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A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter

W. Gary Fowler* †

Reforming the judicial selection process has long stirred the interests of lawyers, politicians, bar associations, professors, and judges. Since the passage of the Omnibus Judgeship Act of 1978 and its creation of 152 new federal court positions, interest in reform has increased dramatically. Reforms in judicial selection have focused on the initial recommendation process. Thus, reformers have questioned the basis of senatorial power in judicial selection: the custom of senatorial courtesy that allows a senator of the President’s party and of the nominee’s home state to select candidates and to block unacceptable nominees for district and circuit court positions. These reforms have advocated the use of screening panels or “merit panels” in federal judicial selection.

This paper compares the initial recommendation procedures for district and circuit court judges under the Carter and Reagan administrations. The two administrations adopted different frameworks in obtaining initial recommendations for these positions and in dealing with senatorial courtesy. While Carter adopted the panels in order to open the system to more participants and to increase the representation of women and minorities, Reagan adopted a more traditional framework in his effort to secure the nomination of persons adhering to the philosophy of “judicial restraint.”

The Carter administration instituted more reforms in judicial selection than any previous administration. With the passage of the Omnibus Judgeship Act of 1978, the Carter administration stepped up its efforts to open the selection process to greater public participation and to increase the representation of women and minorities on the federal bench. The panel system was chosen as a means of accomplishing those goals. Carter set up his own judicial nominating commission for the

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† I wish to thank Elliot Slotnick, Kermit Hall, Eugene Alpert, and Stanton Wheeler for reviewing earlier drafts of this article. They, of course, bear no responsibility for the facts or conclusions stated herein. I also wish to thank the American Bar Association Standing Committee on Federal Judiciary, Sheldon Goldman, and the American Judicature Society for providing valuable information.
circuit courts and issued guidelines for senators to follow in making recommendations for district court positions. While Carter also wished to appoint judges who agreed with him philosophically, the emphasis of the panels was on increased participation and "affirmative action" in the judicial selection process.

The Reagan administration is not as concerned with restructuring the selection process itself. Although it seeks to appoint women and minorities, it does not share the "affirmative action" goal of the Carter administration. In addition to appointing highly qualified judges, the chief goal that Reagan wishes to accomplish is the appointment of judges with a conservative judicial philosophy. Since the goals of the Reagan administration do not concern reforming the selection process itself, it has been willing to operate within a more traditional framework and to further its goals while accommodating senatorial courtesy. While "encourag[ing senators] to utilize screening mechanisms . . . includ[ing] . . . advisory groups or commissions," the Reagan administration abolished the presidentially-appointed panels for the circuit court positions and has not emphasized panels for the district court positions as much as the Carter administration.

The first part of this paper provides a brief history of judicial selection and an outline of the initial recommendation procedures of the two administrations. The second part of the paper compares the actual operation of the initial recommendation procedures under the two administrations as to the use of panels for district judges, the role of senators in circuit court selection, and the changes in senatorial courtesy initiated by recent chairmen of the Senate Judiciary Committee. The actual operation of the initial recommendation procedures can influence both the accomplishment of the administration's political or ideological goals in judicial selection and the type of judges selected in terms of their professional background characteristics. The third part of the paper will examine Carter's goal of "affirmative action" and Reagan's goal of "judicial restraint" in the context of the selection procedures. The final part of the analysis asks how different procedures can lead to the selection of persons with particular professional background characteristics. Several key professional and demographic characteristics of the


nominees will be compared according to the selection process used in
their recommendation. "Panel nominees" will be compared with "non-
panel nominees" in professional experience, age, educational back-
ground, and ABA ratings to explore whether different selection proce-
dures lead to the selection of different types of judges.

I. Brief History of Judicial Selection Procedures

The judicial selection process may be divided into three parts: (1) ini-
tial recommendation leading to the selection of one or more candidates,
(2) investigation and screening procedures leading to nomination, and
(3) the confirmation process leading to appointment.\textsuperscript{3} The first stage is
often the most crucial since it involves the selection of candidates\textsuperscript{4} for a
position. The person or group that exercises influence in this area can-
not only block a potential appointment but may also name possible
candidates.

A. Judicial Selection Procedures Prior to the Carter Administration

In analyzing the powers of the President and the Senate in the selec-
tion process,\textsuperscript{5} Hamilton predicted that by exercising the power of nomi-
nation the President would dominate the process. The Senate would
serve only as "an excellent check upon a spirit of favoritism."\textsuperscript{6} After
Hamilton's time, however, a system developed in which presidential

\textsuperscript{3} Professor Howard Ball employs a similar analysis in distinguishing participants in the
judicial selection process. He labels actors as "initiators," "screeners," and "affirmers." H.

\textsuperscript{4} Throughout this paper, "applicant" refers to a person who wishes to be considered for
a judicial appointment. "Candidate" refers to a person recommended for nomination by a
senator, congressman, or nominating panel. "Nominees" are persons formally nominated by
the President. "Appointees" are persons confirmed by the Senate for a federal judgeship.

\textsuperscript{5} Article II, Section 2 of the Constitution provides that the President "shall nominate,
and by and with the Advice and Consent of the Senate, shall appoint . . .
Judges of the
supreme Court, and all other Officers of the United States, whose Appointments are not
herein otherwise provided for . . . but the Congress may by Law vest the Appointment of
such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in
the Heads of Departments." Some have suggested that the Constitution is ambiguous as to
the appointment of federal judges in that district and circuit court judges could be considered
"inferior officers." H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 4-5 (1972); 2 J.
STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 400 (Colley 4th ed.
1873).

\textsuperscript{6} THE FEDERALIST No. 76, at 457 (A. Hamilton) (Mentor ed. 1961). Hamilton also
wrote, "It will be the office of the President to nominate, and, with the advice and consent of
the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Sen-
ate." Id. No. 66, at 405 (emphasis original).

The selection of federal judges stirred controversy during the constitutional debates. See
debated whether the appointment power should rest with the President or the Senate. The
combined selection and confirmation process was a compromise. See generally A. NEFF, supra
note 1, at 1-6; L. BERKSON & S. CARBON, supra note 1, at 9-11.
power to select judges depended upon whether the appointees were to fill district, appellate, or Supreme Court vacancies. Home-state senators of the President's party dominated the initial selection of district court judges while the President controlled Supreme Court nominations. The appointment of circuit judges differed according to the circumstances of each nomination and was to some degree determined by the political "clout" of the senator and the strength of the tradition that the particular vacancy "belonged" to his state.

The development of senatorial courtesy was instrumental in the senators' acquisition of influence in the selection of lower court federal judges. The custom first appeared in non-judicial appointments. During the First Congress, the Senate deferred to the objections of Georgia's two senators in rejecting the nomination of Benjamin Fishbourn to a position in the Port of Savannah. When President Washington yielded by nominating the candidate proposed by Georgia's senators, he established a precedent that the President consult with home-state senators prior to making executive branch nominations. The strength of the precedent remained in doubt through most of the nineteenth century. Many presidents, including Washington, asserted a presidential prerogative to choose the person that would be nominated. Nevertheless, by the twentieth century, the senatorial right to be consulted on judicial nominations often included the power to select the nominee. Hamilton's idea was reversed; it became the President, rather than the Senate, who operated as the confirming body and as "the excellent check." The constitutional system "ha[d] been turned on its head."

This shift drew severe criticism over the years, largely because of the extent to which it fostered a system of patronage appointment. "Parochialism, localism, and conservatism are words that have often been used to categorize the selection of federal district court judges," de-
Judicial Selection Panels

scribed one author. Criticism charged that in the traditional system of selecting judges, a candidate's political connections were often more important considerations than his professional qualifications in getting a judicial appointment. Some believed that the quality of the federal bench was not as high as it might have been in a system in which politics did not play as great a role. Moreover, the "closed-door" appearance of federal judicial selection under the traditional system conveyed a feeling of impropriety—that judgeships were traded and bartered like so many votes on the latest pork barrel. Presidents wishing to influence the composition of the federal judiciary to further national aims often found themselves blocked by recalcitrant home-state senators.

