

## American University Washington College of Law

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2004

### Right Wing Justice: The Conservative Campaign to Take Over the Courts (Excerpt pages 51-53)

Herman Schwartz, *American University Washington College of Law*



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## Chapter 2

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# 1981–1988

### 1981–1984

The double blow of the 1979 oil shock, which produced startlingly high inflation, and the Iranian hostage-taking of Americans were too much for a president who had not aroused much affection or respect. President Jimmy Carter thus had little chance of winning a second term and Ronald Reagan won handily in 1980.

The welfare-regulatory responsibilities undertaken by government, and the revolution in women's rights, sexual practices, and other social attitudes and behavior were both targeted by Ronald Reagan and the conservatives upon their accession to power in 1980. Reagan's prime targets were civil rights—one of his earliest campaign trips was to Philadelphia, Mississippi, where three civil rights workers had been killed in 1964—and the Supreme Court decisions on abortion, school desegregation, affirmative action, school prayer, the rights of prisoners and criminal defendants, as well as antitrust and other economic regulation, including environmental protection. Because the federal courts had been in the forefront on these issues, a takeover of the courts by the right was among

the first orders of business. Liberal judges were to be replaced by zealous young right-wingers who believed in “judicial restraint” and would be on the bench for years to come; doctrines expanding the authority of both the federal courts and other parts of the federal government to protect individual and other rights would be cut back; once again, a nearly unfettered market would be king. The architect of this policy was presidential counselor and later Attorney General Edwin Meese III, supported by right-wing think tanks, pressure groups, and the newly established Federalist Society.

The Reagan-Meese strategy depended on two key elements: a systematic ideological screening system for judicial nominations initially recommended to Nixon but not implemented by him, and an emphasis on youth. To promote ideological purity as rigorously as possible, a Committee on Federal Judicial Selection was established and chaired by Counsel to the President Fred Fielding; it included Meese, Attorney General William French Smith, and other top White House and Justice Department officials. A computer data bank containing every available publication by a candidate was set up, and daylong interviews were held with the finalists. The role of the American Bar Association was reduced. More controversially, senatorial influence over the choice of judges was reduced, which often led to sharp clashes between Republican senators and the White House. According to Stephen Markman, who was in charge of judicial selection in Reagan’s second term, “the Reagan administration has in place what is probably the most thorough and comprehensive system for recruiting and screening federal judicial candidates of any administration ever. This administration has, moreover, attempted to assert the president’s prerogatives over judicial selection more consistently than many of its predecessors.”<sup>1</sup>

The goal, according to Meese, was to “institutionalize the

Reagan revolution so that it can't be set aside no matter what happens in future presidential elections. Young conservatives were to be named, wherever possible, so that the revolution would last long after Reagan was gone. Fred Fielding vetoed a sixty-nine-year-old candidate for an appellate slot with the comment, "in view of Judge Neaher's age, appointment runs counter to President's desire to appoint younger judges who will have lasting impact on the judiciary." During Reagan's first term, 11.4 percent of all his appointees were under 40, a higher percentage than under any previous Presidents in recent years; the average age of his appeals court appointees during his first term was 51.5, the youngest average of the past five administrations. Examples of this youth movement included the appointment of the 42-year-old Richard A. Posner, a leading conservative theoretician when nominated, and 35-year-old Frank Easterbrook, both of the University of Chicago Law School, to the Seventh Circuit (Illinois, Indiana, Wisconsin); J. Harvie Wilkinson, 39 when nominated to the Fourth Circuit (Maryland to South Carolina); Kenneth Starr, an assistant to former Attorney General William French Smith, 36 when named to the US Court of Appeals for the District of Columbia; Alex Kozinski, 34 when nominated to the Ninth Circuit, which covers the West Coast; and Edith Jones (one of Reagan's few female nominees) who was 36 when appointed to the Fifth Circuit (Texas, Mississippi, and Louisiana). Despite Reagan's obvious agenda during his first term, there was little opposition to his nominations; it helped that his party controlled the Senate all four years.<sup>2</sup>

Within a few months of his inauguration, Reagan had his first Supreme Court appointment when the ailing Justice Potter Stewart retired. Reagan used the occasion to appoint the first female Justice, an early example of the curious attitude of recent Republican presidents toward affirmative action. While