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The Nixon appointments to the United States Courts of Appeals : the impact of the law and order issue on the rights of the accused.

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THE NIXON APPOINTMENTS TO THE UNITED STATES COURTS OF APPEALS: THE IMPACT OF THE LAW AND ORDER ISSUE ON THE RIGHTS OF THE ACCUSED

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The Nixon Appointees to the United States Courts of Appeals: The Impact of the Law and Order Issue on the Rights of the Accused (August 1975)

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The major findings of this study include the following:

(1) When appeals judges were aggregated in terms of their scores on criminal procedures cases, differences were observed in the voting behavior of Nixon appointees as compared to non-Nixon Democrats and non-Nixon Republicans during fiscal 1970 to 1973.

(2) Nixon appointees voted more "conservatively" than these other two judge groups. Non-Nixon Democrats were the most "liberal" group, and non-Nixon Republicans fell in between the other two groups.

(3) However, when the circuit was introduced as a control, it was found that (a) the relationship between the three judge groups varied from circuit to circuit with only six circuits conforming to the hypothesis; (b) the composite and median scores of Nixon appointees and non-Nixon Republicans outside the South were virtually identical when only the cases of fiscal 1973 were considered; and (c) bloc analysis of individual circuits revealed that Nixon appointees do not constitute monolithic and sharply "conservative" blocs in any but the District of Columbia circuit, where voting patterns of Nixon appointees were similar to voting patterns of Nixon appointees to the Supreme Court.

(4) Moreover, when other background characteristics were entered as controls on the appointing administration variable, the latter was found to account for only a small proportion of the observed variances in voting behavior among the judges of the Courts of Appeals.

(5) There also appeared to be a relationship between the scores of Nixon appointees and their sponsoring Republican Senator, where one existed. The most "conservative" Nixon appointees were recommended, for the most part, by the most conservative Republican Senator, or were the choices of the Administration in the absence of eligible Republican sponsors. This suggests that Senatorial courtesy was an obstacle to the attainment of preferred administration nominees.

(6) Finally, doctrinal analysis of confession cases also indicated that Nixon appointees did not always agree on confession issues, varying in their legal positions not only from circuit to circuit but within some circuits.

(7) The tentative conclusion, then, of this study is that, although the Nixon appointees did appear more "conservative" when their voting behavior was aggregated, they constituted, with the exception of the District of Columbia circuit, nothing like the cohesive "conservative" bloc of Nixon appointees which dominated criminal justice issues on the Supreme Court over roughly the same period.

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INTRODUCTION

The bizarre end of the Nixon Administration has seemingly closed a strident period of public struggle over the proper role and direction of federal court judges, particularly those on the Supreme Court. This struggle, which centered around the liberal activism of the Warren Court majority from the middle 1950's to the late 1960's and the conservative reaction to that activism, has ended, largely because Richard Nixon appointed four conservatives to the Supreme Court.

As with the previous elections of Andrew Jackson and Franklin Roosevelt, the election of Nixon engendered the highest hopes and the deepest despair in those who respectively hated and defended the current Court and the new President; for Nixon, like his famous predecessors, explicitly promised new judges and, through them, new law, although he simultaneously seemed to disavow judicial policy making.

Public debate over the Court has now subsided largely because the Supreme Court, led by the four Nixon appointees, has merely refused to extend Warren Court reforms, thereby avoiding the more ostentatious reversals of precedents.

Because a conservative revolution on the Court seemed imminent, scholars carefully monitored the behavior of the Nixon appointees to the Supreme Court. On the other hand, less attention has been devoted to assessing the impact of the Nixon appointees to the lower federal courts. There are probably several reasons for this neglect. For one thing, the large numbers of judges and cases at those levels prohibits traditional

research involving the reading of judicial opinions. Moreover, comparison of judicial behavior is very difficult on the lower federal courts as the judges, for the most part, are deciding different cases. For instance, district court judges usually sit alone as trial judges, while judges of the eleven United States Court of Appeals usually decide cases in panels of three. In only about one percent of their cases do all the appellate judges of a particular circuit sit en banc. So comparison of judicial behavior even within a particular circuit must be at best tentative. This problem of comparability of judicial behavior in the lower courts also has the effect of inhibiting the use of the newer quantitative methods such as bloc analysis and scaling which have gained acceptance in studies of the Supreme Court. Another reason for the neglect of the lower courts is probably the assumption that cases are less important and interesting at that level because the lower courts do not exercise the same degree of control over which cases they hear as does the Supreme Court. District and Circuit Courts, for the most part, must hear and decide the cases that are brought to them, while the Supreme Court decides which case to hear from among many submitted.

Lower courts are probably also neglected because of the limited impact of any one lower court decision and their perceived lack of importance. A panel or en banc decision in one circuit, although it may be persuasive, has no binding effect on other circuits. Normally a decision by a three judge Courts of Appeals panel is limited to the parties involved in the particular case, although en banc decisions of the circuit are expected to control future panel decisions within (but not out of) the circuit. Supreme Court decisions, on the other hand, are statements

of law which theoretically bind all officials in the United States. Thus a broad "impact" of the Supreme Court decisions is assumed, although many recent studies have shown that the degree of compliance with Supreme Court decisions certainly varies.

These are very good reasons for studying the Supreme Court. However, there are cogent reasons for extending the study of Nixon appointees beyond the Supreme Court. Obviously, the Supreme Court cannot review every lower court decision. In fact, according to one scholar, the Supreme Court reviews and reverses only 1.4 percent of Courts of Appeals' decisions.[1] In other words, the decisions of the Circuit Courts of Appeals are final in almost 99 percent of the cases they decide. Although there is little doubt that most lower court judges are concerned about Supreme Court review of their decisions, the possibility of Supreme Court reversal is remote. Moreover, although the cases at the lower court levels are more routine, some cases do provide opportunities for judicial discretion. Thus "court packing" could influence case disposition in the lower courts. That is the problem and the focus of this dissertation: to measure the impact, if any, of the Nixon appointees to the lower courts.

Such a study, however, must be carefully limited. For one thing, the study will concentrate on the one issue, criminal procedures, stressed in Nixon's 1968 campaign. Criminal procedures cases will be further limited to just cases involving blue collar crimes because blue collar cases seem more sharply to divide liberals and conservatives and to serve

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[1]J. Woodford Howard, "Litigation Flow in Three United States Courts of Appeals," Law and Society Review, VII, No. 1 (fall 1973), p. 44

as a test of the attitudinal characteristics of the judges. This means that such white collar crimes as embezzlement, securities act violations, income tax fraud and selective service violations will be excluded from the analysis as will such other crimes as bribery, perjury, intoxicated driving, false statement, flag desecration, and obscenity prosecutions. Secondly, the study will be limited to the Circuit Courts of Appeals for the fiscal period 1970 to 1973. Thirdly, quantitative techniques will be the primary method of analysis. This will involve the assigning of numerical values to the votes of judges while ignoring their written explanations of their votes. As Goldman has put it, the cases are viewed in basic political terms of who wins and who loses and by implication which broader political and social values are seemingly being fostered.[2] In this particular study, a numerical value of "2" will be assigned to all pro-defendant votes and a numerical value of "0" to all anti-defendant votes. In cases where judges grant but also reject important parts of defendant claims, a numerical value of "1" will be assigned to the votes of judges favoring that position. Moreover, when judges split three ways in a non-unanimous decision, a value of "1" will also be assigned to the middle position.

In order to determine the impact of the Nixon appointees on the disposition of criminal appeals, an arithmetic mean will be computed for all the votes cast by Nixon appointees to the Courts of Appeals and this figure between "0" and "2.00" will be compared with the arithmetic mean

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[2]Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," American Political Science Review, LXIX, No. 2 (June 1975), p. 491.

of all votes cast by non-Nixon Republicans (primarily Eisenhower appointees) and non-Nixon Democrats (primarily Kennedy and Johnson appointees). It is hypothesized that Nixon appointees will have a lower arithmetic mean, signaling less support for the criminally accused than either of the other groups.

Because the number of votes cast by individual judges varies from as few as one to over a hundred in any given term of the court, it is possible that the disproportionate number of votes cast by only a few judges in some of the busier circuits could distort the arithmetic mean as in indicator of the attitudinal characteristics of a judge group. Thus a median score will also be computed for each of the three judge groups which will ignore the number of votes cast by individual judges, with the exception that no judge will be included in the computation who decides fewer than six non-unanimous or fifteen unanimous cases. It is hypothesized that Nixon appointees will also have a lower median score than either of the other judge groups.

The major assumption underlying this study is that attitudinal differences of the judges account for differences in support for the criminally accused, although many of these differences could be explained by the fact that lower court judges are deciding different cases and deciding them differently because the nature of the case left them little choice. One way of minimizing, if not eliminating, this difficulty is to examine non-unanimous cases separately. It can be assumed with some confidence that cases producing open dissent among judges do provide them with a choice. Obviously many unanimously decided cases also provide judges with a choice, but is is assumed that many also do not. This is

particularly true in the criminal law field where one appeal, no matter what its merits, has become almost automatic. Unanimously decided cases then will be treated apart from, as well as in conjunction with, the non-unanimous cases. It is expected that the non-unanimous cases, because they provide more opportunity for discretion, will result in a wider range of individual and group scores and will serve as better indicators of judicial values than will the unanimous decisions. On the other hand, the consideration of both unanimous and non-unanimous decisions combined is expected to provide the best measure of the actual impact of the Nixon appointees. It is expected that, although Nixon appointees may appear more "conservative" on the basis of the non-unanimous decisions, the impact of appointing a more "conservative" group of judges may be greatly minimized by the routine (i.e., non-discretionary) nature of many criminal cases heard by the Courts of Appeals.

With two exceptions, no attempt will be made in this study to classify and compare cases according to the legal issues involved. These two exceptions include claims of alleged coerced confessions and illegal searches and seizures, issues prominently featured in the 1964 and 1968 campaigns of Barry Goldwater and Richard Nixon respectively. Voting in these types of cases will be compared with voting in an "all other criminal cases" category. It is expected that Nixon appointees will differ even more from the other two judge groups on the confession and search issues than they will on the "all other cases" category, for it is believed that any screening process by the Nixon Administration would be particularly concerned with approaches by potential nominees to these controversial issues. Cases will also be classified according to whether

the prosecution originated at the state or federal level in order to control for the possibility that attitudes toward states rights rather than toward the criminally accused influenced the disposition of criminal appeals. It is expected that both Nixon appointees and non-Nixon Republicans will score lower than the Democrats in cases involving state prosecutions, reflecting the greater concern of the former groups on local and state autonomy.

In addition to analyzing the behavior of aggregate judge groups, the study will also focus on individual circuits in order to determine how many and which circuits conformed to the hypothesis that Nixon appointees would be the most conservative group. Only in the fourth and fifth, the southern circuits, is it expected that non-Nixon Democrats will be more conservative than Nixon appointees or non-Nixon Republicans. Therefore, the aggregate analysis already outlined will be done both with and without those circuits included to control for a possible distorting effect they might have on aggregate totals. This is particularly important because of the large size of the fifth circuit which encompasses the "deep" South and which by itself decides nearly a third of all criminal cases heard by the United States Courts of Appeals.

Although there is little reason to conclude that cases are more comparable within than between circuits, intra-circuit analysis does have the advantage of including cases in which judges sit together. This situation makes it possible to compute the percentage of the time a pair of judges hearing the same cases agree with one another, a form of analysis usually known as bloc analysis. Through bloc analysis it can be determined whether, for instance, Nixon appointees tend to agree more readily with

other Nixon appointees or with non-Nixon Republicans and Democrats. Thus the degree of attitudinal cohesiveness of Nixon appointees in a particular circuit can be estimated. If this cohesiveness is lacking in certain circuits where bloc analysis is possible, or if Nixon appointees score higher in criminal cases than either or both other judge groups in certain circuits, it may be assumed that the Nixon Administration met and failed to overcome certain obstacles in their attempt to "pack" that particular circuit. One such potential obstacle is the custom of Senatorial courtesy whereby the Senator of the President's party from a potential nominee's home state may single-handedly veto Presidential appointments to the judiciary at the District and Circuit Court levels. In order to test the potency of this variable in explaining possible variations in the voting behavior of Nixon appointees, scores of these appointees will be compared with Senate A.D.A. scores of their sponsoring Republican Senator (where one exists) to see if there is a correlation between the two.

Finally, this study will include two other aspects designed to measure the character of Nixon appointees to the Courts of Appeals. First, Nixon appointees will be compared with the other two judge groups while holding the age and religious affiliation of the judges constant. These other variables have been found, in another study, to be related in a statistically significant way to voting in criminal cases.[3] And, secondly, the study will also examine the written opinions of appellate court judges in confession cases to see if quantitative findings of

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[3]Ibid., p. 501.

attitudinal similarity or dissimilarity are supported by similarity or dissimilarity in the doctrinal positions taken by judges on this key issue. The chapter outline into which the previously discussed aspects of the study are organized follows below.

Chapter I. The first chapter will attempt to place the Nixon campaign against the court system in an historical context by comparing it with past campaign attempts to alter judicial policy and/or institutions to determine as much as possible the intentions of the Nixon Administration toward its judicial appointments.

Chapter II. The second chapter will discuss the politics of the judicial selection process by reviewing recent literature on the subject and will offer a brief socio-political profile of Nixon appointees, non-Nixon Democrats and non-Nixon Republicans to determine the potential of and limits on judicial selection as an instrument for changing court policy.

Chapter III. The third chapter will try to assess the impact of the Nixon appointments through a quantitative analysis of the voting behavior of the judges of the United States Courts of Appeals in criminal cases decided in fiscal 1973. This analysis will include both unanimous and non-unanimous cases.

Chapter IV. The fourth chapter will attempt to identify the attitudinal characteristics of the three-judge groups by focusing only on non-unanimously decided criminal cases for the four-year period fiscal 1970-73. This quantitative analysis will include the bloc analysis of voting behavior in each circuit and the analysis of the relationship between voting behavior and selected socio-political background

characteristics of the judges and the correlation analysis of the voting behavior of Nixon appointees and their sponsoring Republican Senators.

Chapter V. The fifth chapter will involve a qualitative analysis of coerced confession cases decided in the Courts of Appeals during fiscal 1973. Doctrinal positions taken by Nixon appointees on these issues will be compared with doctrinal issues taken by non-Nixon appointees to see how much these positions varied within and between groups.

Chapter VI. Finally, Chapter VI will summarize and attempt to explain the major findings, comment on the assumptions underlying the research, and suggest other research possibilities uncovered by this study.

CHAPTER I

THE NIXON CAMPAIGN AGAINST THE COURT: AN HISTORICAL PERSPECTIVE

Attacks on the wisdom and even the integrity of the federal courts have been frequent in American history. This is understandable for the federal courts in exercising their almost unique powers of judicial review have been embroiled in intense political controversies from the beginnings of the Republic to the present day.[1] In addition, the Constitutional provision for separation of powers is designed to produce recurring confrontation between semi-independent branches of government. Struggle and tension then are inherent features in a political system of this design.[2] At the same time, the federal courts are dependent on the President and the Congress to appoint their judges, provide their funds, and determine their size, jurisdiction and structure. The federal courts are thus potentially vulnerable to their coordinate branches of government which possess the formal power to significantly alter not only their policy direction but their role and stature in the political system as well. Thus our federal courts lack the complete independence

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[1]Charles Warren, The Supreme Court in United States History, (Boston: Little Brown, 1926). Of several excellent histories, Warren's is particularly sensitive to the political controversies that have swirled around the court.

[2]James Madison (probably), Federalist no 51, in Hillman Bishop and Samuel Hendel, Basic Issues in American Democracy (7th ed., New York: Appelton, Century, Crofts, 1973), p. 43.

that life tenure supposedly provides[3] and our history is replete with instances of "court curbings" and "court packings" that have influenced judicial policy.[4]

Probably the principal protection for the courts against such onslaughts by their coordinate branches is the widely held public expectation that the courts should be subject to influence only through the appointment of new judges as vacancies occur.[5] Thus the appointment power has been a principal means of effecting constitutional change.

Traditionally, the President has appointed his own partisans to judicial vacancies roughly ninety percent of the time.[6] Thus it is understandable that changes in political power are often accompanied by what appear to be threats to the courts or to the policies they represent as

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[3]Robert Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy Maker," Journal of Public Law, VI, No. 2 (1957), pp. 279-295. Dahl effectively refutes the notion that, historically, the Supreme Court has significantly protected minority rights against majority action. Instead, he argues that the Court, with few exceptions, has followed the election returns and served to legitimize the dominant political coalition in the country. Dahl, of course, wrote before the Warren Court of the 1960s dramatically expanded civil rights and civil liberties. The Warren Court experience does not necessarily refute the Dahl thesis, but see Jonathan A. Casper, "The Supreme Court and National Policy Making," American Political Science Review, 70 (1976), in press.

[4]See generally Walter Murphy, Congress and the Supreme Court (Chicago: University of Chicago Press, 1962) and Robert Steamer, The Supreme Court in Crisis (Amherst: University of Massachusetts Press, 1971).

[5]This distinction between legitimate and illegitimate attempts to influence the Court has been drawn by C. H. Pritchett, Congress Versus The Supreme Court (Minneapolis: University of Minnesota Press, 1962), p.119.

[6]Joel Grossman, Lawyers and Judges: The American Bar Association and the Politics of Judicial Selection (New York: John Wiley and Son, 1965), p. 216. Grossman documents this point with regard to the Supreme Court. The figures for the lower federal courts are presented in 20 Congressional Quarterly (1962), p. 1175.

those new in power begin to alter court membership and, frequently, court policies.

Patronage is one reason for continuing partisanship in judicial selection. Federal judgeships have been virtually the most prized jobs in government because of high pay, prestige, and secure tenure.[7] The party in power then is anxious to award these positions to their "faithful."

Policy though is the major source of controversy over judicial appointments. The policy making functions of the federal courts have been apparent to interested partisans at least since the Marbury case,[8] but it has been mainly in this century that the intellectual community, including some of the judges, began to disabuse themselves and others of the notion that judges do not make law. Now the distance between the way judges have acted and what academicians, the legal community, and the general public would admit about them has narrowed. During the Senate struggle over the G. Harrold Carswell nomination to the Supreme Court, Yale Law School professor Charles L. Black contended that United States Senators could legitimately weigh a judicial nominee's attitudes toward key public policy issues, in this case civil rights.[9] Apparently Black's argument was influential in the confirmation proceedings.[10] Similarly, political scientist Joel Grossman has defended partisan (i.e., on the

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[7]Harold Chase, Federal Judges: The Appointing Process (Minneapolis: University of Minnesota Press, 1972), p. 29.

[8]Marbury v. Madison 1 Cranch 137 (1803).

[9]C. L. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," Yale Law Journal, LXXVX, No. 1 (November, 1969), p. 660.

[10]Richard Harris, Decision (New York: E. F. Dutton and Company, 1971), pp. 94-96.

basis of party affiliation) judicial selection, particularly for the lower federal courts, because this allows, he asserts, a rough estimate of the potential behavior of nominees to those courts.[11]

This scholarly "sophistication" about the sources of judicial behavior is also apparent in the public press, the campaign rhetoric of politicians (as shown later), and the views of the general public. A Newsweek article by Stewart Alsop claimed that policy views were the real sources of contention over the Abe Fortas, Clement Haynsworth, and Harrold Carswell nominations to the Supreme Court, as well as with most other high court appointments.[12] And academicians Walter Murphy and Joseph Tanenhaus, who studied public reaction to Senator Goldwater's 1964 anti-Court campaign, said they "...would not have anticipated that the academic debate about neutral principles of constitutional law would have trickled down through all levels of society..."[13]

That judges make law has become almost a dogma then in the popular culture as well as in intellectual discourse. However, the "discovery" of the political nature of the court has been magnified in this century, first by the Court's obstruction of liberal economic measures arising out of the progressive era and the New Deal and later by its championing of civil rights and liberties other than property rights. These Court policies, like others in the more distant past, have engendered a storm

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[11]Grossman, Op. cit., p. 219.

[12]Stewart Alsop, "The Myth and William Rehnquist," Newsweek (December 6, 1971), p. 124.

[13]Walter Murphy and Joseph Tanenhaus, "Public Opinion and the Supreme Court: The Goldwater Campaign," Public Opinion Quarterly, XXXXII, (Spring 1968), p. 48.

of controversy[14] provoking campaign attacks from Progressive LaFollette, Republicans Goldwater and Nixon, and American Party candidate Wallace.

In the present era, Nixon, Goldwater, and Wallace seemed most concerned with the Warren Court's expansive interpretation of the Bill of Rights and the Fourteenth Amendment, particularly as these constitutional provisions were applied to limit the powers of various state governments to regulate race relations, to cope with problems of lawlessness, to elect their officials to state and county governments, to outlaw obscenity, and to curb radical political dissenters.[15] In part, the Nixon campaign reflected the Eisenhower Administration's concern over the liberal trend of criminal justice decisions by the federal courts and the liberal tendencies of federal judges (eighty percent of whom were Democrats when the Republican Party regained the Presidency in 1952)[16] in this policy area. Thus Republican concern was apparent long before the Warren Court decisions of the 1960s "revolutionized" the administration of criminal justice,[17] and can be traced back to Republican Congressional hostility to the Supreme Court's 1943 decision McNabb v. United States.[18] Eisenhower,

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[14]Of course scholarly revelations about the political character of court action may have contributed to the controversy over the court's modern role.

[15]An excellent review of the Warren Court's civil liberties decisions can be found in Henry Abraham's Freedom and the Court (2nd ed.; New York: Oxford University Press, 1972).

[16]Chase, op. cit., pp. 94 and 102.

[17]Ibid.

[18]McNabb v. United States 318 U.S. 332 (1943). An early confession case involving a delay in arraignment prior to police questioning. The Supreme Court nullified the conviction without ruling that the confession was involuntary. To be discussed in more detail in Chapter 5.

however, avoided commenting on any decisions of the Supreme Court, led by his appointee Chief Justice Earl Warren; and Nixon, then Vice President, on one occasion, following the Court's decision in Brown v. The Board of Education, praised "the great Republican Chief Justice."[19]

Following dramatic court decisions early in the 1960s on reapportionment, prayer in public schools, and as already mentioned, criminal procedures, opposition to the Court reached a shrill crescendo; and the 1964 Republican Presidential candidate Barry Goldwater peppered his campaign with critical references to the Court.[20] Goldwater and his anti-court campaign were, however, overwhelmed by the "finger on the nuclear button" and economic welfare issues, and the conservatives lost their chance to "turn the court around."[21] Subsequent to that election, President Lyndon Johnson's Supreme Court appointments of liberals Abe Fortas and Thurgood Marshall, and his abortive attempted elevation of Fortas to the Chief Justiceship and friend Homer Thornberry to an Associate Justiceship, increased conservative fears over the future policy directions of the Court and the intentions of the Democratic Administration in that regard.

Meanwhile, coupled with court decisions which in the eyes of some seemed to undermine religion, encourage the breakdown of traditional sexual morality, free known criminals, aid and abet communists, and mix the races, there was an alarming rise in the crime rate, up 120 percent

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[19]New York Times, Feb. 14, 1956, p. 18.

[20]Murphy and Tanenhaus, loc. cit.

[21]Theodore White, The Making of the President 1964 (New York: Antheneum, 1965).

from 1960 to 1968, according to the Federal Bureau of Investigation's uniform crime reports.[22] Although statistics are suspect in this field due to problems of record keeping and crime reporting (by victims), crime and political dissent had, in the 1960s, dramatically coalesced in the nation's major cities and particularly its capital where race riots and political demonstrations were often accompanied by looting and vandalism. Crime was thus televised and dramatized,[23] and a perceived breakdown in public order and private morality became the principal domestic theme of Richard Nixon's successful 1968 campaign for the Presidency. Because this campaign directly relates to the purposes of this dissertation, it is useful to discuss it in some detail.