The senatorial system, however, was not without its advocates. Some viewed senatorial influence to be an important check on presidential power. Defenders of senatorial selection argued that only those with contacts with the state could make an informed choice. That responsibility, they argued, should rest with the state's senators, who could be held responsible for their decisions by the voters. Given the fewer contacts of the President and his aides with the state, their limited resources, and the large number of district judges, some sort of delegation to the local level appeared to be necessary.

Prior to the Carter administration, two reform waves swept judicial selection. The first of these, associated with the Jacksonian Era (1829-1837), attempted to make all public offices (including judgeships) elective. Although many state court selection systems were changed to popular election, the federal judiciary was unaffected. The second reform wave, the movement for "merit selection," began in the early part of this century and has continued to affect federal judicial selection to the present day. The early proponents of merit selection did not argue that the

10. H. Ball, supra note 3, at 180.
15. J. Harris, supra note 8, at 316. The "patronage" system at times produced humorous results. One author reported that officials during one administration were particularly perplexed by the support of a prominent midwestern senator for a nominee who appeared to lack both political ties and outstanding credentials. Later, a friend of the senator explained to an aide: "Hell, . . . —'s just trying to prove to people back home how powerful he is. Any senator can get a qualified lawyer appointed as a federal judge. But it takes real power to get an appointment for somebody who is recognized by everybody as obviously not qualified." Totenberg, supra note 12, at 95-96.
senators were the wrong initiators in a political system. Instead, they argued that the system should not be based on politics at all and advocated the adoption of panels to make nominations or recommend candidates for judicial positions. The American Judicature Society (AJS) promoted the "Missouri Plan," which called for selection of a slate of candidates by a nonpartisan group with final appointment by an elected official. The plan was adopted by many states and was proposed for the federal judiciary.

The American Bar Association also called for the nonpartisan selection of judges. Unlike the AJS, the ABA formed its own committee in 1946 to review and rate federal judicial nominations. In 1952 the ABA increased its influence by gaining the privilege of reviewing candidates prior to nomination under the Truman administration. The ABA's influence reached a peak when President Eisenhower gave the committee a virtual veto power. The ABA has continued to influence the selection process through the Carter and Reagan administrations. Although it has been charged with substituting a conservative, corporate-firm philosophy for "merit," it has retained its power largely because it provides an independent source of information that the executive branch may weigh against that provided by home-state senators.

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17. The early proponents of merit selection included Roscoe E. Pound and William Howard Taft. Id. at 10.
18. Id. at 11.
19. Id. at 27-37.
20. H. CHASE, supra note 5, at 201-02.
22. In 1946, the House of Delegates formed a Special Committee on the Judiciary to review judicial nominations. The ABA committee gained early acceptance with the Senate Judiciary Committee through its chairman, Senator Alexander Wiley. H. CHASE, supra note 5, at 124.


23. The break for the ABA occurred when Ross Malone, a member of the House of Delegates and the Board of Governors of the ABA, was appointed Deputy Attorney General. H. CHASE, supra note 5, at 126. Malone felt strongly that the ABA should have a role in the selection process. Id. at 127. The Standing Committee on Federal Judiciary issues a tentative report to the Attorney General prior to nomination and gives its formal rating after nomination. The ABA is pledged to oppose any nominee who is found "Not Qualified." ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 8-12 (1977), reprinted in Initial Hearing, supra note 9, at 104-17.
25. Initial Hearing, supra note 9, at 45 (questioning by Sen. Howard Metzenbaum directed to Robert D. Raven, Chairman, ABA Standing Committee on Federal Judiciary).
Judicial Selection Panels
time, the ABA ratings, for better or worse, have become an index of a
president's success in appointing highly-qualified judges.

As the ABA and AJS became more interested in reforming the selec-
tion system, the increasing importance of the lower federal courts in de-
ciding matters of social policy led to greater executive interest in the
selection process. Originally, the district courts were tribunals of ex-
tremely limited jurisdiction. When the circuit trial courts were abol-
ished in 1911, the district courts became the sole courts of original
federal jurisdiction. At least since the Eisenhower administration, the
Department of Justice (DOJ) and the White House began to take
greater initiatives in the selection process. Executive branch interest
increased particularly in circuit court positions where DOJ officials
could play senators off against one another—especially when more than
one senator claimed the right to make the recommendations. DOJ offi-
cials could also rely on their own sources of information for the more
prominent circuit court positions and consequently did not have to rely
on senators as much for recommending candidates. The greater power
and multi-state character of the circuit courts justified greater attention
from the executive branch. Scholars concluded that in the administra-
...
objection to this nomination. In truth, however, the blue slip came to mean the opposite, for the understanding was that no action would be taken in the absence of a returned blue slip. This gave a senator of the President’s party a pocket veto and even expanded senatorial prerogatives to a senator who was not of the President’s party to at least delay—if not defeat—a nomination. As we shall see, although Senator Kennedy changed certain aspects of the blue slip policy in 1979, the blue slip continues to influence the judicial selection process.

Judicial selection involved a wide array of actors. One writer likened the selection process to a baseball game in which the number of players could be expanded indefinitely. Sitting judges, interest groups, Congressmen, governors, state party leaders, businessmen, contributors, and potential nominees could intervene to recommend candidates or to exert influence in filling a judicial vacancy.

While the process for each nomination varied, the traditional selection and confirmation process for district and circuit court judges as it existed prior to the Carter administration can be briefly summarized. For district court nominations the process usually began with home-state senators of the President’s party (or the congressional delegation or state party leadership where there was no senator) making recommendations to the Department of Justice. Most senators made only one recommendation per vacancy, although some made several. Candidates were then screened by the Department of Justice, the American Bar Association, and the Federal Bureau of Investigation. After a nominee was chosen, the Senate Judiciary Committee held what critics found to be a perfunctory hearing that served more to show senatorial support than to gain any public input. Confirmation on the Senate floor followed.

The initiation of circuit court nominations prior to the Carter administration varied among the Department of Justice, the White House, and senators. Screening and confirmation procedures for circuit court judges followed roughly the same procedures for district court judges, although all bodies scrutinized candidates for circuit court positions more carefully.

32. The blue slip states that it operates pursuant to a “rule of the Committee.” Research by the Senate Judiciary Committee indicated that no such rule has existed at least since 1969. STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 96TH CONG., 1ST SESS., SENATORIAL COURTESY 2, reprinted in Initial Hearing, supra note 9, at 119.

33. Slotnick, Reforms in Judicial Selection: Will They Affect the Senate’s Role? (pt. 1), 64 JUDICATURE 60, 63 (1980).

34. H. CHASE, supra note 5, at 3-4.


36. See R. RICHARDSON & K. VINES, supra note 30, at 63.
Judicial Selection Panels

B. Judicial Selection Procedures under Carter and Reagan

Presidents Carter and Reagan made radically different campaign pledges regarding the selection of federal judges. Proud of the commission system he instituted as governor of Georgia, Carter expanded his promise to create an "independent" federal judiciary by calling for "merit selection": "All federal judges and prosecutors should be appointed strictly on the basis of merit without any consideration of political aspects or influence. Independent blue ribbon judicial selection committees should be established to give recommendations to the President of the most qualified persons available for positions when vacancies occur."37

While Carter's promise attracted only mild attention, the 1980 Republican Party platform, ultimately embraced by President Reagan, stirred controversy. Although all presidents (including Carter) have chosen judges on the basis of philosophy, the Republican platform specifically called for the appointment of judges who had "the highest regard for protecting the rights of law-abiding citizens" and who hold views "consistent with the belief in the decentralization of the federal government and efforts to return decision-making power to state and local elected officials." Most controversially, the plank seemed to be aimed directly at the Supreme Court's abortion decisions by calling for judges "who respect traditional family values and the sanctity of innocent human life."38 Reagan and his aides attempted to deflect criticism, however, by pointing to the ambiguity in "innocent human life" and by stressing that no "litmus test" would be used in choosing federal judges.39

All administrations wish to accomplish ideological objectives by ap-


pointing judges of certain backgrounds or political beliefs. In addition to its goal of opening up the recommendation system to more participants and of increasing the diversity of the federal judiciary, the Carter administration also sought judges with moderate to liberal judicial philosophies. Partly in response to its perception of an ideological imbalance resulting from President Carter’s selection of judges for 152 new positions, the Reagan administration has been concerned with appointing judges who agree with the President philosophically. One current Justice Department official added that the President wished to appoint qualified people and that the selection of women and minority group members was consistent with this objective.

