of course, the Judiciary Committee has the majority of people on it who are hoping that they will win the Presidential election and that their President will be able to appoint whoever is there.

At one point, some of us had a suggestion to move things along. I still think it is a good idea. One way in which things get slowed down is if a name is put up to the White House and to the Justice Department and, for whatever political reason, neither wants to be blamed for saying we do not want this person. So they just sit on it, and they sit on it and sit on it. Now that is not always the reason

things get sat on. I think sometimes it is just indolence — they simply just do not get around to it; but there have been a number of times when there is a stalemate that goes on.

We have got a little committee at the Bar Association that came out with a suggestion that there be voluntary timetables set up so that when a vacancy occurred the senator whose job it was to come up with a vacancy would have, say, three months to come up with a name to put in that vacancy. Then, once the name was submitted, the White House and the Justice Department would have another three months to move it onto the Committee; and then, after that, the Committee would have three more months. The only sanction that would be applied would be that if more than three months went by, there would be a sort of pocket veto. In other words, if the White House took more than three months with a particular candidate, then that candidate would be considered withdrawn, which would take the heat off of people, a little bit anyway, and might move things along. In eighteen years, that was the only real suggestion I could come out with other than lighting fires under people.

JUDGE KEENAN: You were appointed by a Republican to the office of U.S. Attorney, and you have seen the federal bench and what has evolved over the years. Is it your opinion that this Administration has made the situation worse by sending up, as they say, the liberal activists?

MR. OBERMAIER: Well, I would not agree that the majority are liberal activists, but I think the problem is the inability of the Administration to work with the Senate Judiciary Committee, people of different persuasions, to move the judicial candidates along. Let me say it is not surprising that there is controversy about federal judicial appointments. I can think of at least three good reasons.

First of all, the positions are extremely desirable. They are appointments for life at a salary of roughly \$150,000 a year.¹¹ They are much sought after; if one were to assume that the average male at age fifty-five had at least another twenty years to live, the position is worth roughly \$3 million! So, if one were trying to figure out what that value would be if one had to buy a fully paid-up annuity that would pay \$150,000 for twenty years, one would need

11. Each circuit judge shall receive a salary at an annual rate determined under § 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361), as adjusted by 28 U.S.C.S. § 461 (1998). Each district court judge shall receive a salary at an annual rate determined under § 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361), as adjusted by 28 U.S.C. § 461 (1998).

\$1.5 million in cash to pay the insurance company. There are also very few of them. I mean think for a minute there are more active players in the National Football League than there are federal judges in our nation of 260 million people. There are less than 1,000 federal judges. As you can see, the job is both desirable and prestigious in some people's view.

The second is that historically there have always been fights in our nation about judicial appointments. You mentioned *Marbury v. Madison*.¹² Marbury wished as a Federalist to get one of the positions as a Justice of the Peace in the District of Columbia.¹³ It was an attempt by the Federalists who were going out of power upon the succession of John Adams' Presidency to put people in the Judiciary so that the new Republicans, the Jeffersonians, would not have that opportunity. There was a fight. This was a political activity by the Federalists to continue their legacy in government.

That was not the first fight. The first fight was in 1795 when George Washington, the revered father of our nation, could not get the United States Senate to confirm the prospective appointment of John Rutledge to be Chief Justice upon the resignation of John Jay, who came back to run for Governor of our beloved State. So there is nothing unusual, it seems to me, about the fact that there are fights.

Indeed, the nature of the federal judiciary has changed. Beginning with the election of Roosevelt in 1932 and the New Deal in 1933, and continuing to this day, many social programs were enacted with an attempt to better the nation in some people's view or to aggrandize power to Washington.

That controversy is currently a controversy that is playing itself out in Washington. There is a movement among some against activist judges — judges who will favorably interpret for governmental powers certain statutes. For example, how one decides issues of abortion depends upon, I think, whether or not one views government as the solution or the problem. Affirmative action, class action, search and seizure — all of those issues — likewise depend upon one's perception of government.

Indeed the House last week, by voice-vote, passed a statute which sought to put restrictions on the federal judiciary because of what they viewed to be activist judges. Whether or not a person is an activist judge or not an activist judge, indeed influences the political process by which the President nominates and the Senate

12. 5 U.S. 137 (1803).

13. See *id.*

advises and consents; and if, in point of fact, the senators are of a persuasion that in the majority there should not be activist judges, then the role of the federal judiciary has been bastardized by allowing judges, unelected officials, in our democracy to put their own will into place.

The Administration, for its part, cannot simply stamp its feet and say in substance we want these people because there has to be a give and a take. I think that a give and a take is basically playing itself out in Washington. Is it messy? Sure. Is it efficient? No, but is not that pretty much a hallmark of our democracy?

MR. BROWDE: One of the victims of that mess, if you will, is Judge Michael Schattman. Judge Schattman, you were nominated twice and have yet to get a hearing. They say that you are too activist/Democrat and that you would not be fair to defense contractors because you were a conscientious objector to Vietnam. Are you the bug-eyed liberal about whom they are speaking?

MR. SCHATTMAN: I am probably the bug-eyed liberal that they think they are talking about, but I do not think I am the bug-eyed liberal. The objections that you mentioned there came up only last July — and I will try to put that in context for the moment — and for matters of the fact the senators from Texas had long known. Indeed Senator Graham would have to acknowledge that he was an active Democrat once. I have got a ballot hanging on the wall at my house of the 1978 Democratic Primary, and his name and my name are about three lines apart. He was running for Congress at the time, and I was running for Judge.

In Texas, very much like in New York, we elect all of our judges. I think you now appoint to the Court of Appeals. We elect from top to bottom, Justice of the Peace to the Supreme Court, and it is done in partisan elections. Texas electoral politics is very much like Big East basketball, let us say a “full contact” sport.

So I think the objections are disingenuous and particularly the conscientious objector thing. I was an officer in the United States Army and did seek through the Army’s process a conscientious objector discharge and was granted one. The objection is that I could not be fair to defense contractors. Well I was a judge on the state courts in Texas for eighteen years and handled a number of cases involving defense contractors including a couple, well frankly, where we had to deal with things that were, how do you say, secret, I suppose, about the design of jet air-crafts and the like. We had to have closed hearings and, get everybody out of the courtroom but

the people involved. I never had a complaint from anybody on one side or the other.

Let me back up a second and talk about process. Because whether I become a federal judge or not, the Republic is not going to fall. You know it is not going to ruin my life if I do not become one; and despite the opinions of Senator Graham, if I do become one, I doubt seriously that you will see Cuban revolutionaries suddenly taking over the United States.