The 1968 Nixon Campaign

When in August of 1968 Richard Nixon accepted the Republican Party's nomination for the Presidency of the United States, he summed up eight months of campaigning for the nomination and previewed the subsequent election campaign:

> Let us always respect. . . our courts and those who serve on them, but let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country. . .
>
> Let our judges who have the responsibility to interpret our laws be dedicated to the great principles of civil rights, but let them also recognize that the first civil right of every American is to be free from domestic violence. And that right must be guaranteed in this country.[24]

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[22] Crime and the Law, Congressional Quarterly (Washington, D. C., 1971), p. 5.

[23] Theodore White, The Making of the President 1968 (New York: Atheneum, 1969). See generally Chapter 11.

[24] New York Times, August 9, 1968, p. 1.

In March, the candidate had pledged, if elected, to modify three Supreme Court decisions which had broadened the procedural rights of criminal defendants, although he did not identify the decisions.[25] In May, he partially blamed Supreme Court decisions Escobedo v. Illinois and Miranda v. Arizona for an eighty-eight percent crime increase since 1960.[26]

After the Miami Convention, ostensibly responding to advice from Republican Senator Edward Brooke of Massachusetts, Mr. Nixon refrained from criticizing specific court decisions. Thereafter he attacked the courts in more general terms.[27] In early October, over national television, he asserted that the Supreme Court had "injected social and economic ideas into their opinions." He promised therefore to appoint judges who would interpret the Constitution "strictly and fairly."[28] Three days before the election he told a nationwide radio audience that members of the Supreme Court were unfamiliar with criminal justice. He pledged to appoint as judges men with experience or great knowledge in the field of criminal justice, who recognize that the "abused deserve as much protection as the accused."[29]

Campaign criticisms of the federal courts by major Presidential contenders are rare. In the nineteenth century the courts became an

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[25] Ibid., March 11, 1968, p. 33.

[26] Ibid., March 9, 1968, p. 1.

[27] Ibid., September 8, 1968, p. 78.

[28] Ibid., October 4, 1968, p. 50.

[29] Ibid., November 3, 1968, p. 79.

issue only in the election of 1860 as the Republicans responded to Dred Scott v. Sanford[30] and in 1896 when the Populists, angered by monopoly, income tax, and injunction decisions, included an anti-Court plank in their platform.[31] In this century, other than Nixon, only LaFollette (1924) and Wallace (1968) have made the Court a significant campaign issue. None of the latter three appealed successfully to the voters, Wallace receiving 13.4 percent of the vote, LaFollette 16.6 percent, and Goldwater roughly 39 percent. Even Nixon received a plurality of only 43.2 percent although the "harder line" on law and order represented by Nixon and Wallace campaigns attracted, in the 1968 election, roughly 56 percent of the popular vote, a mandate of sorts for the appointment of strict constructionist judges, knowledgeable about criminal justice and sympathetic to "the peace forces as opposed to the criminal forces."

Of the four contenders in this century, Nixon's campaign most resembled Senator Goldwater's in 1964. Goldwater tied Supreme Court decisions, specifically Mallory v. United States and Mapp v Ohio, to the rising crime rate and pledged to work to overturn by Congressional action and constitutional amendment these and other Supreme Court decisions which had favored excessively the rights of defendants in criminal prosecutions. He also pledged to use his appointment power to "redress constitutional interpretation in favor of the public."[32]

In contrast, the Progressive Party platform of 1924 promised to make

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[30]Kirk Porter and Donald Johnson, National Party Platforms 1840 - 1968 (Urbana: University of Illinois Press, 1970), p. 2.

[31]Murphy, Op. cit., pp. 44-45.

[32]New York Times, September 16, 1964, pp. 1 & 12.

all federal judgeships elective for ten-year terms and to authorize Congress to override Supreme Court decisions.[33] Similarly George Wallace, the American Party candidate of 1968, called for elected federal district court judges and Senate reconfirmation of Supreme Court judges after an unstated period.[34]

Thus the Nixon campaign on the court issue cut a middle course between the more extreme institutional "reforms" of Wallace and the limited support for the Court offered by the Democratic candidate Hubert Humphrey.[35] Republican Vice Presidential candidate Spiro Agnew attempted to distinguish his party's views on law and order from Wallace's. He charged Wallace with using the law and order issue as a "hatchet" and attempted to tie law and order to social progress.[36] R. B. Semple, commenting on Nixon's presentation of the crime issue to the Republican platform committee at the convention, saw the candidate's "militance" on law and order as designed to "head off Wallace in the border states, stem fellow Republican contender Reagan's inroads into the south, and free himself for a more liberal foreign policy position."[37]

Nor did candidate Nixon appear to depart from public opinion in his court criticism. In a March 1968 Gallup Poll, the Gallup organization found that sixty-three percent of Americans surveyed believed that the

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[33]Porter and Johnson, Op. cit., pp. 252-254.

[34]Ibid., pp. 702-705.

[35]Humphrey's position will be elaborated upon later in the chapter.

[36]New York Times, September 5, 1968, p. 40.

[37]Ibid.

courts were "too lenient" with regard to the accused. In contrast, just three years earlier, only forty-eight percent had believed the courts were "too lenient." Gallup also found that two out of three persons believed the Court was "wrong" on the coerced confession cases.[38] In July 1968, Gallup reported a decline in attitudes favorable to the Court from forty-five percent favorable in July 1967, to thirty-six percent favorable in the sample taken a year later.[39] This poll further reported that fifty percent of the northerners and Democrats held unfavorable attitudes toward the Court and indicated that the anti-Court impulse was even stronger among southerners and Republicans.[40] Sixty percent of those polled endorsed a non-partisan method of judicial selection.[41] A month later, in August, Gallup reported that crime was perceived as the top problem in the country by twenty-eight percent of the respondents as compared with thirteen percent who singled out race relations and fifty-two percent who indicated the Vietnam War as the most pressing national problem. Crime had hardly been mentioned in a 1966 survey in which the Vietnam War, racial strife, and living costs had been of greatest public concern. In the three-month period between May and August of 1968 those perceiving crime as the major issue had increased from fifteen to twenty-eight percent.[42]

Two September polls by Louis Harris and Associates replicated the Gallup organization's findings concerning the public mood. Harris reported

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[38] Ibid., March 3, 1968, p. 40.

[39] Ibid., July 10, 1968, p. 19.

[40] Ibid.

[41] Ibid.

[42] Ibid., August 4, 1968, p. 45.

that eighty-one percent of his respondents agreed that "law and order had broken down in the country," and that eighty-four percent believed a "strong President could make a difference" although the Supreme Court was not mentioned by respondents as a cause of crime.[43] A later Harris poll reported that thirty-eight percent felt Nixon could best handle the law and order problem; Humphrey drew the support of twenty-six percent and Wallace was endorsed by twenty-one percent.[44] In the same poll, Harris also found that respondents rejected by fifty-eight percent to twenty-two percent the statement that "politicians for law and order were against progress and negroes." Sixty-three percent agreed that there could not be law and order unless there was justice for minorities.[45]

By thus stressing law and order while occasionally mentioning justice and progress, the Nixon campaign harmonized with public concern over crime, public dissatisfaction with the courts and a degree of public sophistication with regard to the social causes of lawlessness. Whether the Nixon campaign or that of other candidates contributed to that opinion swing or merely mirrored it has not been determined.[46]

But if the Republican candidate was in accord with views expressed by the general public, he was not as attuned to the views of many in his

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[43] Ibid., September 10, 1968, p. 31.

[44] Ibid., September 13, 1968, p. 52.

[45] Ibid., September 10, 1968, p. 31.

[46] Murphy and Tanenhaus, Op. cit., p. 47. In their study of the 1964 campaign the authors concluded that "Goldwater's complaints about the court decisions on . . . the rights of criminal defendants could not possibly have had a great impact on public opinion. There was simply little reaction to these rulings."

party in Congress. The positions of these Congressional Republicans can add another perspective to his campaign. C. Herman Pritchett and Walter Murphy both wrote books on the vituperative "court curbing" activities of Republican Congressmen during the eighty-fifth Congress (1958). Probably the best known "court curbing" proposal during this session was the Jenner-Butler bill designed to restrict appellate jurisdiction of the Supreme Court in areas where the court had made controversial decisions.[47] In addition, fourteen other bills were introduced designed to alter in some way the process of choosing the judges themselves.[48] Pritchett and Murphy agreed that the Republican Party in Congress was virtually unanimous in support of "court curbing" just as Democrats outside the South were almost unanimously against it. Not only were Republicans in the Congress widely separated from non-southern Democrats on the court issue, they were also in disagreement with the Republican administration of which former Congressman Nixon was the Vice President. Pritchett reported that only thirty of one hundred and forty-four Republicans in the House supported President Eisenhower on the Jenner-Butler Bill.[49] He credits Vice President Nixon with a key procedural ruling which made adjournment possible without the adoption of a single one of the bills, despite the fact that there was probably a Senate majority for some of the proposals.[50] These Republican Congressmen were a part of the same

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[47]Grossman, Op. cit., p. 216.

[48]Ibid.

[49]Pritchett, Op. cit., pp. 127-128.

[50]Ibid., p. 11.

anti-court faction that Murphy and Tanenhaus claim Goldwater "mobilized, articulated and legitimized" in 1964. Significantly neither President Eisenhower nor Vice President Nixon were identified with that faction in 1958. Ten years later candidate Nixon still had not become a "court curber" in the sense of advocating insitutional changes.[51]

Democrats skirted the court issue in 1964 and 1968. President Lyndon Johnson claimed that the court "was not an appropriate election issue.[52] Hubert Humphrey, in his acceptance speech for the 1968 Presidential nomination, weakly responded to the Nixon campaign that "the answer . . . to the law and order problem . . . does not lie in an attack on our courts, our laws, or our Attorney General,"[53] but he offered no positive defense of court policies. In Congress, some northern liberals supported the Omnibus Crime Control and Safe Streets Act which had hit at Miranda v. Arizona, Wade v. United States (requiring counsel at policy "line ups"), and Mallory v. United States (a controversial 1957 confession case); so effective northern Democratic support for Court policy appears to have eroded in the decade following the 1958 battles.[54]

From either a more distant perspective or in the political context of his own time, Richard Nixon's assault on the federal courts does not appear

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[51] Ibid., pp. 123-124.

[52] Murphy and Tanenhaus, Op. cit., 33-34.

[53] Hubert Humphrey, "Address to the Democratic National Convention," Vital Speeches, XXXIV, No. 22 (September 1968), p. 708.

[54] Harris, Op. cit., p. 172. Subsequently northern liberals supported President Nixon's crime package including preventive detention. Harris comments that these Senators "rationalized...(about this support)..as the need for progressives to take the lead in this area and the need to rid the streets of fear before constructive approaches could be taken."

to have been a radical departure from American political tradition or popular opinion, but rather to have been imbedded within it. If the Nixon campaign was not unique, however, his victory was, for by winning the 1968 election he became the first successful Presidential candidate to promise to change judicial policy on a specific issue.[55] Thus the Nixon victory offers an exceptional opportunity to inquire into the potential of and limits on a national political movement frankly attempting to change federal judicial policy through the appointment process.[56] This inquiry will begin by examining, in the next chapter, literature concerning the judicial selection process.

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[55]Fred Graham, The Self-Inflicted Wound (New York: MacMillan Co., 1970), p. 306. Such notable court opponents as Andrew Jackson and Franklin Roosevelt did not make court policy an election issue. Jackson's numerous appointment opportunities made dramatic assaults unnecessary and Roosevelt saved his infamous court "reform" bill for Congress. However, 1936 was a referendum on the New Deal and in a broad sense, opposition to the New Deal from conservative Justices of the Supreme Court was an issue.

[56]It is of course clear by now that criminal issues sharply divide the Nixon four from the rest of the Supreme Court and particularly from liberals Brennan, Marshall and Douglas. Only Byron White frequently agrees with Nixon's appointees and these five, sometimes joined by Stewart, have accomplished something of a constitutional revolution of their own with regard to the fourth, fifth and sixth amendments to the Constitution, although they have avoided the ostentatious overruling of precedent so common during the Warren Court era. See particularly Leonard Levy's Against the Law (New York: Harper and Row, 1974).

CHAPTER II

THE SELECTION AND SOCIO-POLITICAL BACKGROUND CHARACTERISTICS OF THE JUDGES OF THE UNITED STATES COURTS OF APPEALS: EISENHOWER TO NIXON

As the last chapter indicates, candidate Richard Nixon clearly and repeatedly stated that, if elected, he would appoint "law and order" judges to the federal courts. Four years later, as President, Nixon acknowledged that pledge and offered his own general assessment of his judicial appointments of the previous four years.

> I promised that I would appoint judges to the federal courts and particularly the Supreme Court who would recognize that the first civil right of every American is to be free from domestic violence.
>
> I am proud of the appointments I have made to the courts and particularly proud of those I have made to the Supreme Court of the United States.[1]

Nixon had reason to be proud of his Supreme Court appointments, for in the face of the most stubborn Senatorial opposition to Presidential court nominations in this century, he had succeeded in placing four judicial "conservatives" on the high Court.[2]

It is not clear from this statement, however, whether Nixon was less proud of his lower court appointments or merely unaware of or unconcerned with their performance. Perhaps though his statement reflects his

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[1] New York Times, August 24, 1972, p. 47.

[2] Prior to the Senate's rejection of both Clement Haynsworth and G. Harrold Carswell and the 1968 proposed elevation of Abe Fortas to the Chief Justiceship, only 1930 Hoover nominee, John Parker, failed to gain Senate confirmation in this century.

awareness of the declining power and involvement of the President personally in the selection process at the lower levels of the federal judiciary.

One of the ironies of the judicial selection process it seems is that the Senate Judiciary Committee and sometimes the Senate as a whole, make a genuine effort to investigate and sometimes to challenge Presidential appointments to the Supreme Court but with only rare exceptions, not to the lower federal courts,[3] yet the President is perhaps more likely to get his way with the Supreme Court than with the district and circuit courts, where the choices of individual Senators may prevail. This is probably due to a number of factors including the perceived lack of importance of lower courts by both President and Senators, the unwillingness of either institution to devote significant resources to lower court appointments and consequently the growth of unwritten rules which assign the lower court appointment prerogative to individual Senators.[4] A further irony is that Presidents may find that they have greater freedom of choice at the lower court level when facing a hostile Congress dominated by the opposition party because real Congressional veto power over judicial appointments is lodged in the hands of individual Senators of the President's party--the fewer of these Senators the President must contend with

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[3]Joel Grossman, Lawyers and Judges: The A.B.A. and the Politics of Judicial Selection, (New York: John Wiley and Sons, 1965), pp. 170-1.

[4]Ibid., p. 122.

the greater his latitude in making lower court appointments.[5]

Despite formidable constraints on the President's appointment power at the lower levels of the federal judiciary, there is no reason to conclude that the executive branch has little influence on their selection. The thrust of recent studies by Chase,[6] Goldman,[7] and Grossman,[8] among others, is that the Justice Department, and particularly the Attorney General and Deputy Attorney General, play a positive and perhaps dominant part in the selection of lower federal judges, particularly those to the circuit courts.[9]

Typically, argues Goldman, appointing administrations face two types of situations: (1) where one or both Senators from the state from which the appointee will be selected belong to the President's party; and (2) where both Senators belong to the opposition party. In the latter situation, "justice officials can select their own candidate and can ordinarily secure 'clearance' for that candidate."[10] In the first situation

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[5]For example, Kennedy was able to appoint eight judges in New York without Senatorial consultation, acceding only to the wishes of Democratic House Judiciary Committee chairman Emmanuel Cellar on one nominee. See Victor Navasky, Kennedy Justice (New York: Athenium, 1971), p. 264. By contrast, Nixon was forced to delay some appointments in the second circuit for over two years because of inability to reach agreement with Republican Senator Jacob Javits.

[6]Harold Chase, Federal Judges: The Appointing Process, (Minneapolis: University of Minnesota Press, 1972).

[7]Sheldon Goldman, "Judicial Appointments to the United States Courts of Appeals," Wisconsin Law Review, LXVII, no. 1 (Winter, 1967), pp. 186-214.

[8]Grossman, Loc. Cit.

[9]Ibid., p. 122.

[10]Goldman, Loc. Cit., p. 213.

where Senatorial courtesy may be invoked, the administration has several options for securing appointments over the opposition of an in-party Senator: It may avoid the invocation of courtesy by appointing its man to a judgeship outside the recalcitrant Senator's state or region, for instance to a judgeship in the Washington, D. C. circuit. Or it may appoint judges to recess appointments which do not require confirmation, and then use the judge's record of successful interim service to lobby for Senate confirmation to a life term. Or it may delay appointing anyone at all to vacant judicial posts and rely on an accumulation of pressures from local press and bar associations to force Senatorial compromise.[11] Or it may arrange "package deals" to secure the appointment of preferred candidates.[12]

In effect, writes Grossman, the appointing administration "occupies a controlling position" in the selection of lower federal court judges.

> [the Attorney General] may not be able to engineer a nomination over the adamant opposition of an "in-party" Senator, but...he can generate sufficient pressure on a Senator to achieve a workable compromise...Sometimes the price will be prohibitive and he will have to approve a nomination that he dislikes. But he cannot afford to have such instances be more than exceptions.[13]

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[11] New York Times, Feb. 7, 1971, p. 69. According to the Times the Nixon Administration delayed for two years the appointment of judges to some vacancies on the second circuit because of its inability to reach an accord with Jacob Javits, the liberal Republican Senator from New York.

[12] Chase, loc. cit. Chase discussed administration options in some detail in part I of his book.

[13] Grossman, Op. cit., p. 122.

The Role of the American Bar Association

One impetus for a positive administration role in the appointment process other than its own policy or patronage interests, is the active, critical role of the American Bar Association's Committee on Federal Judiciary which has in recent years exercised a quasi-official role in the initial investigatory stages of the selection process. By screening potential nominees and passing on their qualifications, the American Bar Association is both a goad to an administration that wishes to avoid adverse publicity on the quality of its appointments,[14] and also a potential source of leverage and support for administrations in conflict with Senators from their own party.[15]

The A.B.A. is also a potential source of trouble for administrations with distinct policy and patronage interests. The political and philosophical leanings of the A.B.A. toward the Republican Party are well known,[16] and it was during the Eisenhower Presidency that the Committee on Federal Judiciary of the A.B.A. first attained a secure role in the selection process, exercising an informal veto over lower court nominations and securing an election pledge from 1960 Presidential candidate Nixon to implement "non-partisan" judicial selection.[17] The Democrats, on the other hand, could never appear to be "captive" of the A.B.A., and both Kennedy and Johnson refused to grant a veto power to the A.B.A. or

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[14] Ibid., p. 80.

[15] Ibid.

[16] Ibid., p. 80.

[17] Ibid., pp. 77-8.

pledge themselves to bipartisan or non-partisan judicial selection.[18] However, Democrats have utilized the investigatory, advisory and publicity functions of the A.B.A.

President-elect Nixon's relationship with the A.B.A. was marked by ambivalence. Nixon became the first President to declare publicly that he would not appoint a lower court judge who had been deemed unqualified by the A.B.A.,[19] but then refused to submit the names of Supreme Court nominees for even preliminary screening after the A.B.A. "shot down" his prospective nominations of Mildred Lilly, Richard Poff, and Herschel Friday prior to the eventual naming of Lewis Powell and William Rehnquist.[20]

Factors influencing administration choices. Given the relative freedom of choice, which is even more pronounced with circuit than with district judges, what factors influence the President's choices of lower court judges? More specifically, of what importance are questions of the judge's ideological and policy viewpoints on his eventual selection?

Goldman's study of Eisenhower and Kennedy appointments led him to conclude that considerations of "quasi-ideology" came into play along with considerations of strengthening a circuit, making party leaders happy, and legal competence. However, political rather than legal or ideological factors seemed most important:

> On balance it seems that the candidate's quasi-ideological viewpoint or his position on specific policy areas occasionally plays a decisive role in the appointment process...it is probably an inarticulate force operating to favor 'our kind,' other things

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[18]Chase, Op. cit., p. 74.

[19]New York Times, February 7, 1972, p. 69.

[20]Elizabeth Drew,"The Nixon Court," Atlantic, CCXXX, no. 5, (November, 1972), p. 10.

> being equal. However, because quasi-ideology and specific policy areas...do not usually explicitly concern the political actors involved in the process, quasi-ideology and specific policy views are not pronounced features of the selection process.[21]

However, both Goldman and Chase, who had access to Justice Department files, found evidence that the Kennedy and Eisenhower Administrations had checked the policy views of candidates on specific issues in addition to "our kind" considerations of a general conservative or liberal orientation. The Eisenhower Administration was particularly alert to the law and order views of specific nominees and were "apparently seeking to pick men who took a jaundiced view of the Supreme Court's decisions in that field, particularly the decision in the Mallory case..."[22] Similarly, Goldman found the Kennedy Administration officials had checked the racial segregation views of all six of its nominees to the southern (fifth) circuit.[23]

Apparently the Law and order views of judges were a concern of both the Eisenhower and Kennedy Administrations, but this and the check on racial views in the Kennedy era were exceptions. According to Goldman, the Justice Department has organizational needs that would lead it to avoid those potential nominees with an anti-prosecution bias. This

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[21]Goldman, Op. cit., p. 211.

[22]Chase, Op. cit., pp. 104-5.

[23]Goldman, Op. cit., pp. 210-11. Navasky offers an excellent account of how the Kennedy Administration, through inexperience, faulty intelligence, and the politics of the judicial selection process, came to appoint five fervent segregationists to district and circuit judgeships in the South at a time when the Justice Department was committed to promoting civil rights through litigation. See Victor Navasky, Op. cit., Chapter V.

presents few problems to a "right of center" administration such as that of Eisenhower or Nixon, but an internal schism in "left of center" administrations such as Kennedy's or Johnson's.[24]

This is not to suggest that policy views of prospective nominees were the decisive factor in their eventual selection. Goldman's comparison of the voting behavior of Kennedy and Eisenhower nominees on criminal procedures issues revealed no statistically significant differences between the two groups.[25] Moreover, Kennedy appointees to the southern circuit were generally very conservative on racial issues despite the administration's check on their views.

Nevertheless, the Nixon Administration professed a singular determination to change court policy on the law and order issues. No scholar has yet published research on judicial selection during the Nixon Administration based on access to Justice Department files. However, it would appear from the studies already done of the powers and limitations of appointing administrations that a sufficiently determined administration could secure the appointment of particular ideological types to the lower courts and block others.[26] Thus Nixon's 1972 convention statement remains somewhat of a mystery. Was he less than pleased with his lower court appointments? Were policy views and ideological considerations

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[24] Ibid. 209-10.

[25] Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals, 1961-64," American Political Science Review, LX, no. 2, (June, 1966), p. 381.

[26] New York Times, February 7, 1971, p. 69. According to the New York Times, the Nixon Administration rejected liberal New Jersey Senator Clifford Case's nomination to the third circuit of aide Clyde Ferguson, a black, because the latter was "soft" on crime.

a significant aspect of the appointment process for the lower courts during Nixon's term of office? Did his appointees perform unexpectedly once on the courts?

Chase, whose research into judicial selection did not include the Nixon Administration, wrote that

> ...the dynamics of judicial selection are such that administrations which are basically concerned with making appointments of high quality will choose the same kinds of people for the same kinds of reasons whatever goals and standards they articulate..."[27]

Two sources of information as to whether or not Nixon varied considerably from the appointment practices of his predecessors would lie in the voting behavior of his appointees on the bench and in their biographical characteristics. The remainder of this chapter will focus on the biographical characteristics of Nixon appointees. Succeeding chapters will focus on their actual behavior.

Background characteristics of United States Circuit Court judges: Eisenhower to Nixon. Goldman has been the most assiduous collector of biographical information concerning United States Circuit Court judges. This information has been published in two articles comparing first the Eisenhower and Kennedy appointments to the Courts of Appeals,[28] and second, the Johnson and Nixon appointees to those courts.[29] As the

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[27]Chase, Op. cit., p. 185.