The two administrations also differ in their selection procedures. The Carter administration framework focused on creating presidentially-appointed panels for making recommendations for circuit court vacancies and actively encouraging senators to establish similar panels for district court vacancies. The administration moved early to gain acceptance of the panel idea. Before his inauguration Carter and Griffin Bell met with Senator James Eastland, Chairman of the Senate Judiciary Committee. Although the details of the conversation were not reduced to writing, Eastland apparently agreed to support the establishment of the circuit court panels but insisted that senators retain the right to recommend district court nominees. After inauguration, Carter issued an executive order establishing the United States Circuit Judge Nominating Commission. The administration chose circuit court panelists

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40. A. NEFF, supra note 1, at 149.
41. Id. at 151.
43. Interview with Dennis Mullins, Office of Legal Policy, Department of Justice, in Washington, D.C. (Oct. 7, 1982) [hereinafter cited as Mullins Interview].
44. A. NEFF, supra note 1, at 32.
45. Exec. Order No. 11,972, 3 C.F.R. 96 (1977), noted in 28 U.S.C. § 44 at 6 (Supp. 1981). The order was later superseded by Exec. Order No. 12,059, 3 C.F.R. 180 (1978), noted in 28 U.S.C. § 44 at 6 (Supp. 1981). The latter listed the following standards in evaluating applicants: (1) membership in good standing in at least one state bar or the District of Columbia bar; (2) a reputation for integrity and good character; (3) sound health; (4) a demonstrated commitment to equal justice under law; (5) a demeanor, character, and personality indicating judicial temperament. Commissions were allowed to consider the “training, experience, or expertise” of an applicant in order to meet “a perceived need of the court.” The commissions were “encouraged to make special efforts to seek out and identify well-qualified women and members of minority groups as potential nominees.” Supplemental instructions were also issued and suggested that candidates demonstrate legal experience in two out of five areas: (1) substantial appellate experience as a lawyer or judge; (2) substantial trial court experience as a lawyer or judge; (3) mastery of federal law through reaching experience or professional association; (4) substantial legal writing on subjects dealing with federal law; (5) substantial experience in judicial, educational, or legal reform of a highly professional nature.
Judicial Selection Panels

from all states contained in each circuit. The commissions, however, were instructed to limit a particular search to candidates from a designated state. An executive order encouraging the use of panels for the district courts was issued after the passage of the Omnibus Judgeship Act of 1978 created 152 new federal court positions. Senators from thirty states, including six states with two Republican senators, followed the President’s call and created panels. After the names of candidates were received from a panel or from a senator, the Department of Justice sought additional review by sending the names not only to the ABA and FBI but also to the National Bar Association and the Federation of Women Lawyers. The Department of Justice also consulted senators on circuit court candidates received from the President’s nominating panels. For the district court nominees, Carter directed the Attorney General to verify that the senatorial selection process was “fair and reasonable.” The Department of Justice then made its recommendations to the President. Initially, Attorney General Bell presented these recommendations to the President directly. After some disagreement, Bell allowed these recommendations to be reviewed by White House aides before he presented them to President Carter.

The Reagan administration declined to continue the circuit court panels. Instead, it promised to set up procedures that would allow recommendations to come from several sources, including senators representing states in the circuit. As in pre-Carter administrations, dis-

46. The geographically large Fifth and Ninth Circuits were divided into two panels. A separate panel recommended candidates for District of Columbia district and circuit court positions. Exec. Order No. 12,059, supra note 45.


48. A. Neff, supra note 1, at 54-56. See infra part II.A.

49. Initial Hearing, supra note 9, at 15.

50. Telephone interview with Michael Egan, Associate Attorney General under President Carter (Oct. 19, 1982).

51. Exec. Order No. 12,097, supra note 47.

52. G. Bell & R. Ostrow, supra note 37, at 40-42.


54. Department of Justice, Judicial Selection Procedures, supra note 2.
District court nominations are initiated by home-state senators of the President's party or, if there is no such senator, by the state's governor, party leadership, or members of the congressional delegation. A Department of Justice memorandum urged that senators send three to five names per vacancy. Once recommendations are compiled for both district and circuit court nominations, the Office of Legal Policy of the Department of Justice reviews them and sends evaluations to a "Department of Justice Judicial Selection Working Group" chaired by the Attorney General. That committee sends its recommendations to a White House group chaired by White House Counsel Fred Fielding. The panel makes a tentative choice and sends the name to the American Bar Association. DOJ officials make preliminary inquiries before sending the name to the FBI for a full field investigation. After all investigations are complete, the White House committee makes its final recommendation to the President that the person be nominated. Should any problems develop, the process returns to the Department of Justice.

II. **Senatorial Responses to Presidential Initiatives in Judicial Selection**

Although senatorial courtesy has been a strong force throughout the nomination process under both the Carter and Reagan administrations, the administrations have adopted different frameworks for dealing with the Senate's involvement. While Carter stressed the use of panels at both the district and circuit levels, Reagan abolished the circuit panels and placed less emphasis on the use of panels for district court positions. This part of the inquiry examines how senators responded to these frameworks and what recommendation procedures were actually employed in judicial selection. Specifically, this inquiry looks at three factors: (1) the use of nominating panels in selecting district court nominees, (2) roles of senators and executive branch officials in selecting circuit court judges, and (3) changes in senatorial courtesy and the blue slip custom.

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55. Id
56. Mullins Interview, supra note 43.
58. The National Bar Association and the Federation of Women Lawyers do not receive the names of candidates prior to nomination. The ABA, however, does consult with these groups in its investigation.
59. Cohodas, *Vacancy on Supreme Court*, supra note 57, at 1186.
Judicial Selection Panels

A. Use of Panels in Recommending Candidates for District Court Appointments

The panels were the frontispiece of the Carter reforms. Early in his presidency Carter wrote each Democratic senator a handwritten letter urging the establishment of the panels. He took the unprecedented step of taking recommendations from states with two Republican senators if they established a panel. Thirty states responded favorably, and over 66% of all Carter district court nominees in 1979 and 1980 came from states employing panels (Table II-1).

| TABLE II-1 |
| DISTRICT COURT NOMINEES BY RECOMMENDATION PROCESS |
| CARTER AND REAGAN ADMINISTRATIONS |
| 1979-82 |

<table>
<thead>
<tr>
<th>Recommendation Process</th>
<th>Carter Administration</th>
<th>Reagan Administration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel</td>
<td>112/66.7</td>
<td>35/55.6</td>
</tr>
<tr>
<td>Non-Panel</td>
<td>56/33.3</td>
<td>28/44.4</td>
</tr>
<tr>
<td>TOTALS:</td>
<td>168/100.0</td>
<td>63/100.0</td>
</tr>
</tbody>
</table>

Chart covers district court nominees from January 1, 1979 to November 15, 1982.