However, if we do not make our elected representative adhere to process, the Republic will fall! Has everybody got that? Your lawyer's or "lawyer-wannabee's" process and procedure should be important to you. The nomination process provided in Article II, Section 2 of the Constitution, describes how the President will nominate and bind with the advice and consent shall appoint blah, blah, blah. You know what that says? Well it does not quite exactly work the way it says in there, and that is true.

In each of the fifty states it works a little bit differently. New York is in a unique situation as Mr. Armstrong has pointed out. You have got a very mature two-party system where a *modus vivendi* has been worked out. That is not the same in all of the other states. The Senate controls both ends of the pipeline in terms of judicial nominations particularly at the district court level. There is a consultation process that has to go on in this process of nomination, advice and consent.

When the senators are of the President's party, that happens right up front. The Senator basically says these are the ones I want. If the President has a problem with them, he says so. If not, they pretty much go on through. So you have that consultation, recommendation, investigation and so on as Mr. Armstrong mentioned. When the senators are not in the President's party, as happened in my situation, the recommendations are made through some other political means; but the president still consults with the senators in that situation after the recommendation has been made. You then go through the investigation nomination process just as before. The process should lead to investigation. The formal nomination, after you have had the information consultations, then the so-called blue slips — which means everything is okay go ahead — and then a hearing and a vote.

In my situation, one day after Judge Bearford Sanders opted for senior status — and that is his real name, Bearford, okay; it was a family name — I was recommended to the White House by the Texas Democratic House Delegation. The President consulted

then with Senators Graham and Hutchinson and received their blessings. I went through the investigation process with the IRS and the FBI, and I had done that twice. That does not mean I have led a perfect life, just a very dull one. I was formally nominated by the President in December in 1995. I received my blue slips from the two Senators.

The Senate, however, went into adjournment. The election came about. The President won re-election, and then the process started all over again because all nominations die with the Senate going into adjournment. The White House again consulted with the Senate, and again the Senators were okay with this. I was then renominated in March of 1997. In July of 1997 Senator Graham did a back flip. Senator Hutchinson kind of ducked for cover and basically said well if he is objecting, there is nothing I can do.

Why did Senator Graham do his back flip? Well he gave the explanation being I was an active Democrat. Wow, there is gambling in Casablanca!

If you are going to be elected in Texas, you are going to be in one party or the other. The why of it, I think, has a lot to do with politics, and that is okay. I am in favor of politics. However, we found out towards September of this last year that a friend, a Republican friend, received in the mail some correspondence from Paul Wyrick of the Pre-Congress Foundation, Thomas Jiffing of the Judicial Selection Monitoring Project, and Robert Bork writing on behalf of, I think, the Pre-Congress Foundation, as well as telling my friends about a great opportunity he had if he would give, \$5, \$10, \$25,000 which would be treated as tax deductible to this project of theirs. That would then help them stop the Clinton judicial legacy, and they even provided a videotape showing all the ugly things that the Clinton nominees were capable of doing.

On the videotape were several United States Senators including guess who? Bill Graham! It turns out this is probably a violation of the Senate Ethics Rules. We made a concerted effort to get publicity on that and were quite successful and caused each of the four Senators to back away from this thing and say oh my gosh I did not know this was a fund-raising tape. Well, in our part of the world we think Bill Graham can probably smell fund-raising a continent away, but the way the Senators are compensated for these things we found out with a little further research into the Dole campaign. It is not unusual, but it is questionable.

You do an endorsement, let us say, for an organization. I will pick on Mr. Kline — Alliance for Justice — and you are compen-

sated not with money, but with their mailing lists of proven financial contributors. So you could be getting anywhere from a million to \$10 million off the mailing list depending on its quality.

MR. KLINE: With the Alliance for Justice it would be at least \$20 to \$25 million, I am sure.

MR. SCHATTMAN: Or \$20 or \$25. I think that is where part of the problem lies. When you see the documents and when you see the videotapes — and I am going to make Fordham Law School the depository of this little thing — you will see that what they are literally promising is if you will give a political contribution, which they are telling you is tax deductible, then you can meet with significant elected conservatives in the nomination process to help stop the Clinton nominees.

What that tells me is they are selling black balls, and you can see the effect of it and how the civil dockets are going up. Criminal dockets have gone up a little bit but not as much. The real backlog is in civil cases. This is a corruption of the process. Now it may be that it is politically effective, and it may be that it is politically okay; but it hurts the process because the process depends upon things like hearings.

Now, have I ever had a hearing so that I could listen to Senator Graham or any other criticism that anyone might have and respond to it? No, I have not! That is the place where you address questions about a nominee. When the process works, we either get rid of people who should not be judges, and maybe I should not be, or we put in people who should be judges if they have a good explanation for what is going on. The Bork and Clarence Thomas hearings I think are two pretty good examples. One went one way, and one went the other way. Now I don't know how anybody here would have voted, but it does not matter. The process worked. They had hearings, they had questions, and they had votes.

How does this lack of process effect efficiency? As Judge Keenan indicated we have got vacancies all around the country and the backup is in civil cases. In the Fifth Circuit alone, according to Judge Politz at the Circuit conference last week, there are now 37,746 pending civil cases in the District Courts. I do not know how that compares to this part of the world, but that is a lot of lawsuits. There are for comparison only 3,900 pending criminal cases, and that is because the manpower is put on the criminal docket.

This is what Judge Keenan has referred to here by manpower problems. He is a senior judge who is working every day of the week. In fact, 20% of all the cases disposed of in the federal courts in this country are disposed of by senior judges who are already on their retirement.¹⁴ They are entitled to go play with their grandchildren, go to the beach, go to the mountains, but they are having to work every day. We have a mere problem.

JUDGE KEENAN: As Otto Obermaier says, we have a \$3 million annuity.

MR. SCHATTMAN: That is right.

MR. OBERMAIER: You should earn more than \$3 million, that is if you only live to seventy-five.

MR. SCHATTMAN: Right, but I would call this the mere problem. Our system is dependent upon people who are older, who are retired, who are entitled to move on. If they were not there willing to do it patriotically, the system would collapse. That is our problem in Texas. If we keep doing it this way, eventually it will collapse.

I have got other things I can say on other topics, and I hope they will come up from questions; and as some of you may be able to tell from my voice, I am going to let it rest for a moment.

MR. BROWDE: Mr. Kline, 30% of the federal judiciary has turned over the Clinton Administration.¹⁵ He has appointed 30% of the judges. Your organization has said that it does not see that as a problem. Is that just the nature flow of things or is there some bite to that criticism that in fact this Administration, like others, is packing the Judiciary with people who might be going to far?