[28]Sheldon Goldman, "Characteristics of Eisenhower and Kennedy Appointments to the Lower Federal Courts," in Sheldon Goldman and Thomas Jahnige, The Federal Judicial System, (New York: Holt, Rinehart, and Winston, 1969), pp. 25-30.

[29]Sheldon Goldman, "Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives," Journal of Politics, XXXIV, no. 2 (1972), pp. 934-942.

Eisenhower appointees exhaust the bulk of non-Nixon Republican appointees now serving on the Circuit Courts, and the Johnson-Kennedy appointees similarly account for most non-Nixon Democratic judges on the Courts of Appeals, these articles provide an approximate biographical profile of the three groups (i.e., Nixon appointees, non-Nixon Democrats and non-Nixon Republicans) being compared in this study. According to Goldman's data, the Nixon appointments differed from the Eisenhower and Johnson-Kennedy appointments in some of the following ways: (1) Eighty percent of the Eisenhower appointees were Protestant as compared to 73.5 percent of the Nixon appointees and 62.2 percent of the Kennedy-Johnson appointees. Thus Protestants dominate the judicial selections of all three groups. Goldman also found Protestantism to be significantly correlated with pro-prosecution voting behavior on criminal procedures issues. (2) Fifty percent of the Nixon appointees to the Courts of Appeals had prior judicial experience as compared to 55.6 percent of the Eisenhower appointees and 59.2 percent of the Johnson and Kennedy appointees. (3) 17.6 percent of the Nixon appointees had been candidates for or elected to political office as compared to 19.9 percent of the Kennedy-Johnson appointees and 20 percent of the Eisenhower appointees. However, Goldman also found that Nixon appointees had more extensive political backgrounds than had Eisenhower appointees when other types of political experience were considered. He found that in this respect the Nixon appointees were more like prior Democratic nominees, particularly those from the Kennedy Administration. (4) 50.1 percent of Nixon appointees had prior prosecutorial experience as compared to 47.1 percent of Johnson appointees (no information collected on Eisenhower and Kennedy appointees

in this regard). Goldman comments that

> Although the Nixon Administration made political capital over "law and order," the findings suggest no dramatic penchant for appointments of those with public prosecutorial experience.[30]

(5) Goldman also found that the "majority of both Johnson and Nixon appointees had attended private or ivy league law schools." The same was true for Kennedy and Eisenhower appointees, 66.7 percent of each group attending the more expensive private institutions, a possible indication of social class origin. (6) Finally, 29.1 percent of Nixon appointees as compared to 22.2 percent of Eisenhower appointees and 19.9 percent of Kennedy-Johnson appointees were members of large (five or more members) law firms prior to their appointment to judicial office. Such a background, according to Goldman, is also likely to be associated with higher socio-economic status.

Goldman's figures underline the essential similarity of the three groups. He suggests that Republican appointees, whether of Nixon or Eisenhower, "tended to come from a higher socio-economic stratum than Democratic appointees." However, he also stresses that most judges of both parties were solidly rooted in the "middle class" with most mobility confined to movement within that class.

Thus there is little in the biographical data to suggest that Nixon appointees, so similar to prior appointees of other administrations, would revolutionize judicial policy on law and order. However, previous students engaged in aggregate research have found only the slimmest links between selected biographical characteristics of judges and their

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[30] Ibid., pp. 941-2.

behavior on the court. Moreover, despite the "surface" similarity of the three groups, the "screening" process purportedly conducted by the Nixon Administration could still have resulted in the selection of a distinctively "conservative" group of judges on "law and order" issues. The next chapter will compare the voting behavior of Nixon appointees with non-Nixon Democrats and Republicans in an attempt to measure the impact of the Nixon appointees on the disposition of criminal appeals in fiscal 1973. The following chapter will focus exclusively on non-unanimous cases decided during the period fiscal 1970 to 1973 in order to see if any observed differences in voting behavior can be traced to attitudinal cleavages between and within the judge groups being studied.

CHAPTER III

THE IMPACT OF THE NIXON APPOINTEES TO THE UNITED STATES COURTS OF APPEALS: A QUANTITATIVE ANALYSIS OF THE DISPOSITION OF CRIMINAL APPEALS DURING FISCAL 1973

Analysis of the previous two chapters suggests that the Nixon Administration possessed both the will and the opportunity to appoint a more "conservative" group of judges to the Courts of Appeals. Moreover, by fiscal 1973, the Administration had already appointed thirty-seven of what was eventually to be forty-three appeals court judges. This chapter will attempt to determine what difference, if any, those appointments made in the disposition of criminal appeals during the fiscal 1973 term of those courts.

As indicated in Table I, the eleven circuits of the United States Courts of Appeals decided 1572 cases involving "blue collar" crimes during the fiscal 1973 term. Eleven hundred forty-six of these cases were decided against the criminal defendant or prisoner and only 366 were decided in his favor. In sixty-one cases, the Courts of Appeals granted but also rejected substantial aspects of defendant and prisoner claims as also can be seen in Table I. If the numerical values previously discussed are assigned to these voting choices, one arrives at a composite score of .50 out of a possible range of 0 to 2.00 for the circuits taken as a whole. Of these 1572 cases, 111 or approximately seven percent were decided non-unanimously. Of the 111 non-unanimous decisions, 59 were decided against and 52 for the

defendant, producing a score of .94. Of the 1462 unanimously decided cases, 1086 were decided against and 314 for the criminal defendant with 61 decisions in between resulting in a score of.47. Table I suggests that the chances of a decision being favorable to the criminal defendant were greatest when the court was non-unanimous; however, even the pro-defendant decisions were for the most part unanimously decided.

Viewed in another way the United States Courts of Appeals in fiscal 1973, if one excludes the sixty-one cases in which the panels took intermediate positions, ruled for the accused person or prisoner twenty-four percent of the time or about one case in four.[1] The more even division of the non-unanimous cases, whereby the panels decided 47 percent of the cases in favor of the accused person or prisoner, suggests that many of these cases may allow more opportunity for judicial discretion.

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[1] Although this may seem like a high rate of failure on the part of state and federal prosecutors and might suggest a significant impact on societal safety, it should be remembered that the federal government and many state governments negotiate guilty pleas in over ninety percent of cases scheduled for trial, and that these pleas are rarely appealed. Moreover, successful appeals of guilty pleas are even rarer, partly due perhaps to the Supreme Court's reluctance to review pleas based on advice of counsel. Of the ten percent of federal cases which do go to trail and result in a conviction, only one in five are appealed despite the guaranteed right to do so and liberalized policies to aid the poor in carrying out such actions. Finally, of those appellate decisions which favored the accused a very small proportion directed a verdict of acquittal or mandated a dismissal of the indictment. Usually the accused received no more than the right to a new trial or hearing, the outcome of which was not known to this researcher.

TABLE I

DISPOSITION OF UNANIMOUS AND NON-UNANIMOUS RIGHTS OF CRIMINAL DEFENDANTS' CASES BY ALL CIRCUITS DURING FISCAL 1973

	Unan.		Non-Unan.		Total Cases		% Unan.
	#	%	#	%	#	%	
Pro-Def.	314	(24)	52	(47)	366	(23)	86
Inter.	61	(4)	--	--	61	(4)	100
Anti-Def.	1086	(74)	59	(53)	1145	(73)	95
Total Cases	1461	(100)	111	(100)	1572	(100)	93
Score	.47	--	.94	--	--	.50	--

Analysis of Individual Circuits

The hypothesis that Nixon appointees would vote as if they were more "conservative" than either non-Nixon Republicans or non-Nixon Democrats,[2] was supported by the composite scores in six of the eleven circuits when they were examined separately, as shown in Table 2. In five other circuits (the second, fourth, sixth, eighth, and tenth), Nixon appointees had higher composite scores than one of the other two judge groups. However, in no circuit did the Nixon appointees have the highest composite score of the groups. In contrast, non-Nixon Republicans scored highest in five of the eleven circuits (the first, third, fourth, fifth, and tenth), and non-Nixon Democrats had the highest composite score in six circuits (the second, sixth, seventh, eighth, ninth, and District of Columbia).

Six circuits (the second, third, fourth, fifth, ninth, and District of Columbia) were of particular interest for reasons explained earlier and are now examined in more detail. Tables 3-7 present the scores for each judge group on eight categories of cases previously described. These scores were computed on a minimum of ten votes for each judge group. Scores were not computed for a group on a particular category of cases if they cast less than ten votes in those types of cases.

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[2]Throughout the rest of this paper, non-Nixon Democrats and non-Nixon Republicans will be referred to simply as Democrats and Republicans.

TABLE 2

COMPOSITE SCORES FOR JUDGE GROUPS BY CIRCUIT

Circuit	Composite Score Democrats	Composite Score Republicans	Composite Score Nixon Appointees
1	.26	.44	.24
2	.59	.44	.50
3	.51	.61	.42
4	.52	.67	.56
5	.56	.68	.41
6	.73	.52	.66
7	.74	.64	.60
8	.48	.20	.46
9	.70	.36	.28
10	.45	.57	.54
D.C.	.87	--	.48
Aggregate Composite Scores	.60	.51	.43

The District of Columbia Circuit. The District of Columbia Circuit is particularly important to this study because the appointing administration has maximum freedom from party and regional pressures and also because its location in the nation's capital warrants special attention from the appointing administration. Therefore, the District of Columbia Circuit is likely to reflect accurately the character of the appointing administration. As only one non-Nixon Republican was involved in the voting (and he cast only four votes), this analysis was confined to a discussion of the Nixon appointees and non-Nixon Democrats on the circuit. Moreover, the circuit hears only federal cases and there was no opportunity to compare the judges on their disposition of state cases. Thus Table 3 presents the scores for only seven of the eight categories.

In fiscal 1973, the District of Columbia was the second most liberal circuit and had the highest rate of conflict of all the circuits (twenty percent of its cases were decided by non-unanimous votes). The District of Columbia Circuit was also notable because of the significant gap between the composite scores of Nixon appointees (.48) and Democrats (.87). The differential of .39 was exceeded only in the ninth circuit (discussed later). Considering only non-unanimous cases, as indicated by Table 3, the difference between the two groups grew to 1.00 as Democrats scored 1.33 as compared to .33 scored by Nixon appointees. Moreover, Nixon appointees failed to cast even one of fifteen votes for criminal defendants in cases involving search and seizure and confession issues, whereas Democrats scores .62 when one combines the votes for the two categories. On cases not involving the search and confession issues, the difference between the two groups shrunk to .35. It would appear,

therefore, that administration freedom from considerations of Senatorial courtesy has, as with the Supreme Court, resulted in a sharp split between Nixon appointees to the District of Columbia Circuit and appointees from previous Democratic administrations.

The fifth circuit. The fifth circuit is important to this study for several reasons. First, its size has had an impact on the aggregate totals. The fifth circuit in fiscal 1973 decided 459 cases, almost one third of all blue collar criminal cases decided by the United States Circuit Courts of Appeals that fiscal year. Second, the geographic location of the fifth circuit in the deep South and its long (recently ended) history of one-partyism with the consequent regional domination by conservative Congressional Democrats has made it more difficult for the typical more liberal Democratic appointments to be made to the fifth circuit. Kenneth Vines' study of the fifth circuit found that Democratic appointees to the Federal District Courts of the fifth circuit were more "conservative" than Republican appointees to those courts in race relations cases.[3] He explained that the closer ties of Democrats to the conservative southern social structure resulted in their greater "conservatism" relative to Republican appointees. Although Vines did not mention it as a source of Republican "liberalism" on race issues in this region, Republican Presidents historically could avoid the obstacle of Senatorial courtesy in appointments to the southern circuits. Thus the fifth circuit like the District of Columbia circuit normally maximizes the freedom of Republican Presidents in the appointment process and

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[3]Kenneth Vines, "Federal District Judges and Race Relations Cases in the South," Journal of Politics, XXVI, No. 3 (1964), p. 350.

serves as another excellent test of Presidential intentions.[4]

The results of the voting in the fifth circuit were dramatic. Republicans scored .68, their highest score in any circuit. Democrats scored .56. Nixon appointees, however, scored only .41. Thus southern non-Nixon Republicans, as in Vines' study of race relations cases, were more liberal on criminal procedures cases than Democrats and notably more liberal (differential of .27) than Nixon appointees. This pattern is magnified in the non-unanimous cases where Republicans scored 1.29 on seventeen votes as compared to .88 for Democrats and .52 for Nixon appointees. The only exception to this pattern occurred in the confession cases where Republicans scored only .07 (casting 14 of 15 votes against the criminal defendant and taking an intermediate position in the other) in confession cases as compared to .19 for Nixon appointees and .32 for Democrats. The lower score of the three Republican judges on confession cases is perhaps attributable to the fact that the most conservative of the three (Judge Brown) cast nine of the fifteen votes, whereas the most liberal (Judge Tuttle) cast only one vote.[5] All three groups were considerably more lenient toward accused persons and prisoners in state than in federal cases, a pattern repeated in almost every circuit. Republicans, Democrats and Nixon appointees scored .97, .83, and .63 respectively in state cases, as compared to .51, .42, and .31 in federal cases, as shown in Table 4.

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[4]Conservative Republicans such as Tower of Texas and Gurney of Florida would pose no obstacle to Nixon Administration policies on criminal procedures.

[5]On the basis of voting in non-unanimous cases over the four-year period 1970-73, Judge Tuttle scored 1.80, Judge Wisdom 1.30, and Judge Brown .92.

TABLE 3

COMPOSITE SCORE BY ISSUE CATEGORY:
DISTRICT OF COLUMBIA CIRCUIT

Judge Group	# Judges	Confess. Cases	Search & Seize Cases	Other Crim. Cases	Unan. Cases	Non-Unan. Cases	All Crim. Cases
Dem.	8	1.00	.43	.94	.68	1.33	.87
Rep.	1						
Nixon App.	3	.00	.00	.59	.53	.33	.48

TABLE 4

COMPOSITE SCORES BY ISSUE CATEGORY:
FIFTH CIRCUIT

Judge Group	Number of Judges	Fed. Score	Score State Cases	Score Confessions	Score Search	Score Other Crim. Cases	Score Unan.	Score Non-unan.	All Crim. Cases
Dem.	10	.42	.83	.32	.44	.60	.52	.88	.56
Rep.	4	.51	.97	.07	.21	.76	.63	1.29	.68
Nix	4	.31	.63	.19	.29	.45	.37	.52	.41

The fourth circuit. The patterns in the fifth circuit were largely repeated in the other southern circuit, the fourth. Republicans with a composite score of (.67) were again the most liberal group although Democrats (.52) replaced Nixon appointees (.56) as the most conservative group. There were too few cases for comparison of the judge groups on search and seizure and confession cases and non-unanimous cases. As for the federalism issue, Nixon appointees were the only group more conservative on state than on federal cases scoring .42 on the first and .65 on the latter. Democrats, on the other hand, scored .61 on state cases and .49 on federal cases. Republicans scored 1.00 on state cases as compared to only .53 on federal cases.

The ninth circuit. The ninth, or far western circuit, like the fifth, is important because of the large number of criminal procedures cases it decided, 319 in fiscal 1973 or approximately twenty percent of all criminal cases decided in the Courts of Appeals during that fiscal year. Together, the fifth and ninth circuits decided over half of all cases heard by the United States Courts of Appeals in fiscal 1973. The ninth circuit is also important to this study because of Goldman's earlier finding that "criminal procedures cases were important sources of conflict for the ninth circuit."[6]

As in the fifth circuit, the results were dramatic. As indicated by Table 5, Democrats scored .70, Republicans .36, and Nixon appointees .28. The gap of .42 between the most liberal and most conservative groups was the largest of any circuit. When only non-unanimous cases

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[6]Sheldon Goldman, "Conflict on the United States Courts of Appeals 1965-71: A Quantitative Analysis," Cincinatti Law Review, XXXXII, no. 4 (1973), p. 641.

are considered the difference between Democrats 1.64 and Nixon appointees (.14) is magnified to 1.50, again the greatest gap between any two groups of judges on any circuit in the courts of appeals. The confession issue was particularly divisive. Democrats scored 1.23 as compared to .00 for both Republicans and Nixon appointees. The federalism issue did not, however, divide the groups as dramatically as all three were much more liberal on state than on federal cases, a common pattern for all the circuits, as can be seen in Table 5.

The second and third circuits. In contrast to the circuits which maximized Nixon administration freedom from considerations of Senatorial courtesy, the second and third circuits were both scenes of conflict over administration preferences and Senatorial prererogatives as the Nixon administration quarreled with liberal Republican Senators Jacob Javits and Clifford Case. Considering first the overall totals, Nixon appointees to the third circuit scored lower (.42 composite score) than Republican appointees of earlier administrations who scored .61 and also scored lower than Democrats who scored .51. Considering the fact that the Nixon administration made five appointments to the third circuit, these results seem to portend a swing to the right in that circuit on at least the criminal cases.

In the second circuit Nixon appointees scored slightly higher (composite score.50) than other Republican appointees (.44) and lower than the Democrats who scored .59. Thus when one views the cases as a whole, Senatorial courtesy does not appear to have been a serious obstacle to the Nixon administration's appointment of "conservative" judges in the third circuit although his appointments were slightly more "liberal"

in the second circuit as can be seen from Table 6.

On the non-unanimous cases, however, if one combines the votes of the judge groups in the two circuits, as seen in the last column of Table 7, Nixon appointees emerge as the most "liberal" group, scoring 1.31 on 29 votes as compared to 1.20 for Democrats (30 votes) and only .84 for Republicans (16 votes).

The situation is reversed, however, if one looks only at unanimously decided cases. Then Nixon appointees are the most "conservative" group in each circuit scoring only .36 in the third and .37 in the second. Republicans are the most "liberal" group in the third circuit on the basis of votes in unanimously decided cases (.53), and Democrats are the most "liberal" group in the second circuit in such cases (.49).

Thus Senatorial courtesy appears to be an important check on administration preferences in the second and third circuits only if one ignores the unanimously decided cases and regards only the non-unanimously decided cases as valid indicators of judicial attitudes and voting tendencies.

TABLE 5

COMPOSITE SCORES BY ISSUE CATEGORY:
NINTH CIRCUIT

Judge Group	Number of Judges	Score Fed. Cases	Score State Cases	Score Confession	Search & Seizure	Other Crim. Cases	Unan.	Non-unan.	All Crim. Cases
Dem.	6	.64	.82	1.23	.62	.66	.60	1.64	.70
Rep.	7	.30	.48	.00	.47	.33	.31	1.14	.36
Nixon App.	6	.24	.55	.00	.25	.29	.28	.14	.28

TABLE 6

COMPOSITE SCORE BY ISSUE CATEGORY:
SECOND CIRCUIT

Judge Group	# Judges	Unan. Cases	Non-unan. Cases	All Crim. Cases
Dem.	5*	.49	1.33	.59
Rep.	6	.41	.77	.44
Nixon App.	4	.37	1.82	.50

*Democratic group includes one Liberal (Hayes)

TABLE 7

COMPOSITE SCORE BY ISSUE CATEGORY:
THIRD CIRCUIT

Judge Group	# Judges	Unan. Cases	N-Unan. Cases	All Crim. Cases	N-Unan. Cases 2d & 3d Circ. Combined
Dem.	8	.45	1.00	.51	1.20
Rep.	2	.53	1.00	.61	.84
Nixon App.	5	.36	1.00	.42	1.31

Aggregate Analysis for Fiscal 1973

During fiscal 1973, thirty-seven Nixon appointees to the United States Courts of Appeals cast 1380 votes in criminal procedures cases for a composite score of .43. In contrast, seventy Democrats cast 2190 votes for a composite score of .60. Finally, thirty-four Republicans cast 872 votes in fiscal 1973 for a composite score of .51. Thus there is evidence to support the hypothesis that Nixon appointees in the aggregate would be more conservative than non-Nixon Republicans and non-Nixon Democrats.

The federalism issue. A striking aspect of the overall findings is that all three groups of judges scored higher on the claims of state rather than federal defendants. The Democrats scored .76 on 537 votes cast in state cases compared to .55 on 1613 cases appealed from the federal level for a difference in scores of .21. Similarly, Republicans scored .66 on 195 state cases and only .44 on 651 federal cases for a .22

differential. Nixon appointees scored .64 on 306 state cases as opposed to .36 on 1056 federal cases, for a differential of .28. Table 8 presents these results.

This was surprising. It was expected that at least Nixon appointees and Republicans would score lower on state prosecutions. But the federalism issue did not seem to divide the judges in this manner. It seems likely that the more favorable treatment given by all three groups to offenders at the state level reflects the large number of state cases in which a state judge was overruled for dismissing a habeas corpus petition without a hearing, although the difference may also reflect lower standards of due process at that level. In either case the federalism issue or lack of it was not a significant factor in explaining the voting differences observed between the three groups of judges.

The confession and search and seizure issues. Similarly, all three groups tended to take a harsher position toward criminal defendants in confession and search and seizure cases than in other criminal cases. As with the federalism issue, however, this difference may be due to the nature of some confession and search cases in which the appellate court upheld a trial judge's finding that disputed evidence was admissible. These hearings within a trial to determine admissibility of evidence are more difficult for an accused to challenge because the state must only prove a preponderance of the evidence rather than beyond a reasonable doubt as in the trial itself. Table 9 presents these comparisons.

However, the differences between the lowest scoring group (Nixon appointees) and the highest scoring (Democrats) are slightly larger in the search and confession cases than in the "all other criminal cases"

category and the same is true when Democrats and Republicans are compared. Thus, unlike the federalism issue, cases involving the confession and search and seizure issues do appear to be somewhat more divisive for Nixon appointees and Republicans on the one hand and Democrats on the other. Above all, however, the figures portray a marked reluctance on the part of all three groups of judges to employ the exclusionary rule to throw out convictions based on alleged coerced statements as compared to their willingness to overturn convictions based on other alleged violations of due process. It does not appear from the quantitative evidence, then, that Miranda and its progeny have "thrown open prison gates" if the voting behavior of United States Appellate Court judges is indicative of judicial behavior in other "lower" courts.

TABLE 8

COMPOSITE SCORES FOR AGGREGATE JUDGE GROUPS:
FEDERAL AND STATE CASES, FISCAL 1973

Judge Group	State		Federal		Diff. in Scores
	# Votes	Scores	# Votes	Scores	
Dem.	537	.76	1613	.55	.21
Rep.	195	.66	651	.44	.22
Nixon App.	306	.64	1056	.36	.28
Diff. in scores bet. Dem. & Nix. app.		.12		.19	

TABLE 9

COMPOSITE SCORES FOR AGGREGATE JUDGE GROUPS: CONFESSION, SEARCH AND "ALL OTHER CASES" CATEGORIES FISCAL 1973

Judge Group	Confession		Search & Seizure		All Other Criminal Cases	
	Votes	Score	Votes	Score	Votes	Score
Dem.	108	.39	370	.50	1672	.62
Rep.	47	.19	130	.34	669	.53
Nix.	69	.19	231	.28	1061	.47
Diff. in scores bet. Dem. & Nix. app.		.20		.22		.15

Unanimous versus non-unanimously decided cases. There were also, as expected, sharper differences between the three major groupings of judges when the non-unanimous deicsions were treated separately from the unanimous decisions. Democrats scored 1.14 as compared to .96 for Republicans and .61 for Nixon appointees. In the unanimous cases, Democrats scored .54 as contrasted to .47 for Republicans and .41 for Nixon appointees. Thus the scores of all three groups rise when only the non-unanimous cases are considered with both Democrats and Republicans moving into the moderate category. The much greater difference between the three groups on the non-unanimous as compared to the unanimous cases suggests that the former cases may be the best indicators of the ideological predispositions of the judges. On this particular measure, the

Differences between the highest and lowest scoring groups on unanimous cases was only .13 but rose to .53 on non-unanimous cases as can be seen in Table 10.