60. A. NEFF, supra note 1, at 53. The New Hampshire panel did not operate during the 96th Congress.

61. Table II-1 is for all nominees sent to the Senate for confirmation between January 1, 1979 and November 15, 1982. The set of nominees consisted of all those listed by the ABA Standing Committee on the Judiciary who were confirmed in 1979 and 1980 or who were not confirmed at the end of Carter's presidency. For those nominated after the end of the Neff study (February 20, 1980), it was assumed that all states with "permanent" panel charters retained panels for all nominees in the remainder of the 96th Congress. For all those operating on an "ad hoc" basis, the state's retention of the panels was verified by Senate hearings or interviews with Senate aids. States which had not used panels for previous nominees were assumed not to have used them for the final group of nominees in the 96th Congress.
### TABLE II-2

<table>
<thead>
<tr>
<th>State</th>
<th>Affiliation of Senator(s)</th>
<th>Number of Nominees</th>
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<tr>
<td></td>
<td>Sponsoring Panel</td>
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<tr>
<td>Alabama</td>
<td>D,D</td>
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<tr>
<td>California</td>
<td>D,R</td>
<td>13</td>
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<tr>
<td>Colorado</td>
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<td>2</td>
</tr>
<tr>
<td>Florida</td>
<td>D,D</td>
<td>9</td>
</tr>
<tr>
<td>Georgia</td>
<td>D,D</td>
<td>7</td>
</tr>
<tr>
<td>Hawaii</td>
<td>D,D</td>
<td>1</td>
</tr>
<tr>
<td>Indiana</td>
<td>D</td>
<td>1</td>
</tr>
<tr>
<td>Iowa</td>
<td>D,R</td>
<td>1</td>
</tr>
<tr>
<td>Kansas</td>
<td>R,R</td>
<td>2</td>
</tr>
<tr>
<td>Kentucky</td>
<td>D,D</td>
<td>3</td>
</tr>
<tr>
<td>Maine</td>
<td>D</td>
<td>2</td>
</tr>
<tr>
<td>Massachusetts</td>
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<td>4</td>
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<tr>
<td>Michigan</td>
<td>D</td>
<td>7</td>
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<tr>
<td>Minnesota</td>
<td>R,R*</td>
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<tr>
<td>Nevada</td>
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<tr>
<td>New Jersey</td>
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<tr>
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<td>Oklahoma</td>
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<td>Oregon</td>
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<td>Pennsylvania</td>
<td>R,R</td>
<td>4</td>
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<tr>
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<td>Wisconsin</td>
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<tr>
<td>District of Columbia</td>
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<tr>
<td>Puerto Rico</td>
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**TOTALS:**

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<th>Number</th>
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<td>R,R</td>
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<tr>
<td></td>
<td>D,R</td>
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312
Table II-2 cont.

STATES NOT EMPLOYING PANELS DURING THE CARTER ADMINISTRATION
1979-80

<table>
<thead>
<tr>
<th>State</th>
<th>Affiliation of State's Senators</th>
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<td>D,D</td>
<td>7</td>
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<td>D,R</td>
<td>3</td>
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<td>Mississippi</td>
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<tr>
<td>Missouri</td>
<td>D,R</td>
<td>4</td>
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<tr>
<td>Montana</td>
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<tr>
<td>New Hampshire***</td>
<td>R,R</td>
<td>1</td>
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<td>North Carolina</td>
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<tr>
<td>West Virginia</td>
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</table>

TOTALS: 4 D,D
13 States 8 D,R 56
1 R,R

* — Vice President Mondale also selected panelists.
** — Presidentialy appointed panel.
*** — Panel only operated for nominees in 1977 and 1978.

D - Democrat  R - Republican  I - Independent

Sources: A. Neff, The United States District Judge Nominating Commissions: Their Members, Procedures, and Candidates 54-56 (1981). "Number of Nominees" was compiled from information provided by the ABA Standing Committee on Federal Judiciary.
<table>
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<tr>
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<th>Number of Nominees</th>
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<td>Florida</td>
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<td>Georgia</td>
<td>R</td>
<td>1</td>
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<tr>
<td>Illinois*</td>
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<td>Indiana</td>
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<td>Kentucky</td>
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**TOTALS:**

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<th>States</th>
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<td>2 R,D</td>
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<td></td>
<td>1 D,D</td>
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</table>
Judicial Selection Panels

Table II-3 cont.

<table>
<thead>
<tr>
<th>STATES NOT EMPLOYING PANELS DURING THE REAGAN ADMINISTRATION</th>
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<tbody>
<tr>
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<td>South Carolina</td>
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<td>Texas</td>
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<tr>
<td>Virginia</td>
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<tr>
<td>Washington</td>
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<tr>
<td>District of Columbia</td>
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<tr>
<td>Puerto Rico</td>
</tr>
</tbody>
</table>

TOTALS:
15 States 6 R,D 28
1 R,I
3 R,R
5 D,D

* — Extensive bar screening process. Committees solicit and evaluate candidates, but do not name specific persons.

** — Where there is no Republican senator, candidates have generally been recommended by the Republican congressional delegation, governor, or state party leadership.

D - Democrat  R - Republican  I - Independent

Although one might have expected a sharp decline in the use of panels for district court nominees under Reagan, this has not been the case. Instead, many senators have continued to use the panels in making recommendations for district court vacancies. Of the thirty states that filled judicial vacancies by November 15, 1982, half employed panel processes62 (Table II-3). States employing panels accounted for

62. In order to determine which senators were using the panels during the Reagan administration, letters were sent to all Republican senators in states which had a district court vacancy filled between January 20, 1981 and November 15, 1982. Where there was no Re-
55.6% of all Reagan district court nominees during this period.

The continued use of the panels is not as surprising when one examines the motivations of senators in establishing panels under Carter. Some senators, especially those with seniority, jealously guarded their prerogatives and resented Carter's intrusions. Other senators embraced the panel idea, but their reasons for doing so were not always identical to the administration's. A study by Dr. Elliot Slotnick of The Ohio State University explored senatorial motivations in electing to use advisory panels and concluded: "On the surface it appears that the President brought about great change with his recommendation [to use panels]. . . . In reality, however, consideration of the operation of the panels demonstrates that these processes were often personalized efforts elected for instrumental purposes unrelated to the President's initiative." Senators may have one or several of a variety of motivations in establishing a formal recommendation procedure. Public commissions are considered "good politics" and create public support for a senator and his role in judicial selection. A panel enlists more public participation in judicial selection and can create a broader pool of applicants. Panels are also used to share power between senators—either between those of the same party or those of different parties. (Under both administrations, for instance, New York's senators have operated their own individual panels with the "out-party" senator's panel making publican Senator, letters were sent to the two Democratic senators. These letters were followed up by telephone inquiries.

Two of the ten states sponsoring panels with only one Republican senator included the Democratic senator in creating the commission. In the other eight states, the senatorial responses either explicitly stated that they were the sole sponsors of the system or made no mention of participation by the Democratic senator.

63. Slotnick, Reforms in Judicial Selection (pt. 1), supra note 33, at 66.
64. Senator Pat McCarren said of judicial appointments, "It's the lousiest duty in the world because what you end up with is 100 enemies and one ingrate." Initial Hearing, supra note 9, at 25 (Sen. Paul Laxalt quoting Sen. McCarren).
66. See Alan M. Dershowitz, quoted in Schellhardt, Reshaping the Federal Judiciary, Wall St. J., Feb. 23, 1978, at 26, col. 4. See generally Slotnick, Judicial Selection Reform and Advice and Consent, supra note 65, at 11. One Senate aide told Slotnick: "We chose to use a commission in order to make it appear as if the public were more involved. The public likes the commission idea and, ironically, they hope that it will produce the same quality of judges we have in — now." Slotnick, Reforms in Judicial Selection (pt. 2), supra note 33, at 123-26.
67. Forty-three percent of the circuit court candidates surveyed by Berkson and Carbon believed that they would not have been considered for the position if the commission had not been created. L. BERKSON & S. CARBON, supra note 1, at 136.
68. Of the seven states with two Republican senators in which a vacancy has been filled, four have elected to use a panel system. Indiana, Minnesota, Pennsylvania, and South Dakota employed panels; North Carolina, Idaho, and Kansas did not.
Judicial Selection Panels

recommendations for every fourth vacancy. Senators Kasten (Republican) and Proxmire (Democrat) of Wisconsin set up a panel in which both senators chose panelists. The administrative convenience in leaving the decision to a panel should also not be overlooked. Finally, senators support panels because they feel that panels improve the quality of the nominees.