MR. KLINE: I think that, first of all, the typical Clinton judge is not a bug-eyed liberal, despite my colleague here on the left. Experts who have studied the opinions in the first four years of the Clinton Administration have found that by and large they are moderates, whose political and jurisprudential leanings are akin to Gerald Ford's judges. They are more conservative than Jimmy Carter's; and they are more liberal than President Nixon's, President Reagan's, and President Bush's. I do not think that the specific attributes of the judges are at issue.

14. See Judge Jon O. Newman, *Up to Congress to Cure Federal Judiciary's Problems*, HOUS. CHRON., Jan. 7, 1998.

15. See Paul Leavitt, *Senators Back Giving Roads Gas - Tax Revenue*, U.S.A. TODAY, Mar. 3, 1998.

I think that most of this is politics. I think that in this forum we need to deal with two questions. One, is there a crisis and, two, if so, who is to blame for it? We have heard the numbers from Judge Keenan, and Judge Schattman has gone into them to some degree. I think that the numbers do not really speak for themselves.

There are, as of last night, seventy-eight vacancies out of 844 federal judge slots — just under 10% of the positions.¹⁶ Although that is a lot of seats to have vacant, it does not really matter that much. Having five of twenty-eight seats vacant in the Southern District of New York, or however many there are, is normal attrition. In New York you have two other situations. First, you have the Second Circuit, where as Judge Keenan said, there are five vacancies out of fourteen.

JUDGE KEENAN: Thirteen.

MR. KLINE: Thirteen, excuse me. I heard Judge Ralph Winter testify in October, I believe, that when he served as a Clerk in the late '50s on the Second Circuit, there were nine active judges. Clearly the business of the Second Circuit is more complicated, and there are more cases now than there were then.

In New York you also have the Northern District where there are five positions. One of them has been vacant since 1992, and for most of the 1990s there has been more than one vacancy. The Northern District has something like 800 . . . I do not know the exact filings, but I think more than 800 filings per judge on the district, which is one of the highest in the country. There are cases that are taking years to go to trial that really should not, and they are the civil cases. As you all know, the Speedy Trial Act is going to put the criminal stuff first, and I guess it should, but it is the civil litigants who are going to suffer in the system.

For example, in Illinois, until last month, the Southern District had two vacancies out of four seats and the Central District had two vacancies out of five seats. I talked to magistrates, attorneys and some senior judges in those districts who say that the judges tell litigants in settlement conferences that they need to settle or the case is going to take three or four years to go to trial. What about a plaintiff who lost his/her leg in a mining accident. The claim might be worth \$120,000, but the plaintiff is forced to settle it now for \$40,000 because he/she needs the money to eat. That makes a big difference.

16. See *Full Court Press*, DETROIT NEWS, Jan. 8, 1997.

So in the aggregate, seventy-eight or eighty vacancies may not seem like a lot but there is a problem; and I think you can look at it in a different way. Before last year, according to our statistics going back to 1978, which I think was eighteen years, it took a nominee, from the time he/she was nominated to the time the nominee was confirmed, an average of seventy-eight days to fill a vacancy. Obviously, there was a different time period for how long it took the President to make the nomination, but over those eighteen years it took seventy-eight days. Last year it took, on average, 173 days from the time of the nomination to a confirmation. I think I can go into why there really is a crisis of sorts on the bench more during questioning, but basically not only are there all these seats vacant, but the size of the Judiciary has not expanded since 1990.

President Clinton is the only President besides Gerald Ford who has not had a judicial expansion since Franklin Roosevelt. As several have mentioned, the size of the docket has grown enormously, I think, 26%, 27%, or 28% since 1990, and that is a problem. So I think that there is a crisis.

Now who is to blame? I think there is certainly enough blame to go around. I think that President Clinton certainly has been slow in making some of these nominations. As not only Judge Keenan, but also Senator Hatch has said, you can not confirm someone if no-one has been nominated. I would note, however, that from the very first day of the present Congress, when the President made more than twenty nominations, there have always been twenty people who have not had a hearing before the Senate Judiciary Committee. So, yes, there are, I think, forty-four seats at this point that don't have nominees; but there are thirty-six sitting there that Senator Hatch should go to work on.

Now what has the Senate done? I would disagree with, I think it was Mr. Armstrong on one point, which he made about 1996 as being an election year. Well it certainly was an election year, and I think it was the year that started this problem. Actually, election years have not necessarily resulted in a slow down of the confirmation process. In 1996 there were twenty confirmations by the Senate, with seventeen in the second session which began January 6th of that year.¹⁷ In 1992, when the Democrats controlled the Senate and President Bush was in the White House, there were sixty-six confirmations.¹⁸ It was the most confirmations of any year of President Bush's Administration. Similarly in 1988, when President

17. See 144 CONG. REC. S592-01, S592 (1998).

18. See 143 CONG. REC. S12719-03, S12720 (1997).

Reagan was term limited, and the election was actually looking close at that point, there were forty-eight confirmations with a Democratic controlled Senate which was not the highest but it was among the highest of President Reagan's eight years in office.¹⁹ So I do not think that those sorts of politics work out when you look at the numbers.

The Senate, controlled by the Republicans, has done a number of different things which I think are odd. The man at the end of the panel over there referred to —

MR. OBERMAIER: I'm on the right.

MR. KLINE: Actually when we look at the French Assembly, we would be on the right which I think is appropriate being a conservative man myself.

There have always been political problems in confirmations of Supreme Court Justices going back to Chief Justice Rutledge who served as a recess appointment for some period of months and then got voted down by the Senate. That goes from Rutledge in 1795 through the confirmation battle with Clarence Thomas in 1991 where, of course, he was confirmed; but over recent history and, in fact, through almost the entire twentieth century, those battles have generally been focused on the Supreme Court, where there are people who are making national policy either directly or indirectly.

Previously, there have not been widespread attacks on lower court judges. There were a few in the Reagan and Bush Administrations, you may remember Jeff Sessions, who is now on the Judiciary Committee, was rejected by that committee in 1986 for a district court seat in Alabama; and I believe there is now payback for that rejection. There were two or three others during the Bush and Reagan Administrations that were also rejected. The Democrats took their shots at individual nominees who they believed were out of the mainstream. What the Republicans have basically done is try to close down the entire process that takes people who are bar presidents, deans at top schools and people in large firms who do occasional pro bono work, and they say these people are inappropriate for public office because they are going to be judicial activists. That is absurd, but that is what is happening to these nominees.

Since 1986, and I do not need to speak much longer on this stuff, they called for multiple hearings on some of the nominees who

19. See 142 CONG. REC. S11697-02, S11699 (1996).

were re-nominated in 1995 and then again in 1997. Along the way, Judge Schattman is one of the nominees who has been waiting the longest, but there is actually Willie Fletcher who was nominated in April of 1995. Finally, tomorrow, I believe, Mr. Fletcher is going to have a confirmation hearing, and I can get into the specifics of why he is being held up.