TABLE 10

COMPOSITE SCORES FOR AGGREGATE JUDGE GROUPS: UNANIMOUS AND NON-UNANIMOUS CASES, FISCAL 1973*

Judge Group	Non-Unanimous Votes	Non-Unanimous Score	Unanimous Votes	Unanimous Score	Difference	Median Score
Dem.	225	1.14	1965	.54	.60	.64
Rep.	73	.96	799	.47	.49	.48
Nix.	128	.61	1252	.41	.20	.46
Diff. in scores bet. Dem. & Nix. app.		.53		.13		.18

*Includes all criminal cases

Categorizing individual judges. Another way of comparing the three groups of judges is to compute the percentage of each group that falls into the "liberal," "moderate," and "conservative" categories using fifteen votes cast as a minimum number for purposes of classifying an individual judge. Thirty-four of thirty-five Nixon appointees who satisfied this criterion fell into the "conservative" category with the remaining one a "moderate." The median score of the Nixon appointees

was .46. Of the Republicans, 15 of 18 with the minimum number of votes fell into the conservative category and three were classified as moderates. The median score for Republicans was .48. Finally, 32 of 46 Democrats were categorized as conservative with 13 falling into the moderate group, and one, Skelly Wright of the District of Columbia Circuit, classified as a liberal. The median score for Democrats was .64, as can be seen in Table 11.

TABLE 11

PERCENTAGES OF JUDGE GROUPS IN "LIBERAL," "MODERATE," AND "CONSERVATIVE" CATEGORIES FISCAL 1973

	Democrat #	Democrat %	Republican #	Republican %	Nixon Appointee #	Nixon Appointee %	Total (Lib.,Mod.,Con.) #	Total (Lib.,Mod.,Con.) %
Lib.	1	.02	--	.00	--	.00	= 1	(1%)
Mod.	13	.28	3	.14	1	.03	=17	(17%)
Con.	32	.70	18	.86	34	.97	=84	(82%)
Total	46	100%	21	100%	35	100%	102	(100%)

Exclusion of the fourth and fifth circuits. As it has been argued that the peculiar historical circumstances surrounding party politics in the southern circuits may have distorted the combined results, aggregate scores were computed which excluded the two southern circuits.

When these circuits were excluded, the Nixon appointees retained almost the identical score (.43) as when these circuits were included.

Democrats, on the other hand, moved from .60 to .64 when the fourth and fifth circuits were excluded and Republicans slipped from .51 to .43. Thus the more "liberal" Republican judges in the southern circuits seem to account for the observed differences between the scores of Nixon appointees and non-Nixon Republicans on criminal procedures issues in fiscal 1973. See Table 12.

TABLE 12

IMPACT OF EXCLUDING THE FOURTH AND FIFTH CIRCUITS ON COMPOSITE GROUP SCORES FOR FISCAL 1973: ALL CASES

Judge Group	All Circuits Included	4th & 5th Circuits Excluded	Difference
Dem.	.60	.64	+.04
Rep.	.51	.43	-.08
Nix.	.43	.43	.00
Diff. bet. Dem. & Nix. app.	.17	.21	

The exclusion of the fourth and fifth circuits has a similar impact on non-unanimous case scores although the Nixon appointees remain the most conservative of the three groups, as can be seen in Table 13. Nixon appointees increased their score from .61 to .66. Republican scores dipped from .96 to .79 and scores for Democrats rose from 1.14 to 1.26. Thus the gap between Nixon appointees and Democrats increases to .60

outside the southern circuits and the gap between Democrats and Republicans grows to .47 when the southern circuits are excluded.

TABLE 13

IMPACT OF EXCLUDING FOURTH AND FIFTH CIRCUITS ON COMPOSITE JUDGE GROUP SCORES FOR FISCAL 1973: NON-UNANIMOUS CASES

Judge Group	All Circuits Included	4th & 5th Circuits Included	Difference
Dem.	1.14	1.26	+.12
Rep.	.96	.79	-.17
Nix.	.61	.66	+.05
Diff. bet. Nix. & Dem. appointees	.53	.60	

Finally, as one can see from Table 14 (as compared to Table 11), excluding the fourth and fifth circuits increases the percentage of Democrats classified as "moderate," while reducing the percentage classified as "conservative." In contrast, the effect on Republicans is to increase the percentage categorized as "conservative" and decrease the percentage of "moderates" until the Republicans as a group are almost identical to the Nixon appointees who remain unchanged by the exclusion of the southern circuits.

TABLE 14

PERCENTAGES OF JUDGE GROUPS IN "LIBERAL," MODERATE," AND "CONSERVATIVE" CATEGORIES WHEN FOURTH AND FIFTH CIRCUITS ARE EXCLUDED

	Democrats		Republicans		Nixon Appointees	
	#	%	#	%	#	%
Lib.	1	.03	--	.00	--	.00
Mod.	11	.34	1	.06	1	.03
Con.	20	.63	15	.94	29	.97
Total	32	100%	16	100%	30	100%

Summary

The quantitative analysis of all criminal procedures cases decided during fiscal 1973 supported the expectation that Nixon appointees would cast a greater proportion of votes against the accused and prisoners than either non-Nixon Democrats or non-Nixon Republicans when these groups were taken in the aggregate. This was true for all categories of cases considered when measured by the composite scores of the three groups. When, however, the focus was on individual circuits, the Nixon appointees were the lowest scoring group in only six of the eleven circuits. In five other circuits (the second, fourth, sixth, eighth, and tenth), Nixon appointees scored higher than or were equal to at least one of the other groups. However, as shown in Table 3, in no circuit did Nixon appointees score higher than both other groups, in contrast to Democrats who scored

highest in six circuits and Republicans who scored highest in five.

Of particular interest were the high scores of non-Nixon Republicans in the fourth and fifth circuits. It was observed that the differences in the scores in all blue collar criminal procedures cases between Republicans and Nixon appointees could be accounted for by the differences in voting behavior in the fourth and fifth circuit. When these circuits were excluded there were no differences in the scores between the two Republican groups. When only non-unanimous cases were examined there were differences in the three groups as expected, which held up even when the southern circuits were excluded.

It was also observed that the federalism issue did not divide the three groups of judges but that there was some evidence that the search and seizure and confession issues were more divisive than other types of criminal cases. A more important finding with regard to the latter issue were the much lower scores of all three groups of judges on confession issues as compared to search and seizure and the "all other criminal cases" categories, perhaps reflecting the degree to which the American judicial system has come to depend on self incrimination as a means of coping with a constantly expanding caseload or the greater weakness of defendants' cases. A particularly unexpected aspect of the federalism issue was the more favorable treatment given to defendants processed by the state than to those subject to the federal criminal justice system, as it was thought that at least Nixon appointees and Republicans might be less lenient than Democrats with regard to the rights of state defendants, reflecting the greater concern of the former two groups with "states rights."

Finally, the aggregate figures, based on all blue collar criminal cases, suggest an essential similarity and "conservatism" of the three groups of judges. Translated into percentage terms, Democrats decided for the criminal defendant or prisoner roughly thirty percent of the time as compared to twenty-five percent for Republicans and twenty-one percent for Nixon appointees. The influx of Nixon appointees then did not constitute radical change when one views the matter in such quantitative terms.

The similarity and "conservatism" of the three groups might be explained in one of two ways: It could be argued that the dominant role of the Justice Department in the recruitment of judges results in the selection of prosecution orientated individuals no matter which administration is in power. On the other hand, many unanimously decided cases (and some non-unanimously decided cases also) may represent "frivolous" defendant or prisoner appeals in the sense that even "liberal" judges have little choice but to reject them. Therefore, the inclusion of unanimously decided cases may distort the attitudinal characterization of judges. Recall from Table 10 that the difference between the composite scores of the lowest (Nixon) and highest (Democrats) scoring groups was only .13 (.41 to .54) on unanimously decided cases but grew to .53 (.61 to 1.14) on the non-unanimously decided cases. Recall further that all three groups of judges fell into the "conservative" classification on unanimously decided cases but that both Democrats and Republicans rose into the "moderate" category on non-unanimously decided cases, and that Democrats as a group were in the "liberal" classification (1.26) on non-unanimously decided cases when the southern circuits were excluded. It

is possible then that the attitudinal characterization of judges is most useful for understanding conflict (which admittedly is rare; approximately one case in fourteen) on the courts of appeals and that attitudinal characterizations based on unanimous case scores are misleading. It is possible also that the identification of judicial attitudes on the courts of appeals is useful for explaining only a limited aspect of appeals court behavior.

In conclusion, the Nixon appointees had some, but not a radical, impact on the aggregate disposition of criminal appeals during fiscal 1973, an impact which varied considerably from circuit to circuit. The next chapter will attempt to account for some of the differences observed by examining evidence of attitudinal cleavages in the voting behavior of the three judge groups. Only non-unanimous cases will be used in the following analysis because it can be assumed with some certainty that those cases presented opportunities for the exercise of reasonable judicial discretion.

CHAPTER IV

CONFLICT ON THE COURTS OF APPEALS: ATTITUDES, BACKGROUNDS AND THE DISPOSITION OF CRIMINAL APPEALS IN NON-UNANIMOUS CRIMINAL CASES FOR FISCAL 1970-73

The composite score used in Chapter Three as the primary measure of the "impact" of the Nixon appointees has two serious shortcomings as an indicator of the attitudinal characteristics of the judges, the primary concern of this chapter: First, it sometimes combines both unanimous and non-unanimous cases. Second, it does not take into account the fact that some judges cast more votes than others. Thus the composite score may distort measurement of the central attitudinal tendencies of each of the three judge groups. Therefore, this chapter will employ, in addition to the composite score, a medians test, which weighs all judge scores equally no matter how many votes they cast. In addition, the analysis in this chapter will be confined almost completely to non-unanimous cases where the exercise of judicial discretion can be assumed with some confidence.

During the period July 1, 1969 to June 30, 1973, the United States Courts of Appeals decided 530 non-unanimous cases involving the rights of accused persons and prisoners. Forty-five percent of these cases were decided in favor of the accused, fifty-two percent were decided against them with three percent falling in between. This is in contrast to fiscal 1973 (which included those decided unanimously) when only twenty-three percent of the decisions were in favor of the accused or

prisoner, as can be seen in Table 15. Moreover, 49.7 percent of individual votes favored the accused or prisoner in the non-unanimous cases. The more equal division of votes and decisions in non-unanimous cases again suggests that non-unanimous cases may contain more factual and legal ambiguities, thereby providing more frequent opportunities than unanimous cases for the exercise of a wide range of discretion, and they may therefore reveal more about judicial attitudes toward the social and political issues embodied in criminal cases.

TABLE 15

COMPARISON OF CASE DISPOSITION: FISCAL 1973 AND FISCAL 1970-73

	N-Unan. Cases Fiscal 1970-73	N-Unan. Cases Fiscal 1973 Only	All Cases Fiscal 1973
Pro-Defendant	45%	47%	23%
Intermed.	3%	--	2%
Anti-Defendant	52%	53%	75%

Although, as was seen in the last chapter, aggregate analysis may obscure important circuit differences, the major hypothesis of the study that Nixon appointees would vote as if they were more "conservative" than both non-Nixon Republicans and non-Nixon Democrats, is supported by the aggregate data from non-unanimous cases for fiscal 1970-73. This time, however, the margins of difference between the three groups are greater, as indicated by Table 16, column 2. Democrats score 1.18; and when voting

in the fourth and fifth circuits is excluded, Democrats score 1.26 on non-unanimously decided cases from fiscal 1970-73, as can be seen in the last column of Table 16.

In contrast, Republicans score .84 on the non-unanimous cases and Nixon appointees score .58. When the southern circuits are excluded, the composite score for Republicans falls to .73 on the non-unanimous cases and the score of Nixon appointees increases to .60. So the exclusion of the southern circuits again has the effect of narrowing the difference between the Nixon appointees and non-Nixon Republicans, although this time the latter group remains more "conservative," as can be seen in Table 16.

TABLE 16

COMPARISON OF COMPOSITE NON-UNANIMOUS CASE SCORE FOR FISCAL 1970-73 WITH UNANIMOUS CASE SCORES FOR FISCAL '73 BY JUDGE GROUP

Judge Group	Score 1973 Unan. Cases	Score 1970-73 Non-Unan.	Differential	Score Non-unan. 4th & 5th Circ. Excluded
Democrats	.54	1.18	+ .64	1.26
Republicans	.47	.84	+ .37	.73
Nixon	.41	.58	+ .17	.60
Diff. between Nixon App. & Dem.	.13	.60	.47	.66

*As in the last chapter, "Democrats" refers to non-Nixon Democrats and "Republicans" refers to non-Nixon Republicans.

Classification of Individual Judges Based on Non-unanimous Case Votes

Classifying judges on the basis of scores in at least six non-unanimous cases results in a wider "spread" of the judges among the "liberal," moderate," and "conservative" divisions than the earlier classification, which was based primarily on votes in unanimously decided cases. Whereas only one judge in the entire population of judges was classified as a "liberal" when the latter cases were used, thirty-five judges or thirty-four percent of the judge population are classified as "liberal" when only non-unanimous cases were considered. The number of "moderates" remains about the same (17), but the number of "conservatives" is reduced from 84 to 43 when votes in non-unanimous cases are used, as can be seen in Table 17. Thus the criminal defendant has a much better chance of encountering sympathetic judges in non-unanimous cases, but still has a less than even chance of a favorable decision, as the center of gravity remains in the "conservative" category.

Democrats, as expected, dominate the "liberal" grouping, twenty-five of the thirty-five judges classified as "liberal" being non-Nixon Democrats. In fact, forty-four percent of non-Nixon Democrats fall into the "liberal" category as compared to twenty-nine percent of the Republicans and eighteen percent of Nixon appointees. Nixon appointees also place a smaller percentage of judges in the "moderate" category than do either of the other two groups, and place a much larger percentage of judges in the "conservative" category than do Democrats and Republicans, as can be seen from Table 18.

When the southern circuits are excluded, the net effect, as in the last chapter (Table 14), is to narrow the difference between

Republicans and Nixon appointees and increase the distance between these two groups and the more "liberal" non-southern Democrats, as can be seen from Table 19.

TABLE 17

ATTITUDINAL CLASSIFICATION OF JUDGES: COMPARISON OF CLASSIFICATIONS BASED ON UNANIMOUS CASES WITH CLASSIFICATIONS BASED ON NON-UNANIMOUS CASES ONLY

	All Cases Fiscal 1973		Only N-Unan. Cases 1970-73		Difference	
	#	%	#	%	#	%
Lib.	1	.01	35	.34	+34	+.33
Mod.	17	.17	22	.24	+ 5	+.07
Con.	84	.84	43	.42	-41	-.42
Total	102	100%	100	100%		

TABLE 18

PERCENTAGES OF JUDGE GROUPS IN "LIBERAL," "MODERATE," AND "CONSERVATIVE" CATEGORIES: NON-UNANIMOUS CASES, FISCAL 1970-73

	Democrat		Republican		Nixon Appointee		Total "Lib," "Con," "Mod	
	#	%	#	%	#	%		
Lib.	25	.44	6	.29	4	.18	35	(34%)
Mod.	11	.19	7	.33	4	.18	22	(24%)
Con.	21	.37	8	.28	14	.64	43	(42%)
Total	57	100%	23	100%	22	100%		

TABLE 19

PERCENTAGES OF JUDGE GROUPS IN "LIBERAL," "MODERATE," AND "CONSERVATIVE" CATEGORIES, SOUTHERN CIRCUITS EXCLUDED: NON-UNANIMOUS CASES FISCAL 1970-73

	Democrat		Republican		Nixon Appointee		Total	
	#	%	#	%	#	%	#	%
Lib.	20	.49	3	.19	4	.21	27	36
Mod.	7	.17	5	.31	4	.21	16	21
Con.	14	.34	8	.50	11	.58	33	43
Total	41	100%	16	100%	19	100%	76	100%

Analysis of Individual Circuits

As in the preceding chapter, the voting behavior of Nixon appointees varies considerably from circuit to circuit, and in only four of the ten circuits analyzed (there were insufficient votes to include the first circuit), the fourth, fifth, ninth and District of Columbia, are Nixon appointees the most "conservative" of the three judge groups. In three other circuits, the seventh, eighth, and tenth, Nixon appointees are more liberal than one other judge group and in three circuits, the second, third, and sixth, Nixon appointees are more "liberal" than both other groups of judges, as can be seen in Table 20.

The four circuits in which Nixon appointees were the most "conservative" are the same circuits discussed in detail in the analysis of all cases for fiscal 1973. These circuits, the fourth, fifth, ninth and District of Columbia, were the ones in which there was maximum Administration freedom from Senatorial constraints, thus permitting the appointment of appeals judges closest in ideology to the Nixon Administration. The results suggest that it is this factor which accounts for the "conservative" voting behavior of Nixon appointees when compared to other judge groups in those circuits.

Similarly, two of the three circuits in which Nixon appointees were the most liberal group, the second and third, are the two circuits in which the Nixon Administration faced maximum publicized resistance. This was particularly true of the second circuit where Nixon appointees were clearly more "liberal" in their voting on non-unanimous cases than were the other two groups.

TABLE 20

COMPOSITE JUDGE GROUP SCORES BY CIRCUITS: NON-UNANIMOUSLY DECIDED CASES, FISCAL 1970-73*

Circuit	Democrats+		Republicans		Nixon Appointees	
	# Votes Cast	Score	# Votes Cast	Score	# Votes Cast	Score
2	75	1.29	79	.68	23	1.48
3	93	1.08	19	1.05	60	1.10
4	76	.95	27	1.33	9	.44
5	199	.90	44	1.23	33	.42
6	72	.88	12	.42	13	.92
7	78	1.26	19	.42	32	.63
8	71	1.18	30	.27	11	.55
9	167	1.53	111	1.00	81	.33
10	25	.68	16	.31	11	.55
D.C.	315	1.31	4	.00	103	.27
Total	1171	1.18	361	.84	376	.58

*First circuit excluded because of insufficient votes in non-unanimous cases.

+Seventy-one Democrats cast votes in non-unanimous cases as compared to thirty-three Republicans and thirty-six Nixon appointees.

In order further to test the potency of Senatorial Courtesy as a check on the Presidential appointment power and better to account for the observed circuit and individual differences in the voting behavior of Nixon appointees, A.D.A. scores were obtained for Republican Senators eligible to veto Nixon appointments to the courts.[1] Nixon appointees were then grouped into "liberal," "moderate," and "conservative" categories on the basis of their votes on non-unanimously decided cases and average A.D.A. scores computed for the Senators corresponding to each of the three judge grouping. Table 21 ranks and groups the Nixon appointees by score based on votes in at least six non-unanimous cases and gives the corresponding A.D.A. score for the Senator potentially able to veto his appointment. In cases where there was no Republican Senator to oppose the judicial nominee an A.D.A. score of .00 was assigned to indicate the lack of Senatorial opposition to the nominee.

Although only twenty-two Nixon appointees cast enough votes (6) to be included in the analysis, there were significant differences between the A.D.A. scores of Senators linked with the eight Nixon appointees who scored in the "moderate" or "liberal" range and Senators associated with the thirteen Nixon appointees in the "conservative" grouping, as Table 19 shows. Applying Spearman's Rank-Difference Correlation to the date in Table 21 produced a correlation coefficient of .42.[2]

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[1]When two Senators were in a position to veto a nomination, an average A.D.A. score was computed for them. Each individual Senator's A.D.A. score was computed on the basis of his performance in Congress over the four-year period fiscal 1969-73.

[2]Method described in Dorothy Adkins, Statistics (Columbus: Merrill, 1964), p. 282, and in Sidney Siegel, Nonparametric Statistics for the Behavioral Sciences (New York: McGraw Hill, 1956), p. 202.

TABLE 21

COMPARISON OF SENATE A.D.A. SCORES AND JUDICIAL VOTING TENDENCIES*

Circ.	Judge Name	State	Score	Rank	Republican Senator's Name(s)	A.D.A.	Rank
2	Oakes	Vt.	2.00	1	Aiken & Prouty	.44+	10
2	Mansfield	N.Y.	1.33	2.5	Javits & Buckley	.45	8.5
2	Mulligan	N.Y.	1.33	2.5	"	.45	8.5
3	Gibbons	N.J.	1.30	4	Case	.88	1.5
3	Rosenn	Penn.	1.17	5	Scott & Schweiker	.37	11
3	Adams	Penn.	1.04	6	"	.37	3
3	Hunter	N.J.	1.00	7	Case	.88	1.5
7	Stevens	Ill.	.91	8	Percy	.62	5.5
9	Wright	Wash.	.73	9	--	.00	18.5
5	Ingraham	Texas	.57	10	Tower	.00	18.5
7	Pell	Ind.	.53	11	--	.00	18.5
5	Roney	Fla.	.36	12	Gurney	.07	13
7	Sprecher	Ill.	.33	14.5	Percy	.62	5.5
8	Ross	Neb.	.33	14.5	Hruska & Curtis	.03	14
9	Choy	Haw.	.33	14.5	Fong	.24	12
D.C.	Wilkey		.33	14.5	--	.00	18.5
D.C.	Robb		.32	17	--	.00	18.5
5	Clark	Miss.	.29	18.5	--	.00	18.5
6	Brooks	Kent.	.29	18.5	Cook & Cooper	.50	7
D.C.	MacKinnon		.20	20	--	.00	18.5
9	Kilkenny	Ore.	.19	21	Packwood & Hatfield	.64	5
9	Trask	Neb.	.18	22	Goldwater & Fannin	.02	15

Spearman Rank Order Correlation = .42

*Only Nixon appointees who cast at least six votes in non-unanimous cases were included in this table.

+When there were two Senators from an appointee's state their A.D.A. scores were averaged together.

Even when the .00 A.D.A. scores signifying the absence of Republican Senators from the states of six judicial appointees are excluded, the differences between the mean A.D.A. score of Republican Senators from states that produced conservative judges and the mean A.D.A. score of Republican Senators from states that produced "liberal-moderate" judges remains .36, as can be seen in Table 22.

TABLE 22

COMPARISON OF SENATE A.D.A. SCORES AND JUDICIAL VOTING TENDENCIES: "LIBERAL" AND "MODERATE" CATEGORIES COMBINED AND SIX JUDGES FROM STATES WITHOUT REPUBLICAN SENATORS EXCLUDED

	"Lib-Mod" Judge Group	"Conservative" Judge Group	Difference
Mean Senate A.D.A. Score	.59	.15	.47
Mean Senate A.D.A. Score	.59	.27 (6 judges excluded)	.36

Finally, all six of the Nixon appointees not encumbered by considerations of senatorial courtesy fall into the "conservative" grouping, whereas three of the four "liberal" Nixon appointees come from states that have the most liberal Senators.

Bloc analysis of individual circuits. Bloc analysis is a method used to study collegial courts both in the United States and in other countries. The purpose of bloc analysis is to uncover voting alignments

based on shared attitudes and values of the judges.[3] According to Goldman,

> A judicial voting bloc can be said to exist when, in non-unanimous cases, two or more judges vote with each other more frequently than with all other judges on their court in at least a majority of the cases in which they jointly participate.[4]

Here bloc analysis was used to determine whether Nixon appointees tended to have their highest rates of agreement with each other or with other Democrats and Republicans. It was assumed that if they did form cohesive blocs with each other and with similar ideological types, the disposition of cases on the Courts of Appeals might be radically altered, whereas if they did not, the influence of the Nixon appointments would be minimized.

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[3]There is no evidence of "log rolling" on federal appellate courts according to Sydney Ulmer. See "Toward a Theory of Sub-Group Formation in the United States Supreme Court," Journal of Politics, XXVII, No. 1 (1965), p. 133.