Another possible explanation for the continued use of panels is that Republican senators who adopted panels under Carter chose to retain them under Reagan. Under the Carter administration, six states with two Republican senators had elected to use the panels. Of these six, three have had judicial vacancies filled under the Reagan administration. Two of these (Minnesota and Pennsylvania) retained the panel system under Reagan, while the third, Kansas, chose a nominee that had been previously recommended by the panel system. Senator Heinz of Pennsylvania explained his faith in the commission system: "Indeed, I am very proud of the results of our judicial nominating commission. It was a commission that Senator Schweiker and I established five years ago. And people said then, 'Well, I guess it is to be expected that Republican Senators would have a procedure like this if there is a Democratic President, but they certainly would never maintain if if there was a Republican President.'"

For district court nominations, President Reagan has generally acted only on recommendations from Republican senators or their panels. Where there has been no Republican senator, the President has turned

69. A. Neff, supra note 1, at 57. A somewhat similar relationship existed between Senators Cranston and Hayakawa during the Carter administration, although only one panel was created. Id. at 132.


71. Tydings, Merit Selection for District Judges, 61 Judicature 112, 114 (1977). Senators may well have found that they have to devote less of their own time to district judge selection by delegating part of the duties to a panel. Of the five states with the greatest number of judgeships, four have used panels under both administrations: California, New York, Florida, and Pennsylvania (leaving only Texas).

72. Slotnick, Reforms in Judicial Selection (pt. 2), supra note 33, at 124. Thirty-three percent of Slotnick's respondents (senators or their aides) reported that they supported the commission in order to open up or depoliticize the recruitment process. Fifteen percent gave political reasons, such as a campaign pledge. Fourteen percent pointed to Carter's mandate to establish the panels. Another 14% suggested public popularity, while 6% said that the panels enhance the senatorial advice and consent function.

73. Vice President Walter Mondale selected half of the Minnesota Panel during the Carter administration. Senators Boschwitz and Durenberger now select all of the commission members. Letter from Sen. David Durenberger to Gary Fowler (Nov. 22, 1982) (on file with the Yale Law & Policy Review).


317
to the state congressional delegation, prominent officeholders in the state, or the state party leadership. A possible exception is Kentucky, where the President nominated a person recommended by the Kentucky panel set up by Democratic Senators Huddleston and Ford. In Hawaii, however, the President rejected candidates recommended by the commission established by Democratic Senators Inouye and Matsunaga and instead chose a person selected by the state party leadership.

The selection system in Illinois deserves further explanation. Senator Percy has not appointed his own panel but instead has used a series of bar panels to solicit and evaluate candidates. These panels review candidates suggested by the senator and other sources. Unlike other panel systems, however, they do not eliminate candidates from consideration or compile a list of preferred candidates. Instead, their evaluations of all applicants are sent back to the senator. The senator then selects the final list of candidates to be sent to the President.

Both Carter and Reagan have encouraged senators to send more than one name per vacancy. Apparently not wishing to push their luck, all six of the Republican-sponsored commissions under Carter set up "blind commissions" which forwarded the names of all those recommended by the panels directly to the President. Of the remaining twenty-four panels (sponsored at least in part by Democrats), only seven followed the President's direction and submitted more than one name. In the Reagan administration, five of the fifteen states with panels reported sending more than one name per vacancy, but two of these stated that they made their preferences known to the Justice Department. Four states reported recommending only one name per vacancy while the practice of the remaining six was not determined. Republican sena-

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77. Letter from Kathleen Lydon, Press Secretary to Sen. Charles H. Percy, to Gary Fowler (Nov. 17, 1982) (on file with the Yale Law & Policy Review). Although representatives of Alabama Senator Jeremiah Denton stated that applicants were screened by a bar committee, the committee did not have the responsibility of soliciting applicants.
78. Department of Justice, Supplemental Guidelines for U.S. District Judge Nominating Commission § II.F.4, reprinted in A. Neff, supra note 1, at 197; Department of Justice, Judicial Selection Procedures, supra note 2. Thirteen of the thirty states employing panels under Carter left the final selection to the President. A. Neff, supra note 1, at 63.
79. A. Neff, supra note 1, at 60-63.
80. Senators from Georgia and Illinois reported sending lists of candidates to the Department of Justice, but each reported that they singled out a preferred candidate. Senators from Indiana, Kentucky, and Minnesota sent lists of candidates directly to the Justice Department. Senators from Florida, Maine, Missouri, and South Dakota responded that they preferred to
Judicial Selection Panels

tors have expressed reluctance to relinquish any further control over the recommendation process. Senator Percy of Illinois referred to the matter as "an unsettled issue" and said that, "If we find a great deal of dissatisfaction with the [President's] process, if we find it does diffuse and undercut the responsibilities that senators have always had, I think we'd have to sit down and work it out with them."81

Even Carter administration officials recognized that problems could develop in the panel system.82 One notable example under the Carter administration occurred in Virginia. Senator Harry F. Byrd, Jr., an Independent, set up two panels for the state's two judicial districts. Each panel consisted of nine members and included one black and one woman. The Carter administration, however, objected when the panels recommended ten white males. Byrd refused to approve any nominee not selected by the panels, claiming that he was defending "merit selection" by doing "precisely what the President, in a hand-written letter, asked me to do."83 Carter nominated three candidates from the list, but also included James A. Sheffield, a black state judge in Virginia. Byrd returned all four blue slips, approving the three nominees named by the panels but objecting to Sheffield.84 Two of the three recommended by Byrd were later confirmed. Questions regarding Judge Sheffield's tax returns delayed his nomination, and he later withdrew his name from consideration.85

While the Virginia example reveals one way in which a serious impasse can develop between a President and a senator, there have been other difficulties as well. For instance, panel voting procedures were challenged in Wisconsin. The Wisconsin panel, created by Senator Kas-

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send only one name per vacancy. The policy of California, Maryland, New York, Oklahoma, Pennsylvania, and Wisconsin was not determined.

82. Attorney General Griffin Bell told the Senate Judiciary Committee: "I do not think [the panels] ought to be required by law. We have had some trouble with the commissions. They are not accountable to anyone. You have to be certain that they are following fair procedures themselves, that they are not manipulating lists so that they get someone on the list that is going to be appointed because there is one strong person and four weak people, for example." Initial Hearing, supra note 9, at 20.
85. Wash. Post, July 15, 1981, at B1, col. 1, B4, col. 1. The delay in the Virginia nominations allowed the Reagan administration to fill two of the vacancies since neither Sheffield nor James P. Jones was confirmed. Nevertheless, Carter may have received indirect benefit from the situation by showing that he was willing to combat senatorial courtesy. A. Neff, supra note 1, at 115. Attorney General Bell stated that he would return a list of white male candidates where the administration felt that qualified women and minorities were being overlooked. Initial Hearing, supra note 9, at 17.
ten under the Reagan administration, consisted of fifteen members: the Dean of the University of Wisconsin Law School, seven members appointed by Senator Kasten, three by Senator Proxmire, and four by the state bar association. The non-Kasten appointees supported two candidates, the only ones to receive a majority. The seven Kasten appointees supported John C. Shabaz. When it was discovered that only two candidates had received a majority, the panel voted eight to six to include the next three candidates, which then included Shabaz with the seven votes from the Kasten appointees. When Shabaz was nominated, Senator Proxmire returned the blue slip stating his opposition. At Shabaz's confirmation hearing, Proxmire cited a minority report issued by seven of the commission members which charged a pre-arrangement among the Kasten appointees: "[They] succeeded in turning the result of the Commission's designation into a political spoils system benefitting their pre-selected candidate, John Shabaz. This is not to say that Senator Kasten had anything to do with these actions. . . ." Mr. Shabaz’s nomination encountered no further resistance, and he was confirmed.