There have been what I would refer to as acrimonious and inappropriate questioning. Jeff Sessions, who I referred to earlier, asking Susan Graeber, now a Ninth Circuit member, if she is a member of the American Civil Liberties ("ACLU") or has ever been. If anybody knows 1950s history, that has a certain ring. He went on to talk about the ACLU which he seems to have a problem about quoting Senator Sessions, "It has some fine people who are members of it, but it does adhere to a number of positions such as: they oppose the death penalty, they oppose the three-strike sentencing laws, they're in opposition to school vouchers for sectarian schools, they oppose v-chip television sets to limit what is shown, opposition to voluntary labeling of albums, and support partial birth abortion, the constitutionality of racial preferences and the decriminalization of drugs. Well do you agree with all those views? Do you have any concerns about them?"

Not only is it an oddball question, but he and his colleagues are asking for the personal viewpoints of people on matters of policy, not how they are going to interpret the law or rule from the bench. That, I think, is a dangerous sentiment. One of the senators asked Margaret Morrel, now on the Central District of California, to give her personal viewpoint on all of California's initiatives from the past ten years — there were 160 of them.

There have been holds placed on nominees after they have come out of Committee — that is unprecedented. There have been few nomination hearings. There have been long delays on the Senate floor after coming out of the Committee — six months in one case. I can go on and on. I would say though that things are improving to a slight degree, and things are better in 1998 as there have been twenty-two confirmations since they returned in January, but I think there is a problem and you know where I think the blame lies.

JUDGE KEENAN: Well if I might just butt in, I said at the beginning there is enough blame to go around for both of the other branches, the Legislative and the Executive. I think that those of you in the audience would leave with a completely wrong impression if you think that it is all at the door of the Senate Judiciary

Committee or the United States Senate because I go back to official figures that I received yesterday from the Administrative Office of the Courts. These are not figures from some newspaper article. These are from the Administrative Office of the Courts. There are eighty Article III judicial vacancies — forty-three the Executive has done nothing about.

Mr. Obermaier and Mr. Armstrong, two dear friends of mine for many years, have pointed out a fact of life! This is a political process. When it is a political process, there is going to be give and take and push and shove! Remember Justice Brandeis? Do you think he got confirmed in thirty days? Look that up. That took years. That was one of the greatest battles in the history of the republic.

Before I was a judge, I used to try cases. I shall read to you from the statement issued by the Chief Justice of the United States. I do not think anybody could have summed it up better than he did, and this is what I think is the real-world picture.

This was his end of the year report in 1997. "Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only seventeen judges in 1996 and thirty-six in 1997, well under the 101 judges it confirmed during 1994."²⁰ The Senate is, of course, very much a point of appointment process for any Article III judge. One nominated by the President is not appointed until confirmed by the Senate.

The Senate is surely under no obligation to confirm any particular nominee; but after the necessary time for inquiry, it should vote them up or vote them down. No question about that. In the latter case the President can then send up another nominee.²¹ That is not happening!

MR. BROWDE: Judge Keenan, are you seeing in your court the kind of things that Mr. Kline suggests, that is plaintiffs having to settle cases simply because the delays are in essence —

JUDGE KEENAN: No, the lawyers delay the cases not the judges.

MR. BROWDE: Is there a lawyer in the house who would care to rebut?

MR. ARMSTRONG: Not one that intends to appear before him.

20. See 144 CONG. REC. S292-02, S293 (1998).

21. See ALLIANCE FOR JUSTICE, *Judicial Selection Process Annual Report 1* (1997) (quoting William H. Rehnquist, *The 1997 Year End Report on the Federal Judiciary* (December 31, 1997)).

MR. BROWDE: Or continues to practice.

MR. ARMSTRONG: That is right. If I can say, I think the numbers are very useful, but sometimes the practicalities, I think, are different no matter what the numbers are. Mr. Kline said, for instance, that a Presidential year does not result in a particular blockage. I do not know how those forty-eight got through or who they were, but I know that . . . I remember one of, I think, Teddy Kennedy's chauffeurs got through as a District Court Judge one year or something like that. I mean there are people who are saved up and kind of shoved through in little bunches in order to satisfy the numerical criteria.

The fact is that anything that has any controversy to it gets shut off in a Presidential year, and that is just an indication of the fact that politics change. For instance, it was an absolute anathema for the Republicans to use abortion as a litmus test for judiciary nominees when Reagan and Bush were there and they were criticized. Clinton comes in and overtly makes abortion a litmus test and says so and nobody complains because it is a different litmus test.

I think that we often look at the other person's politics as something that is terrible and holding things up and do not look at our own as perhaps doing the same thing.

MR. KLINE: I would like to say that if we are in an odd position, I am not sure how much you know about the Alliance for Justice — but we are a lefty organization and we did have something to do with the debate on the Bork and Thomas nominations — but the people that —

MR. OBERMAIER: I think you opposed both of them as I recall rather vigorously.

MR. KLINE: We had something to do with it. We are in the odd position of pushing for and helping nominees who in any other administration there would be a number of people like them — these pillars of the bar, and great schools, and good corporate law firms. When I say we are in an odd position, it is because we want there to be a diversity of viewpoints on the federal bench. The typical judge, and this is not meant to disparage my colleague on the left over here, is not providing a counterweight to the typical Reagan/Bush judge. It is kind of more of the same with a slightly more moderate tinge than the average President Bush —

MR. ARMSTRONG: If I may, where do you get these? I mean I am thinking of the Clinton judges and Reagan judges and Bush

judges that I know who are here. I do not see much difference over the years, I really do not. I think the people who have been appointed by and large are good people who were appointed.

MR. KLINE: Well —

MR. ARMSTRONG: Understand, a number of Senator D'Amato's appointments, for instance, are Democrats.

MR. KLINE: Right.

MR. ARMSTRONG: A number of Moynihan's appointments have been Republicans. I think that the characterization of them as being one way or another is something that . . . I do not see a hoard of liberals coming when the Democrats are in and then a hoard of right-wing fascists coming in when the Republicans are in.

MR. KLINE: I think that that is actually a good point. New York has been a special place on this issue going back to the Javitz/Moynihan relationship. I think that that is fair point.

MR. ARMSTRONG: The Javitz/Moynihan relationship does not have anything to do with it because all that does is give each senator the ability to appoint someone from his own party unashamedly. In other words, there is an obligation, I think.

MR. KLINE: Right.

MR. ARMSTRONG: There is a legal obligation for the Senate to appoint not on political grounds. One way to get out of that is to say okay we'll give you the minority party, one out of four; but once having given it, then each senator has the ability to be as political as he wants and, in fact, I have not been very political. It has nothing to do with the split. It has to do with the way things work.