[4]Sheldon Goldman, "Conflict on the United States Courts of Appeals 1965-1971," Cincinatti Law Review, XXXXII, no. 4 (1973), p. 645. Goldman describes the McQuitty method of bloc construction as one designed to identify psychological types. In this method, "one first examines the matrix of rates of agreement and underlines the highest percentage agreement in each column of the matrix. The highest percentage agreement is selected first, and the individuals with the highest percentage agreement constitute the core of the first bloc. The next step is to read across the rows of these individuals and bring in all of the people whose entries were underlined indicating that they have their highest agreement with one or more members of the core bloc. Then the rows of these new members must be examined to determine if they bring in more members. When no more members are brought in, one returns to the highest remaining percentage agreement, which forms the core of the second bloc. A similar process of reading across the rows is followed until that bloc is exhausted. The matrix is analyzed until all individuals are classified by bloc." However, this analysis imposed three qualifications upon the identification of blocs: first, each judge had to serve on a minimum of four cases with all other judges included in the blocs and, second, a judge whose highest agreement was less than fifty percent was dropped from the analysis. p. 645-6.

Unfortunately, there were sufficient non-unanimous cases to include Nixon appointees in the bloc analysis of only five of the circuits, as can be seen in Figure I. However, the results in these five circuits were revealing. In the third circuit three of four Nixon appointees, Rosenn, Adams, and Hunter, joined Democrat Aldisert and Republican Van Dusen in a "moderate" (determined by mean of individual judge scores in bloc) bloc. Another Nixon appointee, Gibbons,[5] however, agreed most readily with Democrat Seitz, and they formed a "liberal" bloc. Moreover, Gibbons agreed with fellow Nixon appointees Hunter, Adams, and Rosenn only forty, fifty-seven and sixty percent of the time respectively, as compared to his one hundred percent agreement with Seitz. Nixon appointees then, did not constitute a monolithic or particularly "conservative" bloc in the third circuit and no radical swing to the right is suggested there. Moreover, the third circuit did not appear to be seriously divided. Individual scores ranged only from Aldisert's .89 to Gibbons' 1.30 and the difference between the mean scores of the blocs was .28.

Bloc analysis of the fifth circuit revealed a similar two-bloc pattern: one "conservative" and one "moderate." As in the third circuit, three Nixon appointees divided between the two blocs. Two Nixon appointees joined two Republicans and five Democrats in the nine-man "conservative" bloc which had a mean score of .59. One Nixon appointee, Clark, joined five Democrats in a six-man "moderate" bloc with a mean score of 1.04. As in the third circuit, the blocs were remarkably cohesive, particularly in the "conservative" blocs where all agreements were

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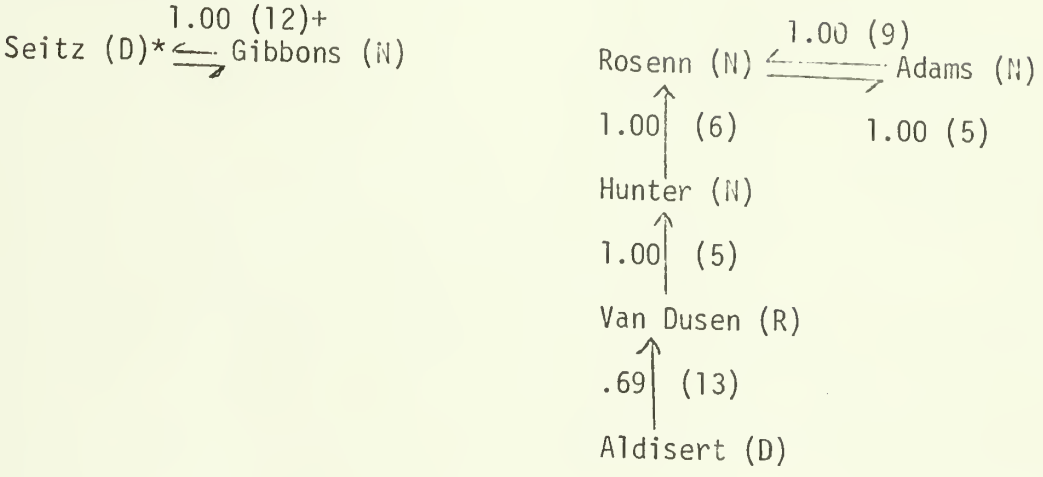
[5]Recall that Gibbons was sponsored by Senator Case, the most "liberal" (A.D.A. score .88) Republican Senator eligible to veto Nixon appointees.

FIGURE I

VOTING BLOCS ON THE UNITED STATES COURTS OF APPEALS IN NON-UNANIMOUS CRIMINAL CASES; FISCAL 1970-73

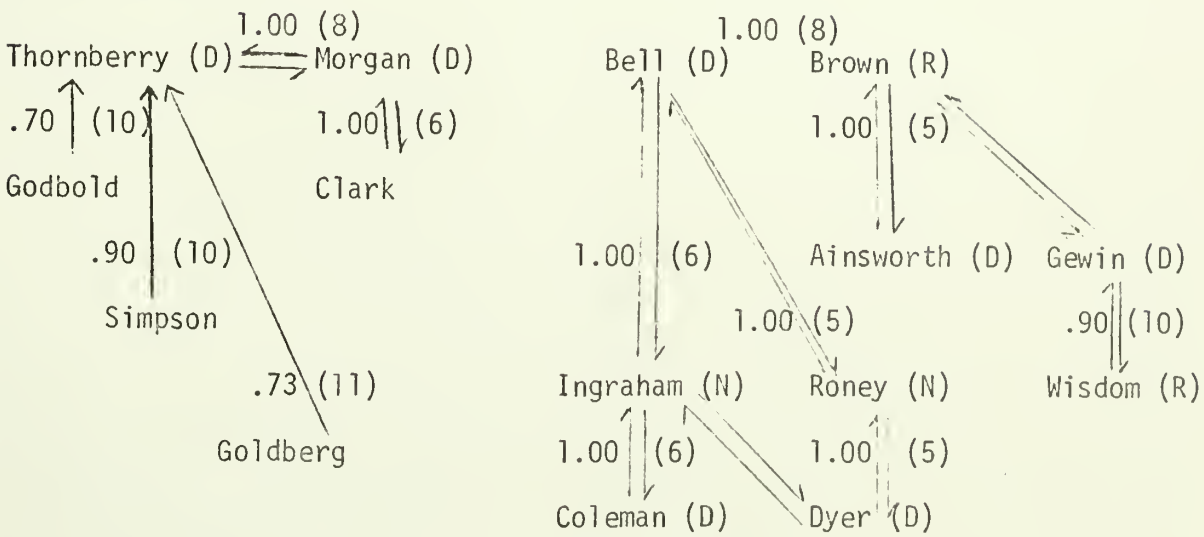
Third Circuit



Bloc Type: "liberal" "moderate"

mean score: 1.30 1.02

Fifth Circuit



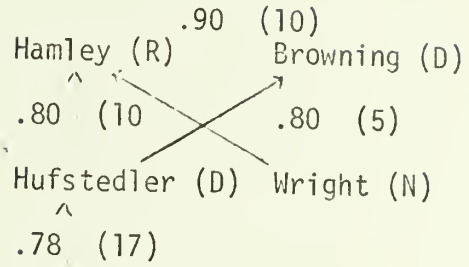
Bloc Type: "Moderate" "conservative"

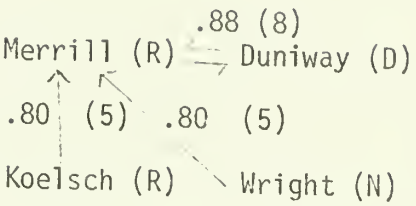
Mean Score: 1.04 .59

*Indicates judge group (D stands for Democrat)

+Number of cases on which agreement score computed

Ninth Circuit



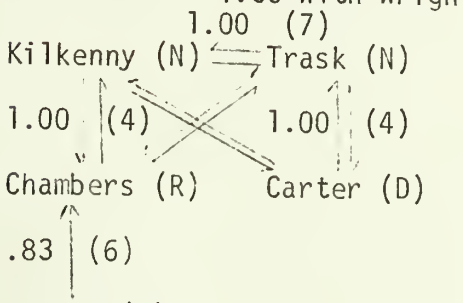


Bloc Type: "liberal"

mean score: 1.78 without Wright
1.56 with Wright

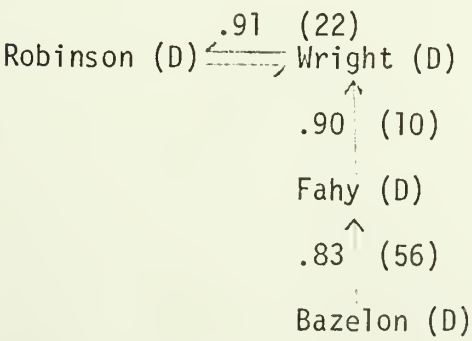
"moderate"

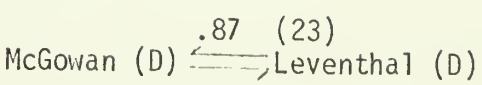
1.33 without Wright
1.18 with Wright



Bloc Type: "conservative"
mean score: .17

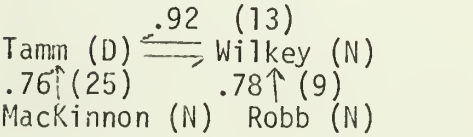
District of Columbia Circuit





Bloc Type: "liberal"
mean score: 1.80

"moderate"
.89



Bloc Type: "conservative"
mean score: .31

one hundred percent with the exception of the ninety percent agreement between Wisdom and Gewin. Agreement in the "moderate" bloc ranged from seventy to one hundred percent. Although Clark in the "moderate" bloc agreed more with the Democrat Morgan, this should not obscure the fact that he also agreed eighty percent of the time with fellow Nixon appointees, Roney and Ingraham. Moreover, Nixon appointee Clark agreed with fellow Nixon appointees Roney and Ingraham more than with any other members of the "moderate" bloc where he was placed by the method for computing the blocs. Thus the Nixon appointees do form a fairly cohesive "bloc" in the fifth circuit although the formal analysis does not show it.

Although the seventh circuit did not produce enough non-unanimous decisions for bloc analysis, there were sufficient cases to suggest that the Nixon appointees Pell and Stevens were not likely to constitute a bloc as they agreed in only one of four cases in which they participated. Pell, on the other hand, agreed one hundred percent of the time with "conservative" Democrat Cummings in five cases, and Stevens agreed twice in three cases with "liberal" Democrat Swygert.

Again, in the ninth circuit, three Nixon appointees who decided enough cases to be included in the bloc analysis were divided between two of the three blocs that emerged there. A "liberal" bloc was composed of three Democrats, one Republican, and one Nixon appointee, Wright, who also could be classified with the "moderate" bloc. The "moderate" group consisted of one Democrat, two Republicans and, again, Nixon appointee Wright. A five-man "conservative" bloc contained the other two Nixon appointees along with two Republicans and a Democrat. In contrast to the third and fifth circuits, the blocs in the ninth circuit were sharply

split ranging from the .17 mean score of the "conservative" bloc to the 1.77 mean score of the "liberal" bloc with Wright excluded. The mean score of the "moderate" bloc was 1.33 with Wright excluded. Although it appears anomalous to include Nixon appointee Wright in the "moderate" or "liberal" blocs when his score for non-unanimous votes (.73) is considered, a closer examination of the matrix reveals that he agreed with fellow Nixon appointees Kilkenny and Trask only three times in eleven decisions in which they jointly participated. On the other hand, he agreed with Merrill and Duniway of the "moderate" bloc eighty and seventy-eight percent of the time respectively, and he also agreed with both Hamley and Browning of the "liberal" bloc eightly percent of the time. Thus it appears that Wright is correctly placed in either of those blocs and separated from his fellow Nixon appointees in the "conservative" bloc.

Only in the District of Columbia Circuit, of the five circuits so far analyzed, did the Nixon appointees, as on the Supreme Court, comprise a cohesive and sharply "conservative" monolith. There, Nixon appointees Wilkey, MacKinnon and Robb joined Democrat Tamm in a "conservative" bloc with a mean score of .31. The "conservative" bloc was arrayed against a "liberal" bloc (mean score of 1.80) consisting of Democrats Robinson, Wright, Fahy and Bazelon. A third bloc (mean score .89) combined Democrats McGowan and Leventhal.

Thus although the results of the bloc analysis are tentative and await further research, it appears that the Nixon Administration was able to appoint a cohesive and monolithic group of judges to only the District of Columbia Circuit (and to some degree the fifth circuit) where appointment conditions similar to those on the Supreme Court prevail.

These findings must be counterpoised against the aggregate figures presented in Table 23 which show a greater percentage of Nixon appointees falling into "conservative" blocs than either Republicans or Democrats.

TABLE 23

NUMBER AND PERCENT OF EACH JUDGE GROUP IN "LIBERAL," "MODERATE." AND "CONSERVATIVE" BLOCS

Bloc Type	Democrat #	Democrat %	Republican #	Republican %	Nixon Appointee #	Nixon Appointee %	Total #	Total %
Lib.	16	43%	5	29%	2	13%	23	33%
Mod.	9	24%	3	18%	5	33%	17	25%
Con.	12	33%	9	53%	8	54%	29	42%
Total	37	100%	17	100%	15	100%	69	100%

Socio-Political Background Characteristics and Voting Behavior

The proposition that differences in judicial behavior can be in part traced to the varying values and attitudes of judges is generally accepted by scholars who study the courts. Scholars engaged in quantitative analysis, however, have achieved only limited success in identifying socio-political background characteristics associated with voting behavior. Generally speaking, prior political party affiliation has been, as with studies of American legislative bodies, the best single predictor of judicial voting

behavior, particularly with regard to economic issues.[6] More germane to this study, Goldman's earlier studies of the courts of appeals found that party, age and religion were the background variables which best correlated with appellate voting behavior in criminal cases.[7] And Nagel, in another early study of state supreme court justices, found prior prosecutorial experience to be significantly correlated with voting behavior in criminal cases.[8]

Most research in this area has assumed explicitly or implicitly that "interests," as objectively defined by socio-economic class, are prime determinants of political attitudes and values; and that these attitudes and values are further refined, modified and transformed by professional training and experience. Thus determinations of social class have been based on undergraduate and postgraduate education, religion, father's occupation, and family political status and influence.[9] Studies of political socialization have focused on regional origin and intensity of social, economic and political ties to a particular region and party

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[6]Walter Murphy and Joseph Tanenhaus, The Study of Public Law, (New York: Random House, 1972), pp. 105-107.

[7]Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," American Political Science Review, LXIX, No. 2 (June 1975), p. 503.

[8]Stuart Nagel, "Judicial Backgrounds and Criminal Cases," Journal of Criminal Law, LIII, No. 3 (1962), p. 336.

[9]See John Schmidhauser, The Supreme Court: Its Politics, Personalities, and Procedures (New York: Holt, Rinehart, and Winston, 1960), Chapter 3. Also see Sheldon Goldman, "Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives," Journal of Politics, XXXIV, No. 2 (1972).

affiliation and activism.[10] Studies of professional socialization have focused on occupation prior to assuming judicial office, types of legal experience, years served on a particular court, and professional and social ties among judges serving in the same circuit or on the same collegial court.[11] Age as related to attitudes has also been studied.[12]

Here, judges were first coded on nine background characteristics: party, religion, candidacy for or election to public office, prior judicial or prosecutorial experience, appointing President, age, years on the Courts of Appeals, and A.D.A. score of Senator or Senators of President's party from the particular judge's state. These background characteristics were treated as independent variables. The scores of each judge who decided at least six non-unanimous cases over the period fiscal 1970-73 and the scores of those who decided fifteen cases both unanimous and non-unanimous during fiscal 1973 were treated as the dependent variables. For the dependent variables there were two different but largely overlapping groups of judges, ninety-seven in the first group (non-unanimous, fiscal 1970-73) and one hundred and four in the second (fiscal 1973). The advantage of the second grouping was that it included thirty-seven Nixon appointees, whereas the non-unanimous case group

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[10]See Kenneth Dolbeare, "The Federal Courts and Urban Public Policy: 1960-67" in Grossman and Tanenhaus, Frontiers of Judicial Research (New York: John Wiley and Sons, 1969). See also Kenneth Vines, "Federal District Court Judges and Race Relations Cases in the South," Journal of Politics, Vol. 26 (1964), pp. 336-356. Also Goldman, Loc. cit.,"Johnson and Nixon Appointees," p. 939.

[11]See Robert Carp, "Scope and Function of Intra-Circuit Judicial Communication," Law and Society Review, VI, No. 1 (Feb. 1972), p. 405.

[12]Goldman, Op. cit., "Voting Behavior Revisited," p. 31.

included only sixteen Nixon appointees. These judge scores and the nine background characteristics were run using the Statistical Package for the Social Sciences[13] and tests were also run to obtain the medians for each of the three judge groups along with tests of statistical significance of the differences in medians.[14] In addition, the stepwise multiple regression procedure was used to measure the total contribution of all the variables taken together in explaining the variance in voting behavior and a partial correlation analysis was undertaken to measure the unique contribution of each variable taken alone to the variation in voting behavior.

Of the nine independent variables tested, only appointing president (coded Nixon appointee or non-Nixon appointee) was related in a statistically significant way to voting on non-unanimous cases and only religion (coded Protestant or non-Protestant) was related in a statistically significant way to voting on all cases in fiscal 1973. Consequently, religion and appointing President were selected for further analysis along with age and prior prosecutorial experience which Goldman and Nagel, respectively, had found in earlier studies to be related to voting behavior in criminal cases. The results of the statistical analysis of just the four background characteristics are presented in Tables 25-27.

Stepwise multiple regression and partial correlation were two of the

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[13]Norman Nye, Dale Bent and Hadlai Hull, Statistical Package for the Social Sciences (New York: McGraw Hill, 1970).

[14]Mann Whitney U Test. Described in Sidney Siegel, loc. cit., pp. 116-127. "When at least ordinal measurement has been achieved, the Mann-Whitney U Test may be used to test whether two independent groups have been drawn from the same population." p. 116.

tests utilized by Bowen and later by Ulmer[15] and Goldman,[16] and are probably the most sophisticated statistical tests yet employed in backgrounds analysis of judicial voting behavior. These tests make formidable assumptions of interval measurement and normal distribution of dependent and independent variables that are technically difficult to justify and must therefore be used with caution. However, they do permit an approximation of the important research questions these methods seek to answer, and taken in conjunction with tests based on the more realistic assumptions of ordinal measurement, without assumptions of normal distribution, can suggest a more complete portrait of the phenomena under investigation.

The results of the stepwise multiple regression were consistent with the findings of other studies that only a small percentage of the variance in voting behavior can be explained by reference to background characteristics. The total explained variance attributed to all the independent variables taken together was 11.7 percent for all cases in fiscal 1973 and sixteen percent for non-unanimous cases from fiscal 1970-73.

The partial correlation indicated that religion was the most important variable in explaining variations in voting behavior on non-unanimous cases during fiscal 1970-73, followed by appointing President and age. Nixon appointees, Protestants and older judges tended to be more "conservative" than Catholics, Jews, younger judges and those appointed by

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[15]Sydney Ulmer, "Social Background and Supreme Court Voting," American Journal of Political Science, XVII, no. 3 (August, 1973), pp. 622-629.

[16]Goldman, loc. cit. "Voting Behavior Revisited."

TABLE 24

STEPWISE MULTIPLE REGRESSION ANALYSIS OF BACKGROUND VARIABLES AND SCORES

Issue	Variable in Order of Entry in Regression	Multiple R	% of Explained Variance
Criminal Procedures 1970-73	Religion	.284	8.0
	President	.335	11.2
	Age	.339	15.9
	Prosecutor	.40	16.0
Criminal Procedures Fiscal 1973 All Cases	President	.243	5.9
	Religion	.325	10.5
	Age	.340	11.5
	Prosecutor	.342	11.7

Presidents other than Nixon. Prosecutorial experience was not related in a statistically significant way to the voting in non-unanimous cases. When voting behavior for all cases in fiscal 1973 alone is considered, appointing President is the most important variable, followed by religion, with neither age nor prosecutorial experience being related to the voting in a statistically significant way. However, as with the stepwise multiple regression, the partial correlation shows the significantly related background variables accounting for only a small proportion of the variance in voting behavior, a finding consistent with those of Goldman and Bowen. However, the association between religion and voting in criminal cases demonstrated by Goldman is supported by the findings here while the relationship between prosecutorial experience and voting behavior discovered by Nagel is not. The association between voting behavior and age is supported for one group of cases but not for the other.

TABLE 25

CORRELATION ANALYSIS OF BACKGROUND VARIABLES AND SCORES ON ISSUES

Issue	Background Variable	Zero Order Correlation With Issue	Partial (3d ord) Correlation With Issue	Reduction Unexplained Variance
Criminal Procedures Fiscal 1970-73 non-unan. cases	Age	-.142	-.232	5.4
	Pres.	-.189 n.s.*	-.252	6.3
	Pros.	-.035 n.s.	.035 n.s.	0.0
	Rel.	-.284	-.294	8.7
Criminal Procedures Fiscal '73 All Cases	Age	.002 n.s.	-.0939 n.s.	0.0
	Pres.	-.243	-.256	6.7
	Pros.	-.068 n.s.	-.045 n.s.	0.0
	Rel.	-.223	-.224	5.0

*Not statistically significant (greater than 5 in 100 that result could be obtained by chance).

Thus the findings concerning voting and background characteristics remain mixed.

The medians tests are largely consistent with these findings. Nixon appointees have statistically significant lower median scores than Democrats and Republicans on non-unanimous cases and statistically significant lower scores than Democrats on all cases decided during fiscal 1973.[17] The difference between the medians of Nixon appointees and Republicans for all cases in fiscal 1973 approaches but does not reach statistical significance. Moreover, 57 percent of Democrats are above

[17]The small difference in medians between Nixon appointees and Republicans on 1973 cases approaches statistical significance at .06. In one sense, however, statistical significance is meaningless as the study has included the entire population of eligible judges and blue

their own circuit median in non-unanimous cases and 58 percent in all cases decided in fiscal 1973. In contrast, only 27 percent of Nixon appointees were above their own circuit median score in fiscal 1973 cases and also in non-unanimously decided cases. Forty percent of Republicans were above their own circuit median for all cases in fiscal 1973, and 52 percent of Republicans were above their own circuit medians for non-unanimously decided cases, fiscal 1970-73, as can be seen in Table 27.

TABLE 26

MEDIAN SCORES OF JUDGE GROUPS ON CRIMINAL PROCEDURES ISSUES

	Democrats Med.	#	Republicans Med.	#	Nixon Appointee Med.	#	Signif. Level Nix. Dem.	Nix. Rep.
N-Unan. Crim. Cases 1970-73	.95	53	.88	22	.45	22	.01	.01
% of Judges Above Own Circ. Med.	58%		52%		27%			
Cases Fiscal 1973	.63	48	.48	23	.46	33	.00	.06 N.S.*
% of Judges Above Own Circ. Med.	57%		40%		27%			

*N.S. stands for not significant.

collar criminal cases for the time period studied. Tests of statistical significance can be treated usefully if the cases are considered to be only a sample drawn from all the criminal cases that these judges have decided or will decide during their careers.

TABLE 27

RELIGIOUS AFFILIATION AND MEDIAN SCORES OF JUDGES ON CRIMINAL ISSUES

	Protestant Med. #	Non-Protestant Med. #	Difference	Significance
Non-unan. Crim. Cases, 1970-73	.67 (63)	1.14 (34)	.47	.01
All Cases 1973	.48 (70)	.64 (34)	.16	.02

Similarly, there are large statistically significant differences between the median scores for Protestants and non-Protestants on both non-unanimous cases and for all cases decided during fiscal 1973. Finally, the differences between the median scores of the judges without prior prosecutorial experience and those with prior prosecutorial experience is almost non-existent for cases decided in fiscal 1973 and only .11 on non-unanimous cases with the non-prosecutors scoring higher, as can be seen in Table 29. In neither case, however, were the differences in median scores between prosecutors and non-prosecutors statistically significant. On the contrary, there was a better than even chance that the difference was attained by accident.