Although panels have been used under both administrations, it should be emphasized that the Carter and Reagan approaches to district judge selection are not identical. Carter not only actively pushed for the panel systems but also instructed the Department of Justice to ensure that all recommendation processes were "fair and reasonable." Senators may have had their own motivations for adopting panel systems, but it was the Carter administration that set the standard for judicial recruitment through its executive orders and suggested guidelines. Perhaps more importantly, Carter changed the "language" of judicial selection; commissions became the norm rather than the exception. To some degree, the Carter administration found it necessary to combat the traditional system of selection in order to promote the nomination of women and minority group candidates. This could be done best by exerting pressures on the first stage of the judicial selection process. The Reagan administration has left more discretion to senators in the types of recruitment procedures they may choose to employ. It performs a function more akin to that of pre-Carter administrations in reviewing and screening candidates recommended by senators.

B. Senatorial Roles in Circuit Court Recommendation Procedures

"When it comes to making appointments to circuit courts, the bal-

86. Hearings, 97th Cong., Part 2, supra note 70, at 167-68.
87. Exec. Order No. 12,097, supra note 47.
88. A. NEFF, supra note 1, at 150.
Judicial Selection Panels

ance of power shifts markedly to favor decision-making by the president's men," observed Professor Harold Chase eleven years ago. The regional character of circuit court positions allows executive branch officials some freedom from the prerogatives of any one state's senator. Senators cannot argue that they may be held responsible at the polls by the voters in the court’s jurisdiction since circuits cover more than one state. Consequently, it is understandable that Judiciary Chair Eastland, who was considered a guardian of senatorial prerogatives, assented to the presidentially-appointed commissions established in 1977.

The panels provided an additional benefit to executive branch officials by clearly separating circuit court procedures from those for the district courts. This is not to say that senators were removed from the pre-nomination process entirely. A study by Slotnick found senatorial participation in the circuit court recommendation and screening process under Carter. While 28% of the senators surveyed claimed a role in helping the President to make a final choice among candidates, a sizeable minority (31%) even claimed some role in choosing the panelists. Once recommendations were received from the panels, Department of Justice officials consulted with a candidate's home-state Democratic senators before nomination. Despite senatorial participation in the pre-nomination process, the President still had a significant advantage in creating a system in which recommendation procedures began in the executive branch through a presidentially-appointed mechanism.

When the panels were instituted under Carter, some senators opposed the greater amount of presidential influence in the circuit court recommendation process. The most visible conflict occurred in North Carolina where both Senators Jesse Helms and Robert Morgan expressed discontent with the commission system from the beginning. The Fourth Circuit panel was criticized for asking questions regarding the candidate’s views on abortion, women’s rights, and “state sovereignty.” Senator Helms objected even more strongly when the panel recommended United States District Judge James McMillan, who had written the lower court decision ordering mandatory desegregation in Swann v.

89. H. Chase, supra note 5, at 43.
90. Id.
91. Slotnick, Reforms in Judicial Selection (pt. 2), supra note 33, at 131.
92. Telephone interview with Michael Egan, supra note 50.
93. Slotnick, Federal Appellate Judge Selection, supra note 1, at 293.
Charlotte-Mecklenberg Board of Education. The panel also recommended Julius Chambers, who was the attorney for the plaintiffs in Swann. Attorney General Bell reportedly supported McMillan for the position. Ultimately, the Carter administration decided to nominate a compromise candidate recommended by the panel, Dickson Phillips of the University of North Carolina Law School.

Senators intervened not only by objecting to the selection of a candidate but also by pushing one of their own choices. Senator Edward M. Kennedy secured the nomination of Harvard Law Professor Stephen Breyer, who had served Kennedy as Chief Counsel of the Senate Judiciary Committee. The Breyer nomination came after a long impasse had developed between Carter and Kennedy on the selection of Archibald Cox for the position. Although Cox was recommended by the First Circuit panel, the Carter administration opposed Cox because of his advanced age. The qualifications of both Cox and Breyer were extremely high, but as one scholar of judicial selection politics posited, the commission's recommendation of Breyer acted only as a "charade" for a selection decision reached independently by the President and Senator Kennedy. Breyer's nomination encountered additional resistance at his confirmation hearing from Senator John Chafee of Rhode Island, who felt his state deserved representation on the First Circuit. Later, Senator Morgan of North Carolina attempted to filibuster the nomination but was overcome by bipartisan support led by Kennedy and Senator J. Strom Turmond, the Ranking Minority Member of the Senate Judiciary Committee.

The Carter administration restricted a panel's search to one state in making its recommendations. Although this restriction tended to perpetuate the idea that a circuit seat "belonged" to one state and opened an opportunity to invoke senatorial courtesy, the Carter administration
Judicial Selection Panels

felt any other system would be unworkable.101

Although the Reagan administration does not maintain a separate system for circuit court nominations, officials have tried to maintain the distinction between district and circuit court recommendation procedures. The administration wishes to give weight to senatorial recommendations but does not wish to perpetuate—or revive—the idea that a senator has a special prerogative to one seat.102 Jonathan Rose of the Office of Legal Policy of the Department of Justice said, “Our pride in our circuit court appointments in large part is due to the fact that we’ve been able to get by the senatorial courtesy system.”103 Rose cited four nominations: Robert Bork, Antonin Scalia, Ralph Winter, and Richard Posner. Two of these nominations—Bork and Scalia—were for the Court of Appeals for the District of Columbia and would be considered to be outside any senatorial prerogative. Executive branch officials also initiated the nomination of Winter for the Second Circuit and Posner for the Seventh Circuit. Word of Winter’s candidacy reached the press before Connecticut Senator Lowell Weicker had made any recommendations,104 while Reagan’s nomination of Posner came after Senator Percy had publicly endorsed three other candidates.105 In both cases, the senators endorsed the nomination, although Percy recommended his three candidates for another Seventh Circuit vacancy.106 The panels set up by Republican senators for district court nominations generally do not consider circuit court recommendations.107

In response to an inquiry to senators in states which had filled judicial vacancies during the Reagan administration,108 senators for seven of the

101. Slotnick, Federal Appellate Judge Selection, supra note 1, at 292, 296.
103. Interview with Jonathan Rose, Office of Legal Policy, Department of Justice, Legal Times, Nov. 8, 1982, at 6, col. 1.
104. N.Y. Times, July 26, 1981, at 1, col. 4. Senator Lowell Weicker’s office affirmed that although Senator Weicker fully supported the nomination, Judge Winter had not been initially recommended by the senator.
106. Letter from Kathleen Lydon, supra note 77.
108. Letters were sent to all Republican senators in states which had a vacancy filled between January 20, 1981 and November 15, 1982. The inquiry asked:

(1) Did you make any recommendations to the President for vacancies on the circuit court of appeals?
thirteen states reported that they had made recommendations for appellate court vacancies. Only one of these (Illinois) replied that the person nominated was not among those recommended. Four states did not respond. Of the remaining two, one was Connecticut (Judge Winter’s nomination) and the other Missouri, where the administration nominated John R. Gibson. Judge Gibson had been recommended to his district court position only one year before by Senator John Danforth’s screening panel.

The most significant difference between the Carter and Reagan circuit court selection systems is that senators who wish to push a particular candidate under Reagan do not have to gain the concurrence of a presidentially-appointed recommendation process. Senators under the Reagan administration, however, do have to gain the acceptance of the Department of Justice and White House officials. These officials have shown themselves willing to reject a senator’s recommendation and nominate their own candidate when they feel that their person better meets the administration’s standards for both quality and philosophy. Even though senators are more directly involved in the initial recommendation process than they were under Carter, the Reagan administration continues to set the terms of the circuit court selection process to a much greater degree than for district court nominations. In Illinois, Reagan’s policy conflicted with the recommendations of Senator Percy in the nomination of Judge Posner. Percy again recommended District Judge Joel Flaum for a position on the Seventh Circuit, although the administration was reported to be leaning toward the nomination of University of Chicago law professor Frank Easterbrook. Nominees to the circuit courts must satisfy Reagan administration criteria to a greater degree than nominees to the district courts. Even among those circuit courts nominees recommended by senators, however, all but one had established a record through judicial experience that Reagan officials could use in determining the nominee’s philosophy and qualifications. Thus, the arena of circuit court nominations is one that may be

(4) Was the person ultimately nominated among those that you recommended?
Where there was no Republican senator, modified inquiries were sent to the Democratic senators.