JUDGE KEENAN: I wonder, most respectfully, where do you get these classifications that somebody is so liberal and somebody else is so conservative, that the Reagan and Bushites are more conservative than the Ford people, or the Ford people are more liberal, whatever that means, than the Clinton people.

First of all, district judges do not set policy. District judges are bound first by the United States Constitution and second by stare decisis in your particular circuit. I have about as much policymaking right as my two and a half year old grandson. Every once in awhile, in a certain case, maybe, I can go one way or the other way. That may come up once out of about 2,500 cases on a summary

judgment motion or on a motion to suppress where credibility is at issue.

If you are talking about the Courts of Appeals who sometimes do get issues that are more philosophical and more susceptible to the term liberal or conservative, maybe there; but I mean I just do not see this in the District Court, I really do not. Where do you get it from in the District Court? What is the source of this assignment of title, liberal/conservative, in the District Court?

MR. SCHATTMAN: Well there should not be. My experience both on the state court and looking at federal judges over the year in Texas, reveals that by and large it is not. I mean you are going to have somebody who is going to stick out like a sore thumb; almost in any part of the country there is going to be one. You should not be able to tell whether someone was appointed by Carter, Ford, Reagan, Bush, or Clinton in how they preside over a trial, rule on objections to evidence, or decide issues of venue. I mean, I have only met Judge Keenan; but I suspect that if he and I were asked to decide some venue issue, we probably would begin to analyze it about the same way and look at the same sort of facts. Maybe we would think one factor or another had different impact, but you are not going to have a decision that somebody is going to say is wildly liberal or wildly conservative. You are going to have a decision. That is it! You know based on —

MR. ARMSTRONG: But Mr. Kline purported to be able to say that the judges that have been appointed fell into liberal or conservative categories. I think what Judge Keenan was asking was, and agreeing with you, that how do you come to those classifications at the district court level?

MR. SCHATTMAN: I think part of it may have to do, and let us take me as a good example — and I do not know how this will work up here — but in my part of the country if you are in favor of the 1964 Civil Rights Act, you are a liberal, okay? Well I am in favor of the 1964 Civil Rights Act. Now, how much of a liberal does that make me?

JUDGE KEENAN: It has been the law of the land for thirty-four years.

MR. SCHATTMAN: It is the law of the land, that is right!

JUDGE KEENAN: What difference does it make whether you are in favor of it or not?

MR. SCHATTMAN: It does not as a judge.

JUDGE KEENAN: I am not wild about the exclusionary rule. I shock my clerks every time I say this. I think that what should happen is that I think that the cops should be penalized who violate the constitutional rights of the criminal defendant. I do not think society should suffer because some cop did something stupid and that results in the suppression of a kilo of heroin. I think the cop should be docked his pay; and if he acts bad enough, I think he ought to be fired and maybe imprisoned. I think the heroin probably should come in. That is the way I feel personally, but I suppress evidence. I have to. That is the law.

MR. SCHATTMAN: Right, that is the law.

JUDGE KEENAN: That is how you have to deal with it as a judge.

MR. OBERMAIER: Let me refer to something I wrote some time ago, and it quotes that there are liberal judges on the District Court. A November 1997 issue of the *Columbia Law Review* was dedicated to Jack Weinstein in the Eastern District of New York. One of his former clerks wrote an introduction to one of the articles there, and this concerns mass torts.

He said, "[W]ith respect to mass torts, Judge Weinstein believes that justice ordinarily requires us to use a portion of our collective resources to mitigate the crippling effects of those disasters on their victims" ²² One could argue that that eliminates fault as a criteria which has been a characteristic of our tort system for some time. So that there are judges who, following confirmation, act in a way that certain political forces believe is inappropriate.

Certainly that is true, I quote a *Wall Street Journal* profile of a Ninth Circuit Judge Steven Rhinehart who wrote the assisted suicide case which ultimately was reversed by the Supreme Court. The *Wall Street Journal* writes in connection with Judge Reinhardt that, "[H]e openly pines for the era when lawyers for minorities, the dispossessed, or those on death row look to federal judges as saviors." ²³ It is just a fact of life.

I disagree with Judge Keenan somewhat. District Court judges do not often have the opportunity to establish policy, but as trial lawyers we are often the hostage of a judicial attitude with respect to certain cases. For example, you are trying a mass tort case

22. John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2063 (1997).

23. Paul M. Barrett, *Bench Pressure: Federal Appeals Judge Embraces Liberalism in Conservative Times, Ninth Circuit's Reinhardt Discovers New Rights that Appeal to the Left, Courting Marilyn Monroe*, WALL ST. J., March 15, 1996, at A1.

before Judge Weinstein for a defendant company, a manufacturer. It is not among the more pleasant experiences that we envision in the course of our legal education.

I am not saying that that is wrong. I am simply saying that it is a reality of the —

JUDGE KEENAN: But Otto, how many —

MR. ARMSTRONG: If you are going to generalize to the judiciary on the basis of Judge Weinstein, can you name me another that is like him?

MR. OBERMAIER: I can not because I would want to document it with other than —

MR. KLINE: I can not tell whether you guys are posing questions or being, I guess, a little disingenuous. People, judges make decisions on a whole array of issues from abortion, to crime, to environment. One might think that —

JUDGE KEENAN: I have not had an abortion case in fifteen years.

MR. KLINE: One of your colleagues on the Southern District, I think it was last year — Judge Sprizzo — made a decision on the Clinic Access Bill that basically said that he would not put someone in criminal contempt for violating his own injunction because they had a moral belief that —

MR. ARMSTRONG: You use, as precedent, some left-wing judge back in the good old days who is ruling in a cart burning case.

MR. KLINE: But when you ask where do you correlate the appointing president and someone's political viewpoints, one would be more surprised if that was —

MR. ARMSTRONG: Sprizzo was originally appointed by Carter.

JUDGE KEENAN: He was proposed by Carter. He was proposed by Carter to the Southern District of New York.

MR. KLINE: That is fine, but he was appointed by Reagan to the Southern District of New York.

JUDGE KEENAN: He was, but he proposed by Carter.

MR. KLINE: I assume it was probably part of the same deal we have been talking about which is fine, but —

MR. ARMSTRONG: No.

MR. KLINE: It was not the same person?

MR. ARMSTRONG: No. I do not mean that there was a deal; rather, I mean Carter put him up, and he just did not make it through because it was a Presidential year. Then the next year, the next time Reagan put him up . . . put forward by Moynihan.