TABLE 28

PROSECUTORIAL EXPERIENCE AND MEDIAN SCORES OF JUDGES ON CRIMINAL CASES

	Prosecutor Med. #	Non-Prosecutor Med. #	Difference	Significance
Non-unan. Crim. Cases 1970-73	.80 (43)	.91 (54)	.11	.52 N.S.*
All Crim. Cases 1973	.52 (47)	.53 (57)	.01	.67 N.S.

*N.S. stands for not significant

Exclusion of the Fourth and Fifth Circuits

When the judges of the fourth and fifth circuits are excluded from the computation of medians for the judge groups, Nixon appointees outside the south have higher median scores than non-Nixon Republicans on the fiscal 1973 cases which included unanimous decisions, and markedly higher scores than the Republicans on the non-unanimous cases, as can be seen in Table 30. The median scores for Democrats remained about the same (63.5) for the 1973 cases but rose to 1.23 on the non-unanimous cases, as can be seen from Table 30. These findings, like those in the aggregate analysis, support the view that it was primarily in the southern and District of Columbia circuits, where the Nixon Administration had a relatively free hand in the selection process, that the Nixon Administration best fulfilled its campaign promises. It is possible that the greater "conservatism" of

non-Nixon Republicans outside the South as compared to Nixon appointees outside the South, can be explained by the greater age of the former group, all of whom were appointed before 1960.

TABLE 29

MEDIAN SCORES OF JUDGE GROUPS: FOURTH AND FIFTH CIRCUITS EXCLUDED

	Democrats	Republicans	Nixon Appointees	Diff. Between Nix. & Rep.
All Cases 1973	63.5	.43	.46	.03
Non-Unan. Cases	1.23	.46	.63	.17

Median Scores of Protestants and non-Protestants: Controlling for Party

When Protestants and non-Protestants of the same political party are compared, differences still emerge between the different religious groups, as can be seen from Table 31. Democratic non-Protestants had higher median scores than Democratic Protestants and Republican non-Protestants, and Republican non-Protestants had higher median scores than Republican Protestants on the non-unanimous cases, although their scores were identical on the 1973 cases. Religion then was an important factor in explaining differences in voting behavior within as well as between judge groups, a finding consistant with the partial correlation analysis.

TABLE 30

MEDIAN SCORES OF PROTESTANTS AND NON-PROTESTANTS COMPARED: POLITICAL PARTY HELD CONSTANT

	Democrats			Republicans		
	Prot.	Non-Prot.	Diff.	Prot.	Non-Prot.	Diff.
1973 Cases	.56	.72	.16	.46	.46	.00
1970-73 Cases	.88	1.31	.43	.57	1.11	.54

In conclusion, the medians tests as well as the composite scores of the judge groups, suggest that attitudinal cleavages underlie at least some of the observed differences in judicial voting behavior on the Courts of Appeals. However, the bloc analysis as well as the correlation analysis suggest that the Nixon Administration failed to appoint a monolithic and cohesive group of "law and order" judges to the Courts of Appeals. In order to explore this issue further, the next chapter focuses on doctrinal positions taken by the judges in cases involving the law of confessions and admissions.

CHAPTER V

QUALITATIVE ANALYSIS OF THE OPINIONS OF THE UNITED STATES COURTS OF APPEALS JUDGES IN CRIMINAL CASES INVOLVING COERCED CONFESSIONS

> A substantial segment of the federal judiciary may justifiably believe that the Supreme Court went too far in (the Miranda) decision and that the specificity of the procedural safeguards prescribed by it has had the effect of creating an unnecessary straitjacket that should be loosened to permit use of custodial statements voluntarily given, even though the interrogations have failed to touch all the bases prescribed by Miranda. But any modification of Midanda must come from the Supreme Court or by constitutional amendment. Until then we are bound by that decision.
>
> --Nixon second circuit court appointee Mansfield dissenting in United States v. Collins, 562 F. 2d. 792 (1972), p. 801.

> What makes this case exceptional is that the nation's highest ranking law enforcement officer, the then Attorney General, saw fit to lash out publicly at the panel decision while the Government's petition for rehearing en banc was pending before the court. In a speech delivered to the National District Attorney's Association, the Attorney General singled it out as "case number one" in his explanation of what he unfortunately sees as the public's loss of confidence in the ability of the courts to dispense justice. I had understood that the Department of Justice's professed policy was, wisely, to refrain from comment on pending cases and to make its argument in court. The Attorney General's deviation from that sensible rule clearly endangers the integrity of the judicial process.
>
> --Truman appointee David Bazelon of the District of Columbia circuit dissenting in United States v. Frazier 476 F. 2d. (1973), pp. 901-2.

It has been shown in the preceding chapters that the Nixon Administration possessed both the desire and the opportunity to change judicial policy on criminal issues. Moreover, it has also been shown that Nixon appointees to the United States Courts of Appeals cast a greater proportion of their aggregate votes in criminal cases against the accused than did appointees of previous administrations, and it has

been suggested that differences in the voting behavior of the three groups may be accounted for, in part, by possible attitudinal cleaveages among them. However, bloc analysis of individual circuits reveals that the Nixon appointees to the Courts of Appeals apparently lack the attitudinal cohesiveness of Nixon appointees to the Supreme Court and appear to be attitudinally a more diverse group than his appointees to that high Court. The analysis to follow will explore this issue further by comparing the doctrinal responses of Nixon appointees to each other and to non-Nixon Democrats and Republicans. The issue to be examined, allegations of coerced confession or statement, was the most politically charged of the criminal issues in the vociferous debate of the 1960s; and, as the quotes that precede the text of this chapter indicate, the judges of the Courts of Appeals were not oblivious to the political pressures surrounding confession issues in the late 1960s and early 1970s. However, exclusion of confessions from criminal trials in the United States is not of recent origin nor is the controversy over it, which dates back to the Supreme Court's 1943 decision in McNabb v. United States[1] and has recurred intermittently since then. Prior to Moore v. Dempsey[2] (1923), exclusion of coerced confessions was based on the long established common law rule that coerced confessions were untrustworthy evidence.[3] However, in that case the Supreme Court fashioned a "fair trial" rule based on "the totality of the circumstances" to govern court review of state cases under

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[1]McNabb v. United States 318 U.S. 332 (1943).

[2]Moore v. Dempsey 261 U.S. 86 (1923).

[3]Otis Stephens, The Supreme Court and Confessions of Guilt (Knoxville: University of Tennessee Press, 1973), p. 17.

the fourteenth amendment. Then in 1936 in the case of Brown v. Mississippi,[4] the court specifically included coerced confessions as violating the fundamental fairness doctrine. It was not until the mid nineteen-sixties that the court was to tie the exclusion of confessions rationale for both state and federal cases to, first, the sixth amendment's right to counsel,[5] and second, to the fifth amendment's prohibition against compelled self-incrimination.[6]

The essence of the Court's early attempts to operate under the trusthworthiness and fairness doctrines was the effort to decide whether the confession was truly voluntary (apparently, no one at that time was suggesting that all use of confessions should be prohibited). In the early cases, including the aforementioned Moore v. Dempsey and Brown v. Mississippi, this effort was not particularly difficult as the cases often involved obvious physical coercion.[7] Later when the Court was to confront more subtle techniques of extraction short of physical torture that pervaded the law enforcement techniques of much of the nation, the decisions were to be legally and politically more difficult. "Justice" in these cases would be more elusive and the social consequence of judicial action potentially greater.

The problem with the voluntariness standard as a guide to court action was, according to some critics, its subjectivity and therefore unpredictability as a guide to law enforcement officers and lower courts.

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[4]Brown v. Mississippi, 296 U.S. 278 (1936).

[5]Escobedo v. Illinois, 378 U.S. 478 (1964).

[6]Miranda v. Arizona, 384 U.S. 444 (1966).

[7]Stephens, loc. cit., Chapter 3.

Generally a determination of voluntariness or coercion involved a balancing of police conduct against the individual's capacity to resist. One solution, it seemed, to avoiding the voluntariness test was prompt arraignment so that a neutral magistrate might inform a suspect of his rights, including silence and counsel, and the Federal Rules of Criminal Procedure provided for arraignment "without unnecessary delay." In 1943 the Supreme Court seized on that provision to throw out a confession without questioning its voluntariness.[8] Thus it embarked on a quest to avoid the more discretionary case-by-case approach to confessions that was to lead eventually, at the high tide of its effort, to Miranda v. Arizona. Some Congressmen reacted immediately and with hostility to the McNabb decision, thus initiating the long political struggle with members of Congress over the law of confessions which was to reach an intense peak in 1957 and 1958, continue through the nineteen-sixties, pouring over into the arena of presidential politics in 1964 and 1968, until it finally began to subside with the election of President Nixon, the exit of Justices Fortas and Warren, the first Nixon appointments to the Court, and the gradual retreat of the court itself on certain aspects of criminal procedure.

The McNabb decision was followed in 1957 by the closely akin Mallory v. United States,[9] which affirmed it. But these were federal, not state, cases and the federalism issue so volatile in other issue areas handled by the Court during the nineteen-fifties had not yet been broached with regard to criminal procedures. The first stroke of the court in regard to

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[8]McNabb v. United States, loc. cit.

[9]Mallory v. United States, 354 U.S. 449 (1957).

confession cases was the Escobedo decision of 1964 which extended the right to assistance of counsel back to the time when a suspect was being interrogated. Once again the Court threw out a confession without questioning its voluntariness. Escobedo, however, did not lay down a detailed procedure that police must follow before and during interrogation. Thus it was left to Miranda v. United States, which followed two years later, to bureaucratize the law of confession and admissions by outlining a detailed procedure for police to follow prior to and during the questioning of a suspect.

The Miranda decision provided the following general guidelines: First, the suspect was to be warned that he had a right to remain silent and that anything he said could be used against him.[10] Second, he was to be told that he had a right to consult an attorney before and during questioning and that if he could not afford it, an attorney would be appointed for him.[11] Third, the suspect could waive his right to silence and an attorney (in practice over ninety percent did) but the waiver must be "knowing," "intelligent," and there was to be a "heavy burden" on the prosecutor to prove such.[12] Finally, even after effecting a waiver, the suspect was to reserve the option of reasserting his right to silence and counsel at any point in the subsequent questioning, and the police were to respect it.[13] Ostensibly, if these procedures were followed by the policy both in spirit and letter, courts could assume

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[10] Miranda v. Arizona, op. cit., pp. 468-9.

[11] Ibid., p. 470-472.

[12] Ibid., p. 475.

[13] Ibid.

that confessions and admissions obtained thereafter were voluntary, and could avoid the older and supposedly more subjective balancing of police methods against individual capacity to resist. Miranda, however, despite its ambitious attempt to create a more uniform objective and settled law of confessions and admissions, contained many seeds of continuing controversy. When was a suspect to be considered "in custody"? Exactly what were the police to say to a suspect to implement the decision? Were written warnings sufficient? What did the prosecution have to prove to demonstrate "knowing and intelligent" waiver of rights? What standard of proof was to prevail in lower court hearings on motions to suppress confessions, beyond a reasonable doubt or preponderance of the evidence? Did an assertion of right to counsel or silence or a refusal to waive rights preclude further police attempts to interrogate? Once a waiver had been obtained did subsequent interrogation sessions require new warnings? Could a tainted confession inadmissible in the state's direct case be used for secondary purposes such as impeachment of a defendant's in-court testimony, or as an aid in gathering evidence which would be admissible?

Complicating further the political and legal picture that Miranda had attempted to simplify was the Omnibus Crime Control and Safe Streets Act of 1968,[14] which purportedly reversed both the Mallory and Miranda decisions and reestablished the voluntariness test as the prevailing standard in the law of confessions and admissions. On firm ground with Mallory, which had been based on the Court's construction of a

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[14]Omnibus Crime Control and Safe Streets Act, (1968), 18 U.S.C., Sections 921-928.

Congressional statute, the act was of doubtful constitutionality in attempting to reverse Miranda, which was based on the constitutional strictures of the sixth and particularly the fifth amendment to the federal constitution. Ramsey Clark, then Attorney General under President Johnson, ordered his staff to ignore it. However, when John Mitchell became Attorney General under the Nixon Administration, he advised Justice Department attorneys to adhere to Miranda procedures but to introduce even tainted confessions if agents had inadvertently fallen short of those standards.[15]

Miranda thus raised new questions, many of which remained unanswered by the Supreme Court. Numerous studies have been conducted concerning the impact of the Miranda decision on the police.[16] Few studies, however, have focused on the responses of lower court judges to the issues raised by Miranda and its progeny. Thus one of the purposes of this chapter is to identify some of the doctrinal responses of the Judges of the United States Courts of Appeals to confession issues posed during the 1972 term and before. Second, an attempt will be made to ascertain whether there are significant doctrinal differences between the Nixon appointments and previously appointed Democrats and Republicans on confession issues.

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[15]Stephens, op. cit., p. 164.

[16]Ibid., Chapter 7.

Statements Taken from Suspects After Assertion of Rights to Silence or Attorney

The central issue posed in most Miranda confession cases during the years fiscal 1970 through 1973 concerned the voluntariness of a waiver of rights and what police conduct was permitted in securing such a waiver. Fred Graham in his analysis of the Miranda case and its impact was undoubtedly correct in observing that Miranda had only pushed the voluntariness question back from the confession itself to the waiver of rights.[17] Several cases presented these waiver issues to the appeals judges during the 1972 term and earlier: A second circuit case, United States v. Collins[18] involved a nineteen-year-old heroin addict who three times declined to answer questions before finally signing a waiver and confessing to bank robbery. Judge Lumbard,[19] joined by Hayes, with Mansfield dissenting, held that Collins' decision to waive his rights "was not made involuntarily."

> We do not believe that anything decided in Miranda was meant to prohibit police officers from ever asking a defendant to reconsider his refusal to answer questions...Such a rule finds no support in the fifth amendment, nor, fairly read, in Miranda itself, nor in common sense.
>
> Here Collins was not subjected to any immediate re-interrogration but only asked to reconsider his refusal to answer. So long as such reconsideration is urged in a careful, non-coercive manner at not too great length and in a context that a defendant's assertion of his rights not to speak will be honored, it does not violate the Miranda mandate.[20]

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[17]Fred Graham, The Self Inflicted Wound (New York: MacMillan, 1970), p. 182.

[18]United States v. Collins, 462 F. 2d. 792 (1972).

[19]Lumbard (R, .47), Hayes (D, .82), Mansfield (N, 1.33). "R" refers to non-Nixon Republicans, "D" to non-Nixon Democrats and "N" to Nixon appointees. The number represents the score on at least six non-unanimous cases.

[20]United States v. Collins, op. cit., p. 797.

According to Judge Lumbard, "Collins had been told and could see that if he [Collins] told them [the agents] to stop they would."[21]

Mansfield, however, in dissent, called for reversal of Collins' conviction because he found it "difficult to conceive of a clearer violation of the plain and unequivocal prescription laid down by Miranda than that revealed here."[22]

> Strict and literal interpretation of the Supreme Court's directions in Miranda would have required the government thereafter to cease efforts to interrogate Collins, at least until he was represented by counsel.[23]

Pointing to the fact that on the morning of the confession Collins had refused to answer questions at ten and ten-thirty before agreeing at eleven, Mansfield found it "not surprising that a nineteen-year-old addict broke down."

Another second circuit case, United States v. Massimo,[24] involved a similar issue. Judge Hayes,[25] writing also for Moore and Smith, held that the police have the privilege of "asking a defendant to reconsider his refusal to answer questions," and that such a practice did not amount to a coerced waiver.

In Hendricks v. Swenson,[26] an eighth circuit case, Judge Heaney,[27]

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[21] Ibid.

[22] Ibid., p. 800.

[23] Ibid., p. 799.

[24] United States v. Massimo, 463 F. 2d. 1171 (1972).

[25] Moore (R, .05), Smith (D, 1.83).

[26] Hendricks v. Swenson, 456 F., 2d. 503 (1972).

[27] Heaney (D, 2.00).

in a dissenting opinion, adhered to the view that Miranda required that the suspect not be questioned further after declining to make a statement. Judge Van Pelt, with whom Judge Gibson agreed,[28] however, held the waiver voluntary under the circumstances. Thus in these three cases the majority employed the old voluntariness test based on the totality of the circumstances, whereas the dissenters attempted to avoid that test through their reading of the Miranda decision.

Police questioning after an assertion of rights by the accused. In the sixth circuit case of Combs v. Wingo,[29] however, a unanimous panel consisting of Judges McCree, Weick and Peck,[30] reversed the conviction of the defendant who had requested but was denied, aid of counsel before making a statement. Interrogating officers had agreed to stop questioning but then showed the accused an incriminating ballistics report. On seeing the report, Combs "broke down and confessed." The appellate panel held that the showing of the ballistics report was really "a [nother] question without a question mark..."

> ...according to Miranda interrogation must cease when a defendant requests an attorney...once defendant has asserted that he wants to exercise his rights, a statement taken after that cannot be other than the product of compulsion...[31]

Similarly in the seventh circuit case of United States v. Crisp,[32]

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[28]Gibson (D, .18), Van Pelt (District Judge).

[29]Combs v. Wingo, 456 F. 2d. 97 (1972).

[30]McCree (D, 1.80), Weick (R, .00), Peck (D, .38).

[31]Combs, op. cit., p. 99.

[32]United States v. Crisp, 435 F. 2d. 354 (1970).

Judges Cummings, Hastings and Fairchild,[33] condemned a confession taken after the suspect had asserted his right to silence. Crisp signed a waiver but then said he did not want to talk about the bank robbery. The agent then questioned him about his actions just before and after the robbery. Writing for the panel, Cummings held that

> Both the letter and the spirit of...Miranda call for condemnation of this...police conduct...Not even the slightest circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing less. Once the privilege has been asserted...an interrogator must not be permitted to seek its retraction, total or otherwise. Nor may he effectively disregard the privilege by unreasonably narrowing its intended scope.[34]

The fifth circuit took an intermediate position with regard to the issue of the taking of a statement after an assertion of rights. In United States v. Anthony,[35] appellant contested his theft conviction, arguing that a statement taken from him in the absence of counsel after he had requested counsel had to be suppressed independently of the issue of voluntariness. A unanimous panel consisting of Judges Brown, Goldberg and Morgan,[36] held in a per curiam decision that the continued conversation with the arresting officer had been initiated by the appellant and thus was admissible as evidence.

> In Hopkins we held that if an accused person initiates the conversation his statements do not result from interrogation and are therefore admissible.[37]

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[33]Cummings (D, .57), Hastings (R, .40), Fairchild (D, 1.23).

[34]Crisp, op. cit., p. 357.

[35]United States v. Anthony, 474 F. 2d 770 (1970).

[36]Brown (D, .92), Goldberg (D, 1.78), Morgan (D, .67).

[37]Anthony, op. cit., p. 773.

In the Hopkins[38] case alluded to in the previous quote, Goldberg had been joined by Tuttle and Wisdom[39] in rejecting the contention that no statement could be taken after a refusal to sign a waiver. In still another case, United States v. Phelps,[40] Goldberg was joined by Dyer[41] and a district judge in reiterating the Hopkins position that voluntary statements were admissible evidence even after refusals to sign waivers.

Consistent with the Hopkins doctrine, a unanimous panel of Judge Thornberry,[42] Brown, and Morgan in United States v. Priest[43] held that police questioning of Priest in his hospital room after his refusal to sign a waiver "until after seeing an attorney" was forbidden by Miranda even though Priest had talked freely and voluntarily.

> If such a request is disregarded and the questioning proceeds, any statement taken thereafter, must be presumed a product of compulsion, subtle or otherwise.[44]

In contrast to the fifth circuit, a unanimous panel in the fourth circuit upheld (per curiam) appellant's conviction even though he had refused to sign a waiver and had not initiated the ensuing statement. Judges Boreman, Craven and Butzner,[45] held that Thompson had admitted

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[38]Hopkins v. United States, 433 F. 2d. 1041 (1970).

[39]Tuttle (R, 1.80), Wisdom (R, 1.30).

[40]United States v. Phelps, 433 F. 2d. 246 (1970).

[41]Dyer (D, .40).

[42]Thornberry (D, 1.20).

[43]United States v. Priest, 409 F. 2d, 491 (1969).

[44]Ibid., p. 792.

[45]Boreman (R, .80), Craven (D, .88), Butzner (D, 1.56).

that he understood his rights and "thereafter freely and voluntarily answered questions."[46]

Three positions, then, are discernible in the preceding cases: (1) No statement can be taken from a suspect after refusal to sign a waiver of rights. This position, adhered to in the sixth and seventh circuits, was espoused by eight judges; five Democrats, two Republicans and one Nixon appointee. This position is most closely associated with the Miranda precedent's attempt to supersede the old voluntariness test with an objective, per se rule. (2) A second position taken by the fifth circuit would allow the taking of statements from suspects who had refused to waive their rights as long as the suspect had initiated the further conversation, but it would condemn statements taken as a result of further police questioning after a suspect's refusal to waive his rights. (3) The third position, most closely associated with the second and fourth circuits, would allow continued police attempts to interrogate a suspect even after he had refused to waive his rights, as long as such further police efforts were non-coercive as determined by the circumstances. Six Democrats and three Republicans took this position.

Although there were three alternative interpretations of Miranda in the eight cases just discussed, dissent occurred in only two cases (in the second and eighth circuits). In other circuits such disparate types as Judges McCree (score 1.80), Peck (score .38), and Weick (.00) of the sixth circuit, Fairchild (1.23) and Hastings (.40) in the seventh circuit, and Goldberg (1.78), Morgan (.67) and Dyer (.40) in the fifth

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[46] United States v. Thompson 417 F. 2d. 196 (1970).

circuit, were able to agree on a particular doctrinal position, despite the fact that some unanimously decided cases presented opportunities for judicial disagreement. Moreover, there was no evidence that judges were concerned about settling acknowledged inter-circuit conflict.

Interrogation Without the Knowledge of a Retained Attorney

A similar and troublesome issue for the judges in fiscal 1973 and earlier concerned the questioning of accused persons without the knowledge of their retained attorneys. Four cases involving three circuits dealt with this issue, which is another form of the first question (which involved continued attempts to interrogate after an assertion of rights).

The third circuit faced this issue in United States v. Cobbs.[47] Cobbs was visited in jail by police officers who did not inform his attorney. He agreed to waive his rights and confess. The court of appeals, in an opinion for the court written by visiting district judge Bechtle joined by appeals judges Rosenn and Hunter,[48] condemned the ethics of the police action but upheld its constitutionality citing the seventh circuit's decision in United States v. Springer.[49]

In a dictum Bechtle admitted that constitutional rights are endangered, because

> The relationship between lawyer and client risks significant erosion and the ability of counsel to effectively represent his client is seriously jeopardized when this kind of interrogation ensues.[50]

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[47] United States v. Cobbs, 481 F. 2d. 197 (1973).

[48] Bechtle (District Judge), Rosenn (N, 1.17), Hunter (N, 1.00).

[49] United States v. Springer 460 F. 2d. 1344 (1972).

[50] Ibid., p. 200.

However, he refused to reverse the conviction, and suggested safeguards:

> These risks would be...reduced if...the district court... would expect...the prosecution to include evidence...that the accused, prior to making a statement, specifically acknowledged that he was aware that he was represented by an attorney... however we do not require such evidence.[51]

Although the third circuit refused to impose this higher standard of proof of waiver under these circumstances, it acknowledged the seventh circuit's ruling that "...there is a higher standard imposed to show waiver of the presence of counsel once counsel has been appointed."[52] This position of the seventh circuit, taken in United States v. Springer, was by a divided panel with judges Pell and Cummings for the majority and Stevens[53] dissenting, upholding Springer's bank robbery conviction. Police officers had visited Springer in jail for the purpose of having him correct and sign a typed version of an earlier oral confession. There were no verbal warnings at the time and no further police questioning. Springer was given a warning card containing a waiver which he read and signed. He then signed the confession. His attorney had not been informed of the visit.