109. Illinois, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin. Other authors, however, have observed that the “Department [of Justice] prefers that its suggestions become the recommendations of senators.” L. BERKSON & S. CARBON, supra note 1, at 14.
110. Indiana, Iowa, New York, and Ohio.
111. American Lawyer, Jan. 1983, at 18, col. 3; Chicago Lawyer, Feb. 1983, at 5, col. 1. Judge Flaum was recently nominated for the position.
Judicial Selection Panels

described as one of consensus and compromise, rather than domination by one branch over the other.

C. *The Senate Judiciary Committee and Senatorial Courtesy*

As a formal matter, the Senate Judiciary Committee's function is to evaluate judicial nominees through the confirmation process and to recommend action to the full Senate.\(^1\) Informally, however, the activities of the committee influence the initial recommendation and nomination procedures of the selection process. Its investigations and public hearings reinforce the screening functions of the Department of Justice and the American Bar Association. The committee's position on controversial issues in judicial selection influence the actions of earlier participants who wish to avoid the public embarrassment of problems exposed at confirmation. Finally, the Judiciary Committee for many years acted as the protector of senatorial courtesy through its blue slip procedure. The blue slip worked best not when it provoked an impasse, but when it led executive branch officials to honor senatorial prerogatives in recommending candidates. In these areas of investigating nominees, making policy, and enforcing senatorial courtesy, Senator Edward M. Kennedy, as chairman, changed the committee's role.

Kennedy reformed the committee's investigation procedures over those employed by his predecessor, Senator James Eastland. He created an investigative staff to free the committee from sole reliance on FBI reports and investigations. The committee developed an extensive questionnaire, available in most parts to the public.\(^3\) Upon replacing Senator Kennedy as chairman in 1981, Senator Strom Thurmond of South Carolina continued the use of an investigative staff and adopted a questionnaire similar to that employed under Kennedy. As under Kennedy,

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2. *Initial Hearing*, supra note 9, at 4. Kennedy said, "Appointments to these [lower federal] courts . . . have been of special interest to individual Senators because Federal judicial districts are drawn within the boundaries of individual States. The processing of lower court nominations has been likened to a rubberstamp by some critics who believe that the failure of the Senate as a whole to scrutinize nominations diserves the public and demeans the bench."

3. *Initial Hearing*, supra note 9, at 3. The committee's action in reporting unfavorably the nomination of Charles Winberry for the position of District Judge of the Eastern District of North Carolina may have represented a turning point in the committee's investigative role. The committee voted against the nomination "because it was not satisfied by [his] answers to allegations that he had acted improperly as counsel in a criminal case" in procuring favors for a client. The vote was the first formal rejection of a nominee for a district court position in forty-two years. It was especially noteworthy given the strong support for the nomination by North Carolina Senator Robert Morgan. A. Neff, *supra* note 1, at 43. See generally *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, 96th Cong. 1st & 2d Sess., pt. 4 at 604-32, pt. 5 at 485-604 (1979-1980).
the chairman, ranking minority member, and selected staff personnel have access to the FBI files.114

Committee policy concerns are often reflected at confirmation hearings. Senators often use questioning at these hearings to impress their viewpoints upon nominees before they grant them their lifetime appointments. Senator Kennedy was often concerned with a nominee’s views on civil rights.115 Senator Thurmond and other Senate Republicans have asked over 60% of all nominees their positions on issues regarding “judicial restraint” and the courts’ role in relation to the other branches of government and to the states.116

The most controversial matter under the Kennedy chairmanship was the “club issue.” The controversy concerned the membership of nominees in private clubs whose membership policies excluded or appeared to exclude persons on the basis of race or sex. The issue’s intensity grew during the confirmation hearing of Bailey Brown for a position on the Sixth Circuit Court of Appeals. Judge Brown refused to resign his membership in the University Club of Memphis, but told the committee that,

The University Club has no black member, though I have seen black persons eating there as guests. I understand there is nothing in the constitution or bylaws ruling out black members, though it is my opinion that

114. Senator Thurmond was steadfast that this access be maintained. Confirmation Hearing on William French Smith, Nominee to be Attorney General: Hearing Before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 60-61 (1981) [hereinafter cited as Smith Hearing].

115. For example, Kennedy’s questionnaire asked all nominees: “In what specific ways have you demonstrated a commitment to equal justice during your career?” STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 96TH CONG., 1ST SESS., QUESTIONNAIRE TO JUDICIAL NOMINEES § III.1, reprinted in Initial Hearing, supra note 9, at 130.

116. All hearings through March 31, 1982 were examined. All nominees answer the following question in the committee’s questionnaire:

1. Please discuss your views on the following criticism involving “judicial activism.”

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this “judicial activism” have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 97TH CONG., 1ST SESS., QUESTIONNAIRE FOR JUDICIAL NOMINEES § III (1981).
Judicial Selection Panels

while no blacks may have ever applied, none would have been accepted. Judge Brown emphasized that he believed the policy should be changed but that he could do "more good for the cause by staying in" and promoting the membership of blacks. Judge Brown eventually agreed to suspend his membership until he determined the club's membership policies. Kennedy, in turn, secured Senator Strom Thurmond's support in co-signing a letter, stating: "In our view, it is inadvisable for a nominee for a federal judgeship to belong to a social club that engages in invidious discrimination." The Washington Post later reported that "more than a dozen" nominees for federal judgeships resigned memberships in clubs whose policies were questionable.

Concern with the club issue has decreased since the Brown nomination. Although "endor[ing] the principle that it is inappropriate for a judge to hold a membership in any organization that practices invidious discrimination," the Judicial Conference of the United States moved away from a more rigorous standard and declared that it "must ultimately be determined by the conscience of the individual judge whether membership in a particular organization is incompatible with the duties of the judicial office." Thurmond's position is similar. He concurs with his 1979 letter but states that the question should be left to the judge or nominee. The issue surfaced again in the nomination of District Judge Harry W. Wellford for a position on the Sixth Circuit. Judge Wellford, whose nomination had run into opposition in 1976 because of his membership in the Memphis Country Club, avoided further controversy by resigning it upon his renomination in 1982. The Judiciary Committee has removed the club issue from public scrutiny even further by moving its question regarding club membership from the

118. Id.
120. Wash. Post, Sept. 23, 1979, at A13, col. 1, reprinted in Brown Hearing, supra note 117, at 264-65. Most civil rights advocates were concerned particularly with the appearance of impropriety resulting from a judge deciding civil rights cases while belonging to such a club. To many, such social clubs symbolized racial discrimination. See generally SOUTHERN REGIONAL COUNCIL, THE CRISIS OF CONSCIENCE: FEDERAL JUDGES IN SEGREGATED CLUBS, reprinted in 125 CONG. REC. 26,019-21 (1979).
public to the confidential section of the questionnaire.\textsuperscript{124}

The Kennedy reform with the greatest potential for altering initial recommendation procedures dealt with the blue slip. Saying that he could not “discard cavalierly the tradition of senatorial courtesy, exception-riddled and outdated as it may be,” Kennedy announced at the committee’s hearing in January, 1979, that he would continue to send out blue slips. If a blue slip was not returned, however, “rather than letting the nomination die I will place before the committee a motion to determine whether it wishes to proceed to a hearing on the nomination . . . . The committee, and ultimately the Senate, can work its will.”\textsuperscript{125}

The new policy made it much more likely that the President could nominate someone of his own choosing without facing the possibility of the quiet blue slip veto. Senatorial courtesy could still be invoked, but Kennedy’s policy meant that the fight would be public. At the same hearing, Attorney General Bell noted that Kennedy’s change could force a shift to the executive branch in judicial selection politics. More importantly, the special advantage accorded senators who did not belong to the President’s party would be gone. In response to a question from Senator Thurmond as to whether the Department of Justice would continue to “confer with both Senators before even submitting a nomination to the Senate,” Bell candidly admitted, “[T]hat would get down to whatever the Senate is going to do about the blue slip. . . . If there were no blue slip procedure and we wanted to send a name in, we would. I will have to say, frankly, we would.”\textsuperscript{126}

Nevertheless, the Carter Justice Department never felt secure enough in the new position to test it. Associate Attorney General Michael Egan said, “We never were quite sure what Kennedy would do [without a] blue slip, and we didn’t want to find out.”\textsuperscript{127} What action the Judiciary Committee would have taken is uncertain. Results of a study by Slotnick showed further ambivalence among senators during the Carter administration. While 57% of the senators surveyed favored continuance of the blue slip, only 32% favored its elimination or the Kennedy reform. A majority (62%) seemed to lend qualified support to the Ken-

\textsuperscript{124} 37 \textit{Congressional Quarterly Almanac} \textsuperscript{412} (1981). Attorney General Smith was criticized for his failure to resign from two all-male clubs. Smith pointed out that both clubs had minority members. \textit{Smith Hearing}, supra note 114, at 22-24.