MR. KLINE: I guess my point is that it is not surprising that he was a Reagan appointee. Similarly in the proposition which —

MR. ARMSTRONG: But he was not a Reagan appointee. He was originally put up by Carter, and then he was Moynihan's appointment the next time under Reagan. So he was a Democratic appointee all the way.

MR. KLINE: Under my reading of the Constitution, the President actually makes the appointment. That is how I am referring to him as an —

MR. ARMSTRONG: You draw a significance to the fact that Reagan was technically President, that John Sprizzo is to be attributed to him?

JUDGE KEENAN: I suppressed a half a kilo of cocaine that was taken from a guy who was a bail jumper, who had a criminal narcotic case pending in Bronx County. Now am I a Reagan appointee, or am I a Carter appointee, or am I a Bush appointee? I mean the suggestion that you can stamp somebody at the district court level the way you're doing, 99% of the cases that I handle are civil cases where there are motions, are summary judgment motions, Rule 12 motions — for those of you who have not taken civil practice, a Rule 56 motion is a summary judgment motion, a Rule 12 motion is an old common law demurrer. There also are venue motions or they are what I call 1404A motions, which are to transfer to another jurisdiction.

My philosophy has about as much to do with how I decide a motion like that as in whether the Yankees continue their winning streak. The two things are irrelevant.

MR. KLINE: What about the 1%?

JUDGE KEENAN: The 1% I decide the way that I believe the law is. If there is no precedent, then I decide the way I think the law ought to be.

MR. BROWDE: At this point, let us allow for some questions for both of you if there are any of you who would like to enter this debate? Sir.

AUDIENCE: My understanding of Mr. Kline is he is dissatisfied because we do not have enough to counterbalance what he says was the Reagan/Bush years. In any event, I did not hear an answer to the question as to what criteria is being used to determine whether the district judge is conservative, liberal, or what.

MR. KLINE: Good questions, and I am glad to get back to it. Two things. One, when I started going down this road, I was making the point that it was not the numbers so much. There are fewer Clinton appointed judges than there are Reagan and Bush appointed judges at the bench. It is the type of Clinton judge that is being appointed that is not a counterweight to the Reagan/Bush judge. They are not taking people from the Public Defender's Office, or those who have practiced a significant amount of civil rights law — that sort of thing.

In terms of the criteria that I am talking about, I did not come up with this stuff. The people, the social scientists and political scientists that have studied it have said that it is not a case where you look at people who are implementing the sentencing guidelines. You look at judge's treatment of environmental cases, and religious cases, and civil rights cases, and a whole panoply of different issues.

I do not remember the man's name from the University of Texas. There were political scientists either at the University of Texas or University of Houston that looked at 16,000 cases from 1993 when the Administration started to 1996 and had been studying cases from the whole range of judges going back to 1960.

MR. ARMSTRONG: Are these reported cases?

MR. KLINE: Yes, not just reported cases but available cases, and it says that there are notable distinctions on those cases. I would agree that a District Court judge, by and large, does not have as much latitude as the Second Circuit — as any circuit court. The circuit courts are interpreting the Supreme Court and in most cases are the end stage for decisions; but when you look — I am from Washington and live inside the beltway — at the D.C. Circuit, it is clear that of the eleven people on the Circuit Court, the Carter appointees remain significantly more liberal and more likely to decide in favor of the plaintiff versus the defendant, or the defendant as opposed to the government.

AUDIENCE: Is that a good thing?

MR. KLINE: I do not know if that is a good thing, but it is a clear thing.

JUDGE KEENAN: Mr. Kline, these statistics about judicial decisions, are you aware of how many decisions are one-page memoranda orders that never get into Westlaw, that —

MR. KLINE: I would say with the system probably more of them.

JUDGE KEENAN: What did you say?

MR. KLINE: Judge Winter said that with the problems on the Second Circuit there is becoming more and more of this.

JUDGE KEENAN: Judge Winter obviously knows a lot more about the Circuit than I do. I am talking about district judges. I am saying that district judges . . . I did not file a decision today, but I signed about eleven orders. Now those orders do not go into Westlaw. I assure you of that. So the way I signed those orders may indicate to somebody whether I am a conservative or liberal, but there is no way of checking that.

MR. BROWDE: I would like to wrap this up by going back to Mr. Armstrong's suggestion and just going straight down the panel and quickly asking about whether they think it is a good idea, the three-month pocket veto. Either there is action in three months, or we just take it as a veto and move on. Mr. Obermaier?

MR. OBERMAIER: I do not think it is a good idea.

MR. BROWDE: Mr. Armstrong?

MR. ARMSTRONG: I thought it was a good idea when I had it, and I still do.

MR. BROWDE: Judge Keenan.

JUDGE KEENAN: I was his chief assistant when he was District Attorney of Queens. I never agreed with him then, and I do not agree with him now. I do not think it is a good idea.

MR. BROWDE: Mr. Kline.

MR. KLINE: I think it is a good idea.

MR. BROWDE: Judge Schattman.

MR. SCHATTMAN: The idea has some merit to it, but the problem with it is that it depends upon the trust in the system which is simply not there. Interestingly enough Senator Leahy has introduced a bill about a week ago that would do something like that but only in cases where there were declared judicial emergencies

and would require the Senate to hold a hearing within ninety days when there was a nominating case up for an emergency.²⁴

MR. OBERMAIER: That would only increase the declaration of judicial emergency.

MR. BROWDE: I would like to thank the fine panelists we have had, and at this point turn the program over to our Dean, Dean Feerick.²⁵

DEAN FEERICK: First, I would like to thank the panelists that participated in the program that just preceded this very short ceremony to unveil the portrait of Judge Murphy and to have a few reflections about his life. I would just note that the last time Mike Armstrong was here we had a very active panel and it is very nice to see him back today. Actually, after that particular panel I suggested to Mr. Armstrong that the next time he was on a panel he should take it to Columbia Law School. That was quite a panel discussion, and the one today was terrific, and I am sure . . . I know I learned a lot. Frankly, I was really educated about the subject because I must say I came in today thinking that there was a lot of politics going on right now that seem to be meaner than what I had seen before and perhaps it is more of the rhetoric of the politics as it is communicated in sound bytes. So it really helped me get a broader perspective on it. So I thank the panelists.

Just one word or two about Judge Murphy before introducing our distinguished panelist in terms of this part of program. I found in a file in the Law School he was graduated from Fordham Law School in 1930 and looking at his transcript, and I can assure our graduates of the school that I do not do this often.

