THE POLITICAL SHIFT IN THE COURTS, AND THE SOUTER NOMINATION: INTERVIEW WITH SHELDON GOLDMAN

Public Perspective: There is now intense interest in — and often great controversy over — nominations to the federal bench. Are we in a distinctly new era of court appointments and politics?

Sheldon Goldman: I think that would be an overstatement. To be sure, there are *some* new aspects to the appointment process and appointment politics. We now have Supreme Court nominees going from office to office in the Senate office buildings meeting senators -- that's a new wrinkle. With the Reagan Administration there was the creation of the Office of Legal Policy which innovated a set of interviewing procedures. Previously, there had been some interviews of prospective nominees, but they were not done on a consistent, systematic basis. The Bush people are continuing the Reagan interview process, even though they eliminated the Office, which had been set up to coordinate and focus on the selection of people philosophically compatible with the administration. So, there are a number of things that are new, but the bottom line — that an administration will be interested in the philosophy of its nominees, from the Supreme Court down to the lower courts — that certainly is not new....

Applying ideological standards has waxed and waned throughout American history. It's been a function of the role the Supreme Court was playing at a particular time on the great issues of the day — at least in terms of domestic policy that impacts on the president's policy agenda. Only in times of relative political stability, when the great issues have not taken on a constitutional aura, do we find Supreme Court nominations (or lower court nominations for that matter) not assessed in ideological terms. Starting with George Washington, people were placed on the bench because they shared an ideological perspective with the president. Washington put on the Court justices strongly supportive of the national government. Andrew Jackson made appointments designed to turn around the Supreme Court, which was in conflict with his presidential agenda. In the Civil War period, we see ideology and philosophy guiding appointments — not only the administration's choices, but also Senate confirmation review. Before he appointed Oliver Wendell Holmes to the Supreme Court, Theodore Roosevelt wrote to Senator Henry Cabot Lodge, "I should like to know that Judge Holmes was in entire sympathy with our views, that is, with your views and mine, before I would feel justified in supporting him...."

Franklin Roosevelt sought nominees who would uphold the New Deal, and this involved a broad set of constitutional policies. It encompassed a view of the power of the national government to utilize fully the enumerated powers in Article 1, sec. 8, and the powers of the presidency in Article 2. The Roosevelt administration engaged in some of the most consistent and systematic screening to date in order to place on the Court people who shared the president's philosophy on these matters.

PP: But, to take two of FDR's nominees, Felix Frankfurter and William O. Douglas, weren't their judicial outlooks vastly different?

SG: That's one of the ironies with judicial appointments and presidential expectations. Because the justices are appointed for life, they often remain on the Court after the constitutional issues of the time when they were appointed have receded and new ones have emerged. Frankfurter and Douglas saw eye to eye on the role of Congress in economic regulation; they agreed on the use of the doctine of substantive due process — that is, not to use that doctrine, which had been a mainstay of the conservative Court, to strike down state economic regulation and social policy. But after World War II a whole new set of constitutional issues emerged. They focused not on economic rights, but on civil rights and civil liberties. That's where Douglas and Frankfurter split.

When we examine the 1940s, we see that what the Court was doing was no longer considered antagonistic to the president's or Congress's agenda. Given this, we see Harry Truman come along and appoint to the Supreme Court some very conservative people. There was little controversy because the Supreme Court wasn't seen as being in conflict with the president or Congress. In 1954 *Brown v. Board of Education* was decided, but at the time racial segregation was perceived as a regional matter. Outside the South, the Court was not seen as doing anything vitally affecting American politics.

So Eisenhower could and did name Earl Warren as Chief Justice. Warren did not come to the Court as a presumptive conservative. Everyone knew that he had been a progressive-liberal governor of California. The Court wasn't seen as affecting the president's agenda. In 1956, Eisenhower named William Brennan to the Supreme Court. It was clear he, too, was a progressive. John Kennedy named Byron White, now one of the leading conservatives. At that time White wasn't thought of as a conservative, but the Court also wasn't seen as vitally affecting the president's program. The Kennedy brothers were simply concerned with putting someone on the bench in whom they had personal confidence. John and Robert Kennedy placed a good deal of emphasis on personal loyalty, and here White had proved himself. On civil rights they thought that White's instincts were much the same as their own, but they didn't look much deeper

than that. For roughly two decades, then, ideology was submerged in Court appointments because what the Court was doing was not central to the agenda of the president, of either party. With Lyndon Johnson, this starts changing, but ideology is still muted. It's with Richard Nixon that we have a reversion to the style of the FDR period. Again, what the Supreme Court was doing vitally affected and shaped the president's agenda. Nixon campaigned in 1968 on a law and order platform. He was explicit in his argument that the Supreme Court had gone too far in its criminal procedures decisions, and vowed to turn it around. Ideology again moved to the front burner in judicial selection.