Pell, writing for himself and Cummings, held that there was "no per se rule that talking to a man without his attorney would vitiate a confession or that the mere reading of a waiver form was an inadequate Miranda warning."[54] Since there was no per se rule, Pell deferred to the district

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[51] Ibid.

[52] Ibid., p. 199.

[53] Pell (N, .53), Stevens (N, .91).

[54] Springer, p. 1352.

court's finding that Springer's waiver was voluntary because there was substantial evidence to support that conclusion.

> We are not prepared to say that the evidence was not enough to give substantial support to the decision. We do this even though we recognize that there is a higher standard imposed to show waiver of the presence of counsel once counsel has been appointed than before...[55]

Stevens, however, held that the visit (by agents) to Springer's cell without informing his attorney was "such a departure from procedural 'regularity' as to violate the due process clause of the fifth amendment."[56]

A later case[57] involving this issue in the seventh circuit resulted in three more judicial responses to the problem. Police had questioned appellant Durham four times after his arrest and preliminary hearing without telling his retained counsel. Judge Swygert[58] condemned this practice as forbidden by Massiah v. United States,[59] which had been applied retroactively by McLeod v. Ohio.[60]

> I read Massiah to bar the admissibility of the statements obtained here since the government had initiated adversary judicial proceedings against Durham prior to the time the statements were obtained...it (the government) could not, in my opinion, permissibly interview the defendant without advising his counsel.[61]

Massiah, however, had involved a post-indictment confession. Swygert

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[55] Ibid.

[56] Ibid., p. 1355.

[57] United States v. Durham, 475 F. 2d. 208 (1973).

[58] Swygert (D, 1.44).

[59] Massiah v. United States, 377 U.S. 201 (1964).

[60] McLeod v. Ohio, 85 S. Ct. 1556, 378 U.S. 582. (1965).

[61] Durham, p. 211.

applied it to any situation where adversary judicial proceedings had been initiated. Swygert's reading of Massiah would have avoided the waiver issue by ruling that agents can never question an accused person without informing retained counsel. He would have awarded a new trial in this case and forbidden the use of the confession in the new proceedings.

Judge Pell was equally troubled by the ethical issues involved, but refused to jettison the voluntariness test.

> To the extent that the opinion of Chief Judge Swygert rests upon a per se rule that would exclude confessions when counsel is not notified of or present at the interrogation, I dissent from the opinion...Not withstanding the existence of counsel... a defendant may waive the presence and assistance of that counsel, provided it very clearly appears that the accused deliberately and understandingly chose to forego that assistance.[62]

Pell's position had changed, however, from his opinion in the earlier Springer case.

> ...when the interrogation takes place after knowledge of the existence of counsel the situation calls for a ventilated determination that there was a deliberate and knowing waiver. The burden in this factual situation on the prosecution is a heavy one, but I do not agree with the implicit premise of Swygert's opinion that it is an impossible accomplishment...I would remand for a hearing on the matter of voluntariness.[63]

Judge Castle[64] disagreed with both Pell and Swygert, and was the only one of the three who would have affirmed the conviction. In response to Pell he argued that since this was a 1961 conviction, Miranda did not apply and therefore the pre-Miranda rule of voluntariness of the confession

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[62] Ibid., p. 212.

[63] Ibid.

[64] Castle (R, insufficient votes upon which to compute score).

under "a totality of circumstances" rather than the post-Miranda "voluntariness of waiver" doctrine, was controlling.

> ...even if Durham could prove his waiver was not knowing and voluntary, his failure to point to any other proof of coercion would make his confession admissible under pre-Miranda law.[65]

Thus Castle adhered to the older test of admissibility of confessions. Pell was operating under his interpretation of the more stringent Miranda rules and Swygert under even stricter rules which he claimed were imposed by Massiah and McLeod. Pell and Swygert formed the majority since they were able to agree to remand the case for a lower court determination of the factual questions concerning the circumstances under which the confession was signed.

Finally, in the 1970 term case of United States v. Crisp,[66] Judges Cummings, Hastings and Fairchild[67] "declined to read into McLeod any holding that after indictment a defendant may never effectively waive his right to counsel..."[68]

> Although agents could have informed Crisp's attorney... failure to do so does not require a reversal in this case.[69]

As with the earlier issues concerning continued questioning after refusal of accused persons to waive their rights, both inter- and intra-circuit conflict were evident in cases concerning police questioning without

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[65]Durham, p. 215.

[66]United States v. Crisp, loc. cit.

[67]Fairchild (D, 1.23).

[68]Crisp, p. 358.

[69]Ibid., p. 358-9.

informing the retained attorney of the accused. Yet in two of the four cases there was no dissent, despite the fact that the cases turned exclusively on differing possible interpretations of the law.

More importantly for this study, four Nixon appointees, Rosenn and Hunter in the third circuit, and Pell and Stevens in the seventh, split three different ways on the issues just discussed. This finding further reinforces the revelations of the bloc analysis that the Nixon appointees varied in their attitudes toward criminal issues from circuit to circuit and within individual circuits.

Failure of Police to Honor Requests for Counsel

A number of similar cases dealt with confessions obtained after assertions of right to counsel had not been honored by the police, the issue addressed in the landmark Escobedo v. Illinois.[70] In United States v. Howards[71] in the District of Columbia circuit, appellant Howards had been arrested in North Carolina for robbery and felony murder. After being read his rights he said he "didn't know whether he should get an attorney in Raleigh or wait until he got back to Washington, D.C."[72] The arresting officer said that he couldn't advise Howards and then showed him a confession signed by three accomplices, a familiar police interrogation tactic used in the Escobedo case. Howards then agreed to waive his rights and confess. On appeal from his conviction he argued that Miranda required all questioning to cease after an assertion of

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[70] Escobedo v. Illinois, loc. cit.

[71] United States v. Howards, 470 F. 2d. 406 (1973).

[72] Ibid., p. 408.

rights. A unanimous panel consisting of Nixon appointee Judge MacKinnon and Democrat McGowan, with Democrat Leventhal[73] concurring, held that Howards had not expressed an unequivocal desire for an attorney. "Being undecided about an attorney," they wrote, "is substantially different from making a request for an attorney."[74] The court also noted that informing Howards of the confessions of his fellow suspects was not coercive in this case because the information was true. Leventhal in his concurrence, however, had "some difficulty with pursuing a man who says he wants an attorney through the means of advising him of the confessions of the others in the hope that he might be led, as he was in this case, to say he wanted to tell what he knew and respond to the question."[75] In this respect he quoted Miranda:

> If he [the suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.[76]

Leventhal, however, voted to affirm the conviction because Howard's former trial experience and a second waiver of rights to a magistrate gave him "no doubt" that the confession was voluntary. Thus, although Leventhal gave lip service to Miranda and to a per se rule of exclusion of confessions, he ultimately, like the others on the panel, employed a voluntariness test based on an examination of the relevant circumstances.[77]

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[73]MacKinnon (N, .20), McGowan (D, .71), Leventhal (D, 1.06).

[74]Howards, p. 407.

[75]Ibid., p. 410.

[76]Ibid.

[77]Ibid.

In the fifth circuit an unanimous panel with Judge Gewin[78] writing for Goldberg and Dyer upheld the conviction of a Colombian citizen arrested in Florida who had requested to see the Colombian Consul but who had waived his rights and confessed after that request was denied by arresting officers. Gewin wrote that

> The assertion of a desire to see the Colombian Consul was at most an ambiguous request the motivation for which was unknown. It does not show the specific connotation necessarily involved in the request for counsel. To conclude that such requests would invoke Miranda protection would unnecessarily and universally broaden the purpose of the Miranda decision.[79]

In the eighth circuit case of United States v. Young,[80] an unanimous panel of Judges Duffy, Cummings and Sprecher[81] held that police failure to honor Young's request for counsel did not vitiate his subsequent spontaneous confession to a postal inspector, because the police themselves had not interrogated Young and the postal inspector was part of a distinct investigative body. Therefore, Young's early assertion of his rights did not invalidate a later waiver.

In the ninth circuit case of United States v. La Monica,[82] Judges Goodwin and Merrill[83] and District Judge Skopil upheld appellant's conviction even though a statement had been taken and used after an assertion of rights. Police had not questioned LaMonica further after he had

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[78]Gewin (D, .86).

[79]United States v. Arroyave, 477 F. 2d. 154 (1973), p. 162.

[80]United States v. Young, 471 F. 2d. 109 (1972).

[81]Duffy (D, .80), Sprecher (N, .33).

[82]United States v. LaMonica 472 F. 2d. 580 (1973).

[83]Goodwin (N, .00), Merrill (R, 1.36), Skopil (District Judge).

expressed the desire to retain counsel and remain silent. Instead they had taken him to an office for inventory of his personal possessions. In the course of this routine "booking" procedure, a police officer finding a receipt in La Monica's pocket asked, "What does this mean?"[84] La Monica replied that he had retained an attorney before his trip "just in case something went wrong."[85] The admission was used at La Monica's trial. The appellate panel held the statement admissible because the policeman's question had not been intended for the purpose of obtaining an incriminating statement from the suspect. The judges pointed out that La Monica had not been subjected to persistent and coercive interrogation and that there had been no resort to guile or trickery. Thus the judges in this case clearly leaned toward the voluntariness test in their justification of their decision.

In a similar fifth circuit case, Dempsey v. Wainwright,[86] Dempsey had requested an attorney after his arrest and two hours later refused to sign a waiver. He was not supplied an attorney at that time, and later said to a police officer, "I did it but you will never prove it." This statement was used in his trial and he challenged its admission on appeal. Judges Wisdom and Roney[87] voted to affirm the conviction on procedural grounds, but Rives[88] dissented, asking the district court to hold a hearing to determine whether Dempsey's statement was a result of

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[84]La Monica, p. 581.

[85]Ibid.

[86]Dempsey v. Wainwright 471 F. 2d. 604 (1972).

[87]Roney (N, .36).

[88]Rives (D, 1.69).

the failure to provide counsel within a reasonable time after his reqest.

> Appellant's request for counsel should have been honored within a reasonable time..Beyond such time, appellant should not be subjected to the risk of making a damaging statement without the advise of counsel.[89]

Ambiguous or Contradictory Statements of Defendant Rights

Another issue that split the judges during fiscal 1973 concerned the use of ambiguous or contradictory statements of defendant rights by arresting officers. In United States v. Massimo[90] second circuit judges Hayes, Moore, and Smith upheld the validity of a police warning which included the statement, "We have no way of furnishing you with a lawyer but one will be appointed for you if you wish, if and when you go to court."[91] This statement followed immediately the traditional warning of right to counsel before and during questioning.[92] Hayes reasoned:

> Massimo was clearly warned that he could have a lawyer present during the questioning. The only conclusion that Massino would have been justified in reaching on the basis of the warning was that since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.[93]

This opinion relies directly on the identical holding of the fifth

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[89] Wainwright, p. 607.

[90] United States v. Massimo, loc. cit.

[91] Ibid., p. 1173.

[92] The full warning is as follows: "You have the right both to a lawyer for advice before we ask you any questions and to have him with you during questioning. You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court." p. 1173.

[93] Ibid., p. 1174.

circuit in United States v. Lacy,[94] a case decided in fiscal 1972. There, Judges Wisdom, Coleman, and Simpson found that the above warning administered by federal agents comported with Miranda requirements because the fact

> that the attorney was not to be appointed until later seems immaterial since Lacy was informed that he had the right to put off answering any questions until the time when he did have an appointed attorney.[95]

The seventh circuit case of United States ex. rel. Williams v. Twomey[96] involved the use of an identical warning by Indiana and Illinois police. However, a divided panel, District Judge Dillin, writing with the agreement of Judge Swygert, with Pell in dissent, condemned the warnings because:

> Miranda requires a clear and unequivocal warning to an accused... We hold that the warning given here was not an effective and express explanation...In one breath appellant was informed that he had the right to appointed counsel during questioning. In the next breath he was told that counsel could not be provided until later...The entire warning is..., at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment...The practice of police interrogation of an accused, after informing him that counsel cannot be provided at the present time, is a practice anticipated and expressly prohibited by the Miranda decision.[97]

Pell, in dissent, lamented that although "there was little doubt that the defendant committed the homicide...(he) may be freed because of non-compliance with an overly technical application of the Miranda rule."[98]

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[94]United States v. Lacy 446 F. 2d. 511 (1971).

[95]Ibid., p. 513.

[96]United States ex. rel. Williams v. Twomey 467 F. 2d., 1248 (1972).

[97]Ibid., p. 1250-51.

[98]Ibid., p. 1253.

> I cannot agree...that the Miranda warnings must...convey to the accused that he is entitled to a government furnished counsel here and now. If here and now means the police station, this is just not a realistic statement because police stations do not furnish government counsel...If it is contended that the accused...did...proceed to talk or answer questions on a voluntary basis, there would be indeed a heavy burden upon the state to demonstrate voluntariness. I would not hold however that it was an impossible burden.[99]

Pell would have remanded the case for a hearing on the voluntariness issue and again placed himself in the "voluntariness plus" camp wtih regard to waiver of rights. Finally, he admonished the police to eliminate this source of constitutional challenge by revising their warnings.

To summarize, this type of warning, clearly designed to nullify the impact of Miranda and, it seems, in fairly widespread use at both federal and state levels, was upheld by eight judges and condemned by two, with one, Pell, in the intermediate position of not condemning the warning but not affirming the conviction either. Thus over two thirds of the circuit judges were found to have narrowly interpreted Miranda standards, about the same proportion as with the other issues. Here again, moreover, although the cases turned on different interpretations of the law, two of three decisions were unanimous.

Another issue, involving warnings that seemed to suggest leniency in return for a waiver of rights, was faced by panels on the fifth and seventh circuits. In Frazier v. United States,[100] a fifth circuit case decided in fiscal 1971, Judges Rives, Wisdom and Rodbold, in a per curiam

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[99] Ibid.

[100] Frazier v. United States. 434 F. 2d. 934 (1971).

decision, held that Frazier's confession was not made involuntary by reason of the single fact that the F.B.I. agents told him that if he cooperated with them his cooperation would be made known to the U.S. Attorney, and that there might be some consideration given by the U.S. Attorney but that the agent could make no promises. Standing alone, wrote the court, this was not sufficient to establish that Frazier's in-custody confession was involuntary.[101]

The seventh circuit case United States v. Springer[102] presented the identical issue to Judges Pell, Cummings and Stevens. In the course of encouraging Springer, a bank robbery suspect, to confess, agents (apparently as part of routine procedure) told Springer that the judge, prosecutor and U. S. Commissioner would know of his willingness to cooperate, "although they could make no promises." Springer then waived his rights and confessed. Pell, writing for Cummings with apparently no objection from Stevens (who dissented on other grounds) held that:

> no public policy should castigate a confession of crime merely because it may have been prompted by the hope that cooperation might achieve or increase chances of a lenient sentence.[103]

All six judges then held that this particular statement was not enough, taken alone, to vitiate a waiver.

In the second circuit a confession obtained through the promise of reduced bail was upheld by Judges Lumbard, Kaufman and Hays, who relied on the "voluntariness" of the waiver under the "totality of the circumstances."

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[101] Ibid., pp. 995-6.

[102] United States v. Springer, loc. cit.

[103] Ibid., p. 1347.

They held that Bram v. United States[104] which had held confessions involuntary if "obtained by any direct or implied promises, however slight," had not been applied by the Supreme Court in subsequent cases with "wooden literalness" and that the Supreme Court had "made it clear that the test of voluntariness was based on all the circumstances."[105]

Adequacy of Written Warnings

Three cases dealt with the adequacy of written explanations of Miranda warnings without oral additions. In the fifth circuit case of United States v. Bailey,[106] Judges Goldberg, Brown and Morgan approved the use of warnings presented in writing only. In the seventh circuit case of United States v. Springer[107] (already discussed with regard to other issues), Judges Pell, Cummings and Stevens similarly held that "certainly the fact that the warnings given were only by a written form cannot be dispositive." In an earlier seventh circuit case, United States v. Johnson,[108] Judges Kiley, Castle and Kerner upheld a confession involving the questionable verbal warning that the suspect "could have a lawyer if and when he went to court" because appellant had signed a correct written statement of his right. "Having signed the written waiver form, without evidence to the contrary, he cannot now contend that

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[104]Bram v. United States, 18 Supreme Court 183 (1897).

[105]Case cite misplaced.

[106]United States v. Bailey, 468 F. 2d. 652 (1972).

[107]United States v. Springer, loc. cit.

[108]United States v. Johnson, 426 F. 2d. 1172 (1972).

he did not understand his rights."[109]

Other cases involved the absence of any warnings whatsoever in police interrogations of American citizens in foreign countries. In two cases decided in the fifth and ninth circuits judges agreed that Miranda warnings were not required in foreign countries because the policy purposes of Miranda to prevent third degree tactics could not be affected in a foreign country by excluding the confessions from American trials. The only question in these cases, said the judges, was whether or not the confession was voluntary.

In the fifth circuit's Kilday v. U.S.[110] a unanimous panel of Judges Wisdom, Ainsworth, and Clark upheld the conviction of an appellant who had been arrested and questioned in Argentina without Miranda warnings. In the more controversial United States v. Trenary[111] an American citizen was questioned in Mexico with the aid of an American customs official acting as an interpreter. Trenary, who was not aware that the interpreter was an American official, was given no warnings and confessed. Judges Chambers, Carter and Wright,[112] in an unanimous per curiam opinion, upheld the conviction pointing out that the American Customs agent had only asked questions posed by the Mexican police and had asked no questions of his own. For precedent the court relied on United States v.

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[109] Ibid., p. 1115.

[110] Kilday v. United States, 481 F. 2d. 655 (1973).

[111] United States v. Trenary, 433 F. 2d. 680 (1971).

[112] Chambers (R, .11), Carter (D, .06), Wright (N, .73).

Chavarria[113] and United States v. Nagelberry[114] decided in the ninth and second circuits respectively.

In Nagelberry, decided in fiscal 1971, Judge Smith, who was joined by Friendly and Hays, held that

> The Miranda rule has no application in a case...where the arrest and interrogation were by Canadian officers...The presence of an American officer should not destroy the usefulness of evidence legally obtained on the ground that methods of interrogation of another country, at least equally civilized, may vary from ours.[115]

In Chavarria, another fiscal 1971 case, Duniway, Carter and Hufstedler were unwilling to apply Miranda to foreign interrogations because of the "ineffectiveness" of the exclusionary rule as a deterrent to foreign police methods.

In other cases involving a lack of Miranda warnings, Judges Hastie, Van Dusen and McLaughlin of the third circuit upheld the confession and conviction of a sixteen-year-old who had been questioned for two and a half hours at midday without being informed of his rights to silence or counsel, because the judges found that "under the circumstances" the confession had not been coerced. However, this case stemmed from a 1961 pre-Miranda conviction.[116] And in the second circuit case of United States v. Gaynor,[117] Judges Kaufman, Anderson and Oakes overruled a lower court's decision that a postal inspector was required to interrupt

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[113] United States v. Chavarria, 443 F. 2d. 904 (1971).

[114] United States v. Nagelberry, 434 F. 2d. 585 (1970).

[115] Ibid., p. 587.

[116] Loray v. Yeager, 446 F. 2d. 1360 (1971).

[117] United States v. Gaynor, 472 F. 2d. 899 (1973).

Gaynor's spontaneous admissions with a warning "that he doesn't have to make the statement and that if he does make it, it will be used against him."[118] In an earlier interrogation session Gaynor, who was being investigated for mail theft, had waived his rights. Only in the elevator, after the interrogation session, had he made his unsolicited admissions.

Another second circuit case, United States v. Carneglia,[119] also dealt with the issue of adequacy of warnings. Carneglia, arrested for the theft of a tractor, claimed that he was not warned of his right to counsel prior to his on-the-street interrogation. The arresting officer claimed that "he had probably warned him," because he "usually did." In an unanimous opinion, Judges Feinberg, Lumbard and Friendly affirmed the conviction, reasoning that "Miranda was not a ritualistic formula." Clearly the judges were relying on the older voluntariness test in considering personal characteristics of the suspect and deciding that he knew of his right to counsel even if not told of it by the police officer. Feinberg acknowledged that Miranda had admonished that courts should not "enquire in individual cases whether the defendant was aware of his rights without the warnings being given." However, he holds,

> "(W)e do not think that evidence of subsequent conduct here is irrelevant to show what Carneglia understood from warnings which concededly were administered.[120]

By focusing on what appellant understood rather than on what was said, the panel, in this case, concededly engages in the kind of "speculation"

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[118] Ibid., 900.

[119] United States v. Carneglia, 468 F. 2d. 1084 (1972).

[120] Ibid., p. 122.

about "the knowledge defendant possessed" that Miranda forbids.

Proof of Waiver

Four cases during fiscal 1973 involved the issue of government proof that a waiver was "knowing, intelligent, and voluntary," as required by Miranda. In United States v. Frazier,[121] decided by an en banc District of Columbia Court, Frazier, a robbery suspect, first signed a waiver and then began to confess to a series of robberies and shootings. When, however, the interrogating officers began to take notes on his confession the defendant objected, and he also objected to the officer's offer to write up the confession and have him (Frazier) sign it. When the officer put the pad away Frazier again began to talk freely and confessed to the robbery, for which he was subsequently convicted. Democratic Judges McGowan, Tamm and Leventhal joined Nixon appointees MacKinnon, Robb and Wilkey in upholding the waiver, confession, and conviction. McGowan, writing for the majority, relied on a psychologist's testimony in the trial court that Frazier was capable of understanding, and listed other factors such as the fact that Frazier had not been under the influence, had been warned repeatedly and could hear adequately. Thus his opinion reads very much like the rationales offered by previous judges under the older voluntariness "under the totality of circumstances" test.

Judges Bazelon, joined by fellow Democrats Robinson and Wright, dissented:

> The record makes it crystal clear that the officers failed to correct appellant's apparent misunderstanding by explaining to him that an oral confession was as damaging

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[121] United States v. Frazier, loc. cit.

> as a written one because they were afraid he would stop talking.[122]

Bazelon continued:

> The plain rule of Miranda requires us to reverse this conviction. The Supreme Court has stated that a waiver of the right against self incrimination is ineffective if there is any doubt that it was made with full understanding of the consequences. Since there is ample reason to doubt appellant's understanding here, it was improper for police officers to secure his statement, and error for the trial court to admit it.[123]

In the eighth circuit case of Hendricks v. Swenson,[124] Judge Heaney, in dissent, held that Swenson could not knowingly and intelligently waive his rights and confess on videotape because, due to the novelty of the medium, he could have no real understanding of the implications of a waiver. Written confessions, argued Heaney, were a blander medium familiar to a suspect. The court majority, however, held that the videotape was not so novel or inherently incriminating as to require special warnings. They compared videotape to the already judicially sanctioned use of photographs in court.

In the ninth circuit case of United States v. Moreno,[125] Judges Hufstedler[126] and Wright, and District Judge Lucas, held unanimously that an express waiver of rights was not necessary where the suspect had "indicated" that she understood her rights. The judges held per curiam

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[122] Ibid., p. 122.

[123] Ibid.

[124] Hendricks v. Swenson, loc. cit.

[125] United States v. Moreno, 466 F. 2d. 1205 (1972).

[126] Hufstedler (D, 1.80).

that courts could look at the particular case and imply a waiver where circumstances warranted. Here a nineteen-year-old English-speaking, Mexican-American woman,who had attended high school in the United States, had been detained at the border, had been given proper warnings, had signed a waiver, and had confessed to a narcotics charge.