His highest grade was in evidence, which is sort of interesting given his life in the law. I also found after the Alger Hiss prosecution, which certainly was the most famous of the cases he prosecuted, a series of letters that went to him. One by the President of Fordham University at the time, Lawrence McGinley, dated January 30, 1950; and he wrote the judge as follows:

The congratulations of Fordham and of myself personally are indeed due you for your splendid conduct of the prosecution in the recent trial. While I'm sure that Regis and Georgetown can rightly claim a share in your achievement, I believe that since it was a legal triumph Fordham and our School of Law has special

24. S. 1906, 105th Congress (1997).

25. Dean, Fordham University School of Law.

reason for pride and joy. With prayer for good wishes for your continued success. Signed Father McGinley.²⁶

In law school at the time was Ignatius Wilkinson, and in a letter dated January 23, 1950, he wrote the judge as follows:

Both personally and on behalf of your legal alma mater, I want to congratulate you on your excellent work in prosecuting and convicting Alger Hiss. Your trial strategy and your handling of the whole matter, including your masterful closing address as reported in the papers, stamp you as a great trial lawyer. You are a man of stature both physically and professionally, and we are all proud of you. Signed Ignatius Wilkinson.²⁷

Judge Murphy responded to Dean Wilkinson as follows: "Thank you for your lovely letter. The most pleasant aspect of the whole affair is the approval and good wishes of people like yourself."²⁸

At the time of the Alger Hiss case . . . The New York Times reports that . . . his brother . . . was an ace relief pitcher for the New York Yankees and then the Boston Red Sox and was called Fireman John Murphy. The New York Times reports the judge riding with somebody else in a taxi and the judge . . . [who] was about 6'4" and 240 pounds. When he was getting out of the taxi, the taxi driver says to the other person sitting in the taxi, "Who is that guy?" The other person said, "We'll he's the person who prosecuted Alger Hiss." The taxi driver says, "Oh he's the brother of the relief pitcher Murphy."

But we are certainly very pleased to have with us today as the first speaker Bob Maguire whose career has been a most distinguished one in law. A graduate of St. John's Law School, where he edited its Law Review, he had a splendid career following his graduation from St. John's as an Assistant of the United States Attorney from 1962 through 1966 in which he prosecuted many important cases. Then he established his own law firm, Maguire & Lawler.

Then, in 1978, our distinguished speaker Robert Maguire became a Police Commissioner of New York City and at the time, and I do not think it has been eclipsed, was the youngest Police Commissioner in the history of our city. He held that position for

26. Letter from Father McGinley, S.J., President, Fordham University to Judge Murphy (on file with the Dean's Office).

27. Letter from Ignatius Wilkinson to Judge Murphy (on file with the Dean's Office).

28. Letter from Judge Murphy to Ignatius Wilkinson (on file with the Dean's Office).

several years and then went on to become the Chairman and Chief Executive Officer of the Pinkerton Company; and then that was followed by four years as President . . . and Chief Operating Office of Krull Associates, which is certainly the most distinguished of companies in its field and has now just returned to the practice of law with Morvillo, Abramowitz, Grand, Iason & Silberberg which is certainly one that is familiar here at our school and the Bar in New York.

Beyond all of those biographical statistics, Bob Maguire has been a truly outstanding public servant serving on numerous boards and commissions including the President's Advisory Council on Executive Reorganization, The Secretary of the State's Advisory Panel and Overseas Security, the New York State and City Commissions on Government Integrity, and New York State Commission on Judicial Nomination. He is currently a member of the Conflicts of Interest Board for the City of New York and serves on many other boards including the Police Athletic Board, and he is been very much involved in the affairs of his law school, St. John's Law School, as well as his college, Iona College.

It is a great privilege and pleasure for me to give you Robert J. Maguire:

MR. MAGUIRE: May it please the Dean. Good evening ladies and gentlemen, distinguished guests, those of you who think you should be acknowledged. I personally acknowledge you all.

I am honored and privileged as you might expect. You have been invited to participate in this unveiling of Judge Murphy's portrait. I had the good fortune of knowing Judge Murphy when I served in the United States Attorney's Office, Bob Morgenthau's office, in the early 60s and the further good fortune to have prosecuted several cases before him. Like Judge Murphy, I had the further and further good fortune of moving on from the U.S. Attorney's Office to another position in the public life of this city, namely Police Commissioner.

Indeed it could be argued that Judge Murphy's appointment prepared the way for a similar appointment of both my good friend the late Judge Vincent Broderick and myself to that position. I would venture to say that that is why I have been invited by the Dean and Jack Vaughn²⁹ to speak here briefly before you this afternoon.

29. Senior Counsel, Cahill Gordon & Reindel.

When I began to think about what I might say on this occasion, I reached out to the City Police Department and requested their assistance. They searched their files and they forwarded some documents to me which both announced and discussed Judge Murphy's appointment as Police Commissioner as well as his views on the important issues he is face during his tenure almost all of which related to the well-being of the cops.

Some of you here this afternoon did not know Judge Murphy personally, and I think given the passage of time you may not even have heard or read much about him. So if you will permit me a very few brief moments, I will recite to you some biographical data which was contained in the official police magazine on the occasion of his swearing in on September 26, 1950.

Tom Murphy was born on December 3, 1905, in New York City. His father was the Chief Clerk in the Department of Water Supply, Gas & Electricity. His grandfather was a New York City Police Officer. As Dean Feerick indicated, he was educated in local schools. He attended Regis High School, Georgetown University, and then Fordham Law School at night.

Judge Murphy was an outstanding athlete, an exceptional student, and a leader at each institution he attended. After law school, he spent twelve years in private practice before joining the United States Attorney's Office in 1942. Two years later he became Chief of the Criminal Division and remained in the office for eight years until 1950. At that time, Judge Murphy accepted the request of Mayor Impellitteri to become the City's twenty-second Police Commissioner. He served in that office with distinction until his appointment to the federal court as a Southern District Judge in 1951.

During the ensuing years, Judge Murphy's stature as a trial judge grew to almost mythic proportions. By the time of my appointment to the U.S. Attorney's Office in 1962, he was considered one of the finest trial judges in the nation. He was a judge who possessed high intelligence, extensive trial experience, a sense of humor laced with irony, outstanding integrity, and a superb non-nonsense judicial temperament.

We have all heard first hand or vicariously Murphy stories. In the interest of time, I'm going to restrict myself to a couple. I once tried a fairly cut-and-dry case before the Judge who expeditiously moved the proceedings along and quickly sent the jury out for its deliberations expecting a very quick verdict. After several hours of silence, the jury returned a very complicated note asking for an

explanation on a law conspiracy. Judge Murphy read the note to counsel and then peering down, and as Dean indicated, this man was 6'4" or 6'5", about 260 pounds with a large Walrus mustache. He looked at us and exclaimed to the lawyers, "Somebody in there must be teaching those bastards Aristotle." The Court Reporter did not take this down.