PP: But Nixon didn't have all that great success in getting on the Court conservatives who could redirect it. Didn't Reagan have a much better record in this regard? Was that because of his systematic screening process?

SG: Actually, I think that the Nixon administration, in terms of its focus on criminal procedures (the law and order issue) was quite successful. The Burger Court did not directly overturn many of the precedents of the Warren Court, but it eviscerated its criminal procedure precedents. Perhaps not to as large an extent as Nixon would have wanted, but that was in part because of Burger's deficient intellectual leadership. Overall, the Burger Court was far different than the Warren Court. In the perspective of history we will see it as transitional, from the liberal Warren era to a markedly conservative one. That Justice Brennan was on the Court for as long as he was — providing tremendous intellectual leadership and evidencing unusual personal and political skills — meant some "damage control." That's all gone now. Of Nixon's four appointments, Harry Blackmun must be the biggest disappointment for Nixon. But Warren Burger, Lewis Powell, William Rehnquist, and Blackmun, too, certainly turned around the court in terms of criminal procedures and in some first amendment areas -- particularly sexual expression. Nixon achieved a fair degree of success....

A true conservative doesn't upset the apple cart right away. That is, a true judicial conservative builds precedents, case-by-case-by-case, incrementally, so eventually the precedent the justice didn't like falls of its own weight. That was the strategy Burger was pursuing.

PP: Then, after the Gerald Ford interlude, in which the presidency was weak, with Carter there was a return to a systematic scrutiny of nominees' ideology — though now with the requirement that the nominees be liberal?

SG: With Carter, civil rights and affirmative action were of paramount importance. Carter really broke tradition by appointing an unprecedented proportion of blacks and women to the federal courts. Had he the opportunity, his first appointment to the Supreme Court, according to his attorney general, Griffin Bell, would have been Shirley M. Hufstedler. Carter brought her into the cabinet from a lifetime position on the ninth circuit of the US court of appeals. While no promises were made, it was implicit that the first vacancy would go to her. (Of course, there wasn't one.) And the second appointment would have gone to Wade H. McCree, a distinguished black jurist who was solicitor general in the Carter Administration. There was a convergence of ideological, philosophical, and political considerations. Carter's legacy on the lower courts is certainly profound. Even after 10 years of Reagan and Bush, the Carter contingent of court liberals is a potent force. He named 202 men and women to lifetime district court positions and 56 to lifetime positions on the courts of appeals (these figures are for courts of general jurisdiction). Sometimes affirmative action took precedence over ideology. Thus, Carter appointed a conservative Republican woman to the sixth circuit and a conservative Hispanic to the ninth circuit. Also, we should not forget the role senators play — especially with regard to district court judgeships. This meant that some conservative white males, backed by conservative southern Democratic senators, were appointed. Still, given the larger political context, Carter's appointees to the federal bench as a group were about as coherently liberal as one could reasonably expect. Similarly, Reagan's nominees were about as coherently conservative.

PP: Did the Carter and Reagan administrations differ in their procedural approach to court nominations?

SG: The Reagan administration was more systematic in its scrutiny. With Carter there was less ideological scrutiny per se. Remember that Griffin Bell, who was attorney general, is a conservative Democrat. But he was aware of Jimmy Carter's political needs — to make it crystal clear that a deep south Democrat was going to hold blacks in the Democratic party by naming blacks to the bench in unprecedented numbers, and to appeal to women by naming women in large numbers. Also Carter had to deal with liberal Democratic senators. When the latter urged liberal Democrats who were qualified, Carter didn't say no. Also, the federal courts were really not at odds with Carter's agenda, so there wasn't the kind of conflict which precipitates intense screening. The Supreme Court under Burger was more conservative than Carter on civil rights. But the issue of civil rights was ultimately one that Congress resolved with the Civil Rights Acts of 1964, 1965 and 1968. The issues before the Supreme Court in this area involved statutory interpretation — not as critical a matter as constitutional interpretation. If the Supreme Court gives a cramped reading to a civil rights statute, Congress can enact a new one. In the Carter era with a Democratic president and the two houses of Congress under Democratic control, the Court wasn't a big concern.