Rights of Juveniles

Three cases dealt with the rights of juveniles in confession cases and divided panels in the seventh and eighth circuits. In United States v. Fowler,[127] Judge Kiley, joined by Nixon appointee Stevens, with visiting appeals judge and Nixon appointee Kilkenny dissenting, held that full Miranda warnings must be given to juveniles and that a failure to warn of the right to silence was a defective warning under the Miranda rules. Further, Kiley strongly suggested that the presence of an attorney might be an essential requisite to a voluntary waiver in juvenile confession cases. Kilkenny, however, "doubted that full Miranda warnings were required in juvenile proceedings," but assuming that they were, he thought that the oral and written warnings given in this case were sufficient, because Miranda did not require "...a ritual of words to be recited by rote according to didactic niceties."[128]

Both eighth circuit cases, Loray v. Yeager[129] and Fugate v. Gaffney,[130] dealt with pre-Miranda confession cases, decided against the defendant on

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[127] United States v. Fowler, 476 F. 2d. 1091 (1973).

[128] Ibid., p. 1094.

[129] Loray v. Yeager, loc. cit.

[130] Fugate v. Gaffney, 453 F. 2d. 362 (1971).

the basis of the voluntariness of the confession under the totality of the circumstances rule. The Fugate case is notable because of Judge Heaney's dissent, in which he, like Kiley and Stevens in the Fowler case, abandons the voluntariness test and seems to opt for something like a per se rule in juvenile confession cases:

> Two recent Supreme Court cases have construed Gallegos as holding, in essence, that a confession secured from a fifteen-year-old child in the absence of counsel or a parent capable of protecting the child's rights, violates the due process clause of the Constitution.[131]

Retreating slightly from this position, he argues for at least a higher standard for judging juvenile confessions:

> The Supreme Court has always paid special heed to the age of the offender in determining whether or not a child's confession is voluntary and even though the same test was applied, i.e., the totality of the circumstances test, it has always been applied more strictly in cases involving defendants of Caril Fugate's approximate age.[132]

Although these cases are not strictly comparable, the liberal judges want to apply constitutional standards equal to or higher than adult standards in juvenile cases. Moreover, their emphasis on the presence of counsel in judging the voluntariness of a waiver or confession comes close to applying a per se rule in the Escobedo-Miranda tradition where one factor such as age or one defect in the warning, or failure to provide counsel are determinative of the issue. Thus one sees the continual emphasis of the more "liberal" judges on what critics term as "technicalities" rather than an attempt to fathom the actual voluntariness or involuntariness of the confession.

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[131] Ibid., p. 368.

[132] Ibid., p. 385.

Harris v. New York[133] the Impeachment Issue

One of the first fruits of the "Nixon Court" was the controversial Harris v. New York, which some critics claim partially reversed the Miranda decision by allowing the prosecution to introduce tainted confessions, not as direct evidence, but in order to impeach the testimony of defendants who took the stand in their own defense. Four cases involving Harris and related issues of impeachment were heard by the Courts of Appeals in fiscal 1973.

In the second circuit case of United States v. Kahan,[134] Kahan had lied in claiming that he lacked funds for a lawyer and wanted one appointed for him. This lie was used to impeach his credibility when he took the stand to defend himself against charges of perjury and illegal aid to aliens. He claimed that this use of his lie violated his rights under both Escobedo and Miranda, as it penalized the exercise of constitutional rights. Judges Smith and Feinberg agreed and voted to overturn his conviction. Smith wrote:

> The government's claim that the privilege [fifth and sixth amendment rights alluded to above] does not extend to false statements is not well taken. The ultimate truth of the matter asserted in the pre-trial request for appointed counsel is of no moment. A defendant should not be forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for the appointment of counsel...Defendant was required to speak in order to obtain appointed counsel.[135]

Judge Mansfield, however, dissented. He argued that, although it was "settled that self-incriminatory statements given at a pre-trial

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[133]Harris v. New York, 401 U.S. 222 (1971).

[134]United States v. Kahan, 479 F. 2d. 291 (1973).

[135]Ibid., p. 292.

hearing in support of application for enforcement of fourth and sixth amendment rights may not be later admitted at trial as part of the government's case...this (exclusion) does not extend to perjury or false statements."[136] The purpose of the Supreme Court's exclusion of incriminating statements given at pre-trial hearing in support of applications for enforcement of constitutional rights was not, according to Mansfield, to preclude the accused from telling the truth at the pre-trial hearing. No legitimate interest, he argued, is served by extending the rule to outright perjury or falsification.

> It is unnecessary to grant him a license to falsify in order to protect his exercise of pre-trial constitutional rights.[137]

Moreover, Mansfield continued, the other evidence of guilt was overwhelming.

In his dissent Mansfield demonstrated the emphasis on getting at the truth as a value to be counterpoised against the value of precluding self-incrimination. This argument for protecting the truth-seeking function of trial courts was at the heart of the Supreme Court's decision in Harris v. New York to permit the use of tainted statements to refute in-court testimony when a defendant chose to take the stand.[138] A second aspect of the Mansfield dissent emphasized his faithfulness to precedent. In the cases seen so far he went strongly on record in

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[136] Ibid., pp. 295-6.

[137] Ibid., p. 296.

[138] Ironically, allowing coerced statements to be used for impeachment purposes abandons also the old common law rule that coerced statements are themselves untrustworthy evidence.

support of both Miranda v. United States and its seeming contradiction, Harris v. New York. Glendon Schubert would equate such seeming ideological inconsistency with "dogmatism" as a characteristic of the "judicial mind."[139]

United States ex. rel. Burt v. New Jersey[140] in the third circuit involved another impeachment issue. Burt, after shooting a "friend," left the scene and was arrested a few hours later on a breaking and entering charge after being discovered asleep in an abandoned store. On his arrest for the breaking and entering charge, he did not mention to the police that he had earlier shot his "friend." Later, on trial for murder, the prosecution attempted to use Burt's silence on this point to impeach his testimony that the shooting was accidental. If the shooting had been accidental, contended the state, Burt would not have remained silent, but would have sought aid or enquired as to the condition of the friend. On appeal, Burt contended that the use of his post-arrest silence violated fifth amendment rights guaranteed in Miranda.

In a per curiam opinion, Judges Van Dusen and McLaughlin, with Rosenn writing a concurring opinion, sustained the use of silence for the purposes of impeachment on two grounds: one, that "the jury had adequate basis (for its verdict) without the aid or influence of the contested evidence," and, two, that since Burt had not been accused of murder at the time, he was not in the kind of accusatorial situation

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[139]Glendon Schubert, loc. cit., chapter one.

[140]United States ex. rel. Burt v. New Jersey, 475 F. 2d. 235 (1973).

to which Miranda rules apply.[141]

Rosenn, however, chose to base his concurrence on Harris v. New York.

> I perceive no difference between impeachment by prior inconsistent statements made in the absence of a Miranda warning and impeachment by prior silence inconsistent with trial testimony which justifies not applying the Harris rationale in the present case. In weighing the value to society of ascertaining the truth in the judicial process against the value to the individual of protection against self incrimination, the court determined in Harris that the former value must under some circumstances be given priority when the two values conflict directly.[142]

To Rosenn, the coercive effect here was minimal and not substantial enough to "raise the defendant's right...over society's interest [in discovering the truth]."[143] Thus Rosenn, like his fellow Nixon appointee Mansfield, strongly defended the controversial Harris v. New York decision and stressed the truth seeking functions of the trial courts.

In a similar case in the fifth circuit,[144] Judge Morgan, supported by Clark and District Judge Skelton, also held that Harris v. New York allowed the use of a defendant's silence to impeach his testimony once he had taken the stand. Appellant Ramirez had claimed under oath that he had been coerced into selling marijuana and heroin by a stranger from Mexico and had been glad to be caught. On cross examination and in his summation, the prosecutor pointed out that Ramirez had never told that

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[141] Ibid., p. 236.

[142] Ibid., p. 233.

[143] Ibid., p. 239.

[144] United States v. Ramirez, 441 F 2d. 950 (1971).

story before, particularly not when he was arrested. Morgan explained,

> Once Ramirez elected to testify...he became subject to the traditional truth testing devices of the adversary process, including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest.[145]

The identical issue faced a panel in the tenth circuit.[146] There, however, a divided court reaffirmed a district court's dismissal of Johnson's in-court testimony with his prior silence. Johnson had taken the stand to claim that the woman he was accused of raping had consented after he caught her stealing his car. The prosecutor on cross examination rejoined that Johnson, when arrested, hadn't told the police that. The prosecutor also alluded to Johnson's silence in his summary statement to the jury. Judges Lewis and Murrah reasoned that Harris v. New York allowed the introduction only of inconsistent or contradictory statements, and that silence was not such a statement.

> You would have to start warning a suspect that his silence could be used against him.[147]

Judge Breitenstein, in dissent, contended that

> The majority throws up yet another road block to impede the search for truth in the administration of criminal justice...[148]

Harris, he argued, "destroyed Miranda." Pointing to the conflict between the fifth amendment's right against self-incrimination and the duty to testify truthfully, he held that

> the majority loses sight of the balance which must be

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[145] Ibid., p. 954.

[146] Johnson v. Patterson, 475 F. 2d. 1066 (1973).

[147] Ibid., p. 1068.

[148] Ibid.

> maintained...and converts a criminal trial from a search for truth to a game to be won by the cleverest players.[149]

According to Breitenstein, a defendant who takes the stand waives his right to silence, and there can be no partial waiver of a constitutional right.

In another impeachment case,[150] Nixon appointees Mansfield, Oakes, and Timbers applied the Harris precedent to Escobedo type cases as well as to Miranda. LaVallee, convicted of two murders, had been denied his request to see counsel before giving a statement which was used to impeach his in-court testimony that he had shot in self defense.

To summarize, Nixon appointees Rosenn, Mansfield, Oakes, Timbers, and Clark all supported the extension of the Harris principle, and they were joined by Republican Breitenstein and Democrat Morgan. The extension of the Harris principle was opposed by Democrats Smith and Feinberg of the second circuit, Republican Lewis of the tenth circuit, and Democrat Murrah of the tenth circuit. In particular, those who see the Harris case as controlling stress the truth-seeking functions of the court and employ a "balancing" test to resolve the issue.

Other Cases

The final major issue facing the courts of appeals during fiscal 1973 was that of delayed arraignment and the Crime Control Act's attempt to reverse Mallory v. United States in its holding that unnecessary delay in arraignment constitutes per se ground for exclusion of a

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[149] Ibid., p. 1069.

[150] United States ex. rel. Wright v. LaVallee 471 F. 2d. 123 (1972).

confession. In six cases decided in four circuits no judge defied Congress on this issue, although the ninth circuit overturned one conviction in which delayed arraignment was a minor factor.[151]

Circuit by Circuit Analysis*

The second circuit was one of the most conservative in terms of its stances on doctrinal issues during fiscal 1973. Only Nixon appointee Mansfield endorsed the Miranda precedent in the eight cases previously discussed and only Democrats Smith and Feinberg opposed the extension of the Harris v. New York precedent. Ironically, Mansfield supported the application of the Harris precedent with the same ardor that he supported Miranda. In spite of the two cases just mentioned there appeared to be little conflict on the second circuit in confession cases.

Similarly the third circuit emerged as a conservative circuit although this conclusion is based on only two important cases. The third circuit endorsed the police practice of questioning without informing a retained attorney and the use of a suspect's silence for the purpose of impeaching his testimony. There were no divisions among the judges on this latter issue, but Nixon appointee Rosenn was most eager to apply the Harris principle to the impeachment of a defendant's in-court testimony by use of his prior silence, whereas Van Dusen and McLaughlin merely avoided the Miranda rule by saying the suspect was not in an accusatorial situation and therefore Miranda did not apply.

The fourth circuit decided one important and controversial case in a conservative fashion by sanctioning continued police questioning of a

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[151] United States v. Stage, 464 F. 2d. 1057 (1972).

*The first circuit decided no cases involving alleged coerced confessions or admissions in fiscal 1973.

suspect after his refusal to sign a waiver of rights. There was no evidence of conflict on the fourth circuit on confession issues.

There was almost no evidence of intra-circuit conflict on the fifth circuit, which occupied a moderate to conservative position in eleven confession cases. The circuit refused to allow police to initiate further conversation if a suspect refused to waive his rights, but they allowed police to pursue the matter if the suspect initiated conversation after refusing to waive his rights. Panels of the circuit also sanctioned police disregard of "ambiguous requests for counsel" and police failure to honor request for counsel quickly. More important, panels of the fifth circuit upheld the ambiguous and contradictory police warning which included the statement that counsel could not be provided here and now, as well as police offers of leniency in order to obtain waivers, police use of written warnings, the absence of warnings in out-of-country interrogations and use of a suspect's silence to impeach his in-court testimony. There was only one dissent in the eleven cases decided by the fifth circuit.

The sixth circuit heard only one important confession case and forbade further police questioning after an assertion of rights.

Unlike the other circuits discussed so far, the seventh was more liberal and more divided. On the two major waiver issues, panels of the circuit forbade further police questioning after a refusal to waive rights and required a "higher standard of proof" of waiver in cases involving questioning without a retained attorney. Here the judges split, with liberal Democrat Swygert arguing for a per se condemnation of such practices and Republican Castle opposing the "higher standard

of proof" rule proposed by Nixon appointee Pell. Similarly, the seventh circuit was alone in condemning police use of the ambiguous and contradictory Miranda warning that counsel "cannot be provided here and now but later, in court." However, Pell opposed a blanket condemnation of such warnings (advocated by Swygert) and called for remanding such cases to the lower court for a determination for the voluntariness of the waiver on a case by case basis. Finally, the seventh circuit was alone in requiring full Miranda warnings for juveniles. Only in the approval of police use of written warnings does the seventh circuit conform to the "conservative" trends of the other circuits.

During fiscal 1973 panels in the eighth circuit decided four cases against the accused or prisoners. In three of these liberal Democrat Heaney dissented. The circuit allowed further police questioning after a refusal to waive rights, sanctioned the use of videotapes to record confessions, and allowed the taking of a confession from a juvenile who was unaided by counsel. Heaney's dissents were based on his attempt to substitute per se rules for the voluntariness test of waiver of rights.

The ninth circuit is more difficult to classify according to the major issues discussed earlier because most of the cases were only marginally related to those issues. Panels of the ninth circuit sanctioned the lack of Miranda warnings in foreign countries even when an American official was present, did not require express waivers as proof of voluntariness, and approved inadvertent questioning by a police officer after a suspect had refused to waive his rights. Only in the case of a suspect deemed too emotionally upset to waive his rights, did a panel of the ninth circuit overturn a conviction, and this case divided

liberal Democrat Ely and conservative Republican Jertberg, the latter wanting to affirm the confession as spontaneous and voluntary.

The tenth circuit decided in a split decision, to disallow the use of a defendant's prior silence for purposes of impeaching his in-court testimony. Republican Breitenstein dissented, arguing for the application of the Harris doctrine.

Finally, the District of Columbia circuit decided two confession cases against the accused, one because defendant's request for counsel was too ambiguous and the second, because the court decided that a suspect had intelligently waived his rights. In the latter case, an en banc decision, three liberal Democrats on the circuit opposed three conservative Nixon appointees, one conservative Democrat and two moderate Democrats.

Conclusions

The qualitative analysis of confession cases, like the bloc analysis, included too few of the Nixon appointees to draw any but tentative conclusions. However, Nixon appointees behaved like a diverse group rather than a narrowly conservative monolith. Stevens of the seventh circuit twice disagreed with Visiting Judge Kilkenny of the ninth circuit. Pell disagreed with both Rosenn and hunter of the third circuit, as did Stevens and Mansfield of the second circuit. Stevens emerges as a "liberal" on confession issues. Kilkenny, Rosenn and Hunter are "conservatives," Pell a "moderate," and Mansfield was a "liberal" on the waiver issue and a "conservative" on impeachment issues. Only on the latter impeachment issue were five Nixon appointees unanimous in support of the

"conservative" doctrine. These five were Oakes, Timbers, and Mansfield of the second circuit, Rosenn of the third, and Clark of the fifth.

CHAPTER VI

CONCLUSIONS

The major findings of this study include the following:

(1) When appeals judges were aggregated in terms of their scores on criminal procedures cases, differences were observed in the voting behavior of Nixon appointees as compared to non-Nixon Democrats and non-Nixon Republicans during fiscal 1970 to 1973.

(2) Nixon appointees voted as if they were more "conservative" than these other two judge groups on both unanimously and non-unanimously decided cases when voting behavior was examined in the aggregate, when median scores of the three judge groups were compared, or when percentage of judge groups falling into the "conservative" category or bloc was computed. Democrats were the most "liberal" group on the basis of these measures, and Republicans fell somewhere between Nixon appointees and Democrats.

(3) However, when the circuit was introduced as a control, it was found that (a) the relationship between the three judge groups varied from circuit to circuit with only six circuits conforming to the hypothesis; (b) the composite and median scores of Nixon appointees and non-Nixon Republicans outside the South were virtually identical when only the cases of fiscal 1973 were considered; (c) bloc analysis of individual circuits revealed that Nixon appointees do not constitute monolithic and sharply "conservative" blocs in any but the District of Columbia circuit, where voting patterns of Nixon appointees were similar

to voting patterns of Nixon appointees to the Supreme Court.

(4) Moreover, when other background characteristics were entered as controls on the appointing administration variable, the latter was found to account for only a small proportion of the observed variances in voting behavior among the judges of the Courts of Appeals.

(5) There also appeared to be a relationship between the scores of Nixon appointees and their sponsoring Republican Senator, where one existed. The most "conservative" Nixon appointees were recommended, for the most part, by the most conservative Republican Senator, or were the choices of the Administration in the absence of eligible Republican sponsors. This suggests that Senatorial courtesy was an obstacle to the attainment of preferred administration nominees.

(6) Finally, doctrinal analysis of confession cases also indicated that Nixon appointees did not always agree on confession issues, varying in their legal positions not only from circuit to circuit, but within some circuits.

(7) The tentative conclusion, then, of this study is that, although Nixon appointees did appear more "conservative" when their voting behavior was aggregated, they constituted, with the exception of the District of Columbia circuit, nothing like the cohesive "conservative" bloc of Nixon appointees which dominated criminal justice issues on the Supreme Court over roughly the same period. The next section of this chapter will try to suggest why this was the case.

Explanation of Findings

The findings of this study tend to confirm the view that the appointing administration faces almost no obstacle from the opposition

party in its judicial appointments to the lower courts.[1] Congressional Democrats not only failed to oppose the Nixon Administration's lower court appointments, they created numerous new judicial positions for the Administration to fill, despite the latter's professed intention to "pack" the courts. How does one explain the complicity of Congress on the one hand, and the failure, on the other, of the Nixon Administration to take greater advantage of its opportunity? As has been shown, the behavior of Nixon appointees was not radically different from that of their predecessors.

For one thing, Southern Democrats, some of whom dominated key committees in the House and Senate, were essentially in harmony with the Administration's views on criminal issues. Liberal Democrats were accused of being "coddlers" of criminals, in the over-simple rhetoric of the aroused political climate of the time. As with other complex civil liberties issues, a popular constituency for criminal defendants was not available to support politicians who might have opposed tougher anti-crime measures. Finally, the Nixon Administration was freed by the intermediate nature of circuit court appointments which are not the responsibility of the organized opposition party (as Supreme Court appointments are) or of individual Senators from his own party (as district court appointments are). As a result, the Nixon Administration found less systematic and institutionalized opposition to its circuit

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[1]Although there is evidence of effective opposition from individual Republican Senators, particularly in the second and third circuits, the liberal voting scores of Nixon appointees in the second circuit are based on only a few non-unanimous cases and conflict with their clearly more "conservative" score on unanimously decided cases, which were numerous. Thus these classifications must be regarded cautiously.

court appointments than to its Supreme or District Court appointments, since Congressional responsibility was not as clearly defined at that level.

Why then was there no radical swing to "conservatism" at the circuit level? For one thing, the lower federal judiciary was already "conservative" if one compares it to the liberal majority of the Warren Court on confession issues, or if raw voting statistics are examined for fiscal 1973. Secondly, because the Courts of Appeals lack control over their docket, cases there may pose fewer opportunities for discretion than is the case on the Supreme Court. Thirdly, conservative parties in the United States have historically regarded the unelected judiciary as their natural ally against the leveling impulses of popular majorities. Perhaps too, the Nixon Administration found itself ambivalent about "court packing" and attacks on court credibility. In a similar way, the Republican Party has been closely tied to the American Bar Association's Committee on Federal Judiciary since the Eisenhower Administration. This tie, explicitly acknowledged at the lower court level, may have inhibited the appointment of "political animals" to the Courts of Appeals, although Goldman has found that Nixon appointees had more extensive political backgrounds than did Eisenhower appointees and closely resembled Kennedy and Johnson appointees in the nature and extent of their political involvement.[2]

Thus there are certain built in checks, Senatorial courtesy, the American Bar Association, the commitment to an independent judiciary,

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[2]Sheldon Goldman, op. cit., "Johnson and Nixon Appointees," p. 941.

the routine nature of many cases, and the "professionalism" of most judges, which probably operate to prevent radical and uniform swings in lower court policy and personnel when conservative parties are in power, factors which may be weakened when liberal parties are making the appointments.[3] These factors probably account for the basic similarity of Nixon appointees to their brethren on the United States Courts of Appeals and the mild nature of the change there.

Future Research

The findings of this study suggest several possible areas for future research:

(1) In light of the discovery that Nixon appointees were considerably more "conservative" than non-Nixon Republicans on criminal cases in the fifth circuit, it would be interesting to study race relations cases decided in that circuit from fiscal 1970 to the present to see if the gap between Nixon appointees and non-Nixon Republicans and Democrats extends to race relations cases. This is of particular interest because of the tacit linking of "law and order" and racism in the Nixon and Wallace campaigns of 1968.

(2) Another research possibility concerns the impact of higher per judge caseloads on judicial behavior in the Courts of Appeals. From a cursory view, it appears that there is a larger gap between judge scores in unanimous and non-unanimous cases in the busier circuits, than in those less busy. This could be caused by the more perfunctory

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[3]Of course the Senatorial check on Democratic Administrations becomes rather formidable when the party also possesses a large majority in Congress, as one can see from "conservative" nature of Democratic appointees in the South.

nature of review in those circuits or the more frivolous nature of appeals there, but the subject deserves further exploration in light of the widely recognized problem of the quality of justice in overcrowded urban trial courts.

(3) Instead of inferring the appointment practices of the Nixon Administration from campaign statements and subsequent performance of its nominees, one could attempt to gain access to Justice Department files and interview former Nixon Justice Department officials to ascertain how direct a factor law and order views of particular judges were in the selection or rejection of judges, and whether subsequent judicial performance conformed with promise at the time of the appointment. No one has yet gained access to those files, however.

(4) In light of the slim links discovered between voting behavior in criminal cases and selected socio-political background characteristics, research might be considerably revised to identify factors related to early "socialization" of judges rather than to social class, as voting in criminal cases might be better related to "tough-mindedness"--"tender-mindedness" than to "liberalism"--"conservatism."[4] Gender, for instance, is a characteristic related to differences in early conditioning, although it would be of limited usefulness in the study of judges because of the great preponderence of males in those positions. Similarly, religion might be examined more in terms of the nature and influence of religious doctrine and moral concepts associated with them

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[4]There is support for this characterization in popular parlance where judges or potential judges are characterized as "soft" or "tough" on crime rather than "liberal" or "conservative." Additionally, it can be argued that criminal issues at the appellate level are procedural or "means" issues rather than "ends" issues.

than in terms of the class connotations of different religions. Additionally, psychological questionnaires might be utilized, although many judges might be reluctant to participate in such an exercise.

(5) Finally, additional non-unanimous criminal cases for fiscal 1974 and 1975 should be gathered so that more of the Nixon appointees and more circuits could be included in the bloc analysis and so that more of the Nixon appointees could be more confidently characterized as to their attitudes on criminal issues. This is particularly important with regard to the tentative nature of the findings in the second and third circuits which showed Nixon appointees to be more liberal than the other two groups on the basis of only a few cases.

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