Another favorite, and you have to understand this was in an era of non-political correctness, the Judge arraigned a Muslim defendant and he said, "Sir, do you have counsel?" The man pointed skyward and he said, "Allah is my counsel." Murphy said, "I understand that, sir, but do you have local counsel?"

The final story, and I hope I'm not stepping on Jack Vaughan's lines, the final story is a favorite one and I think I was in the courtroom when it happened. A very elderly man pleaded guilty to a fraud, I forget which kind it was, and there was a sentencing hearing. The defense lawyer made an impassioned plea for leniency. Judge Murphy heard it all out and then imposed a substantial eight or ten-year prison term on the defendant. Defense counsel was shocked and stood up to protest the length of the sentence arguing that the defendant was both frail and elderly and could not possibly serve out this term of imprisonment. Again Judge Murphy, unfailingly polite, heard him out. He then looked down at defense counsel and said in his mellifluous voice, "Tell him to do the best he can."

Let me end by quoting to you the remarks of a fellow student of Judge Murphy set forth in the Regis High School yearbook in 1923, the year of his graduation; and I'm quoting: "Wherever your lot may be cast in the after lifetime, yours will not be a niche of mediocrity. You stand head and shoulders above us all." Indeed he does. Thank you very much.

DEAN FEERICK: Thank you very much. Our next speaker is no stranger to Fordham Law School. Jack Vaughan is a graduate of our school and I believe the class of 1964, an evening school graduate, who then went on to enjoy an extraordinary career as a member of Cahill Gordon & Reindel. What we know him most for is his extraordinary involvement in the life of Fordham Law School. He served as President of the Fordham Law Review Alumni Association, and President of the Fordham Law Alumni Association, where he distinguished himself through many activities enriching the life of the school and particularly helping the students at the school in pursuing careers in law throughout the legal community.

He has served the school beyond those official positions in so many capacities that it is not possible for me to set them all out.

During the fifteen and a half years in which I have had the honor to serve as Dean of our school, there has been no graduate who has certainly helped the current administration more than Jack, and there has been nobody more devoted to Jack than the Law School. It is really a great privilege to ask him as a former Law Clerk to Judge Murphy to share with us some reflections. Jack.

MR. VAUGHAN: Thank you very much John. I would like to acknowledge the presence of another Murphy Law Clerk here today, Charlie Fanning.

It is the Morgenthau mafia: Fanning, Maguire, Armstrong, Obermaier — all at the U.S. Attorney's Office at the same time. To the dilatory and indolent, Judge Murphy was an insurmountable obstacle. To the well-prepared and forthcoming, he was a pleasure. As a rule, he was soft-spoken, low with a deep voice. On occasion when the situation demanded it, he could instruct like a thunder clap.

Murphy genuinely liked lawyers. He always thought of himself as a lawyer in a particular job. He treated lawyers fairly, he was considerate of the demands placed upon their time. He had a summer calendar which served the lawyers as well as everybody else. In preparing his legendary summer calendar, he called all the lawyers who had cases before him and one-by-one allowed them to pick their own dates.

When in the course of the summer a case cleared out and he had time on his hands, he did not call the other lawyers in to fill up that space because he knew they had plans for vacations and they had other cases. Instead he would call the U.S. Attorney's Office and ask them to send him a case for the defendant who was in jail, and he would try that case.

When he sat in motion part, which in those days meant two weeks of hearing motions followed by two weeks in chambers deciding those motions, he tried to avoid adjourning any of those cases because it increased the burden on the judge who would follow him into the part. He did not much like what was then called Part 110, the settlement part, because he was not comfortable banging heads together. He always thought that the best way to get a settlement is to give the trial date.

For their part, lawyers liked Murphy and they knew he was fair, which is why so many defense lawyers agreed to go before him non-jury. Do I have to repeat that Judge Murphy had an exquisite

sense of humor? One of my favorite Murphy stories involves a non-jury trial of a truck driver who stole two tires. It was a simple case, and it took ten minutes for Hugh Humphrey to put the government's case in.

The defendant was a huge man with little or no education. He took the stand, and at a certain point his lawyer, Bernie Maldow, handed him a blank sheet of paper and asked him to write his name and his date of birth. The defendant began writing and writing and writing. What he finally produced was utterly unintelligible. Maldow offered the document in evidence and Humphrey did not object. Murphy looked at it, turned to the defendant and said, "You should be on the Court of Appeals."

One more if I may. A certain lawyer — I will not name him because he is still around — a somewhat oily defense counsel, was summing up to the jury and twice appeared to go faint. He turned to Murphy to explain that he was not trying to arouse sympathy with the jury but that he had recently had an ear infection and had a tube placed in his left ear. Then he had to have another longer tube placed in his right ear. Murphy asked, "Did they meet?"

Murphy was an intuitive judge. He worked hard, but he didn't work long hours. He usually arrived about 9:30 and adjourned court about 4:30 and was out of the building by 6:30. His chambers consisted of a secretary Bill Cashill who came from the Police Department. His bailiff was Pat McNulty, an Irish-born cop, who also came with him from the Police Department. McNulty was really Murphy's "Luca Brazi". When things had to be done outside the office, McNulty did them.

In those days, or at least in Murphy's case, there was only one law clerk. Most stayed with Murphy for more than one year. To his law clerks, he was a gentle friend, and from him we learned much more than the law. The Judge and Mrs. Murphy were avid readers and sometimes spend time reading to each other. They loved music and were fond of the opera. They traveled to Europe just about every year, and lived for a couple of months in Germany, Italy, Ireland and elsewhere. They had a lot to share.

I asked Mrs. Murphy before she died what did she think the Judge would like to be remembered for. She answered, "the Hiss case." Of the Hiss case, perhaps Whitaker Chambers said it best in his book *Witness*.

The whole nation now gratefully knows that six foot, stalwart figure, with the mild but firm face, and the mustache. It knows

what he has done. It watched him do it. I cannot add to that knowledge except to point out this.

When Thomas Murphy decided somewhat reluctantly, to take the Hiss Case, almost nobody had ever heard of him. Within the Justice Department he was known as a man who had never lost a case. Otherwise, he was a man who jostled no one Yet when the historic moment came, Murphy was waiting there at the one point in time and place where he could bring all that he was and all that life had made him to bear with decisive effect for the nation.

It is inconceivable to me that any other man could have replaced him. That is why I can think of his role only in this way. "It pleased God to have in readiness this man."³⁰

I asked Mrs. Murphy how she would like to see Judge Murphy remembered, and she said, "For his kindness." I hope that our remarks have shown that he will be so remembered. It is remarkable that not a single negative memory of the Judge exists — not one. When we think of him, we smile. What a legacy — a smile.

. . . .

30. WHITAKER CHAMBERS, WITNESS 792 (1980).