\textsuperscript{125} \textit{Initial Hearing}, supra note 9, at 4.

\textsuperscript{126} \textit{Id.} at 23.

\textsuperscript{127} Interview with Michael Egan, supra note 50. Although the Virginia nominations were held up partly because of Senator Byrd’s opposition, the situation tested the Carter administration’s merit selection and affirmative action policies rather than Kennedy’s blue slip policy. Ultimately, Senator Byrd returned the blue slips, stating his objections to the Sheffield nomination. \textit{Hearings, 96th Cong., Part 8}, supra note 84, at 1, 4.
Judicial Selection Panels

...nedy initiative by saying that "they would not defer as a matter of course to their colleagues' attempts to block a nomination by withholding a blue slip."128

Thurmond's earlier statements would lead to the expectation that he would support the traditional use of the blue slip. His stated policy, however, introduces even more ambiguity into the procedure:

I intend to follow the same general procedure on the blue slip process as was followed by the previous chairman. If blue slips on a nomination are not returned within a reasonable time, then I would not necessarily consider that fact a bar to the nomination, but it would be a significant factor which should be considered and taken into account prior to any hearing on the nomination.129

Unlike the Kennedy statement, the Thurmond policy makes no mention of a committee decision and leaves open the possibility that a blue slip could be withheld and a nomination die without any public action.130 Thurmond may wish to leave the issue open, rather than commit himself to a position that could bind him in an executive-senatorial confrontation. Thurmond's policy may have been tested in the nomination of Sam Bell for a district judgeship in Ohio. Thurmond held a hearing on Bell's nomination, even though Senator Howard Metzenbaum (Dem.-Ohio) had not returned the blue slip.131 Under Thurmond, therefore, withholding a blue slip will not always delay a hearing on the nomination. Thurmond's action indicates that the blue slip privilege may no longer extend to a senator who does not belong to the President's party.

128. Slotnick, Reforms in Judicial Selection (pt. 1), supra note 33, at 70 (emphasis original). The respondents included both Democratic and Republican senators.

129. Sen. J. Strom Thurmond, Blue Slip Policy (1981) (on file with the Yale Law & Policy Review). At the 1979 hearing, Thurmond said, "I presume that the committee will honor the blue-slip system that has worked so well in the past. This is not only a matter of senatorial courtesy but has on many occasions provided insight on a nominee not otherwise presented." Initial Hearing, supra note 9, at 5 (statement of Sen. Thurmond read by Sen. Laxalt). See also Cohodas, How Reagan Will Pick Judges Is Unclear, But Philosophy Will Play an Important Role, 39 Cong. Q. Weekly Rep. 299, 303 (1981).

130. Compare Kennedy's statement: "If the blue slip is not returned within a reasonable time ... , I will place before the Committee a motion to determine whether it wishes to proceed ... " (emphasis added) with Thurmond's statement: "If blue slips on a nomination are not returned within a reasonable time, then I would not necessarily consider that fact a bar to the nomination ... " (emphasis added). Compare text accompanying note 125 and note 129, supra. The latter statement leaves open the possibility of unilateral action by the chairman that would allow the nomination to die quietly.

131. Metzenbaum did not return the blue slip because he did not have sufficient time to study the nomination. Nevertheless, Thurmond held the hearing and remarked only that the senator did not make "any other attempts to prevent today's hearing." Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary, Part 4, 97th Cong., 2d Sess. 269 (1982). An aide to Senator Metzenbaum told the author that the blue slip was later returned. See also, Goldman, Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image, 66 Judicature 334, 347 n.15 (1983).
In sum, home-state senators played a significant role in both the Carter and Reagan administration recommendation procedures for district and circuit courts. Although President Reagan has not placed as much emphasis on senators’ use of formal nominating panels, a majority of the district court nominees selected under both administrations were selected through panel processes. This suggests that panels have earned a significant place in the judicial selection process for district court positions. For the circuit courts, Carter’s use of a presidentially-appointed nominating commission created a separate system from the district courts in which recommendation procedures were conducted exclusively through an executive branch mechanism. That advantage was lost to the Reagan administration when it abolished the panels. Although senators therefore are more directly involved in the recommendation process than under Carter, the Reagan administration has maintained a prerogative to select its own nominees for circuit court positions.

Both Senators Kennedy and Thurmond as Chairmen of the Senate Judiciary Committee have influenced the recommendation process through their investigation procedures, policy positions, and blue slip policies. While Thurmond has maintained Kennedy’s innovations in investigation procedures, he has placed less emphasis on a nominee’s club memberships. Thurmond’s blue slip policy differs from Kennedy’s in that it allows the possibility of unilateral action by the chairman in deciding not to hold a hearing when a blue slip is withheld. Thurmond’s action in holding a hearing without a blue slip from Democratic Senator Howard Metzenbaum, however, indicates that the blue slip policy no longer automatically extends a special prerogative to a senator who does not belong to the President’s party, at least as far as delaying a hearing on the nomination.

III. Initial Recruitment Procedures and Accomplishment of the President's Ideological and Political Goals

While all administrations wish to appoint judges of high quality who will earn the respect of their peers and of the nation, administrations also wish to accomplish political and ideological goals through their appointment power. Recognizing that close cases on constitutional questions have important political effects, an administration may examine philosophical backgrounds in selecting nominees and in reviewing recommendations from panels or senators. Additionally, the administration may wish to reform the selection system itself to open the process to permit more public participation. It may also wish to appoint judges
from groups that have been previously underrepresented on the federal bench.

Carter's decision to employ panels at the circuit level and to emphasize their use by senators at the district level reflected the goals he wished to accomplish through the appointment process. Carter wished to appoint judges who agreed with him philosophically, but he also wished to reform the system itself. He wanted to include more participants in judicial selection and to increase the representation of women and minorities. Recalling his experience as governor, he chose the panel system as a means of accomplishing those goals. Instead of a single senator with a few aides or close friends selecting federal judges, Carter felt panels would bring to judicial selection a cross-section of the community that would lead to a corresponding diversity in the candidates recommended.

Reagan also wishes to appoint judges who agree with him philosophically. The administration, however, is not as concerned with reforming the selection system itself. It felt that the Carter system for circuit court judges had not eliminated political considerations in judicial selection and had added only a new layer of bureaucracy that would slow the selection process down. Thus, the administration abolished the circuit court panels. It instead chose to work within a more traditional selection system, similar to that which operated prior to the Carter administration. The Reagan system leaves initial recommendation procedures to the senators at the district court level. It, however, reserves to itself the prerogative to name circuit court candidates and employs that prerogative when it feels it can further its goal through the appointment of an outstanding conservative jurist.

An administration's goals and initial recommendation procedures are interrelated. An administration determines its procedures based on the goals that it wishes to accomplish. The Carter emphasis on "affirmative action" led it to create the panels, while Reagan has sought conservative jurists through a more traditional, non-panel system. However, the actual working of those procedures, checked by senatorial courtesy,
mines how successful the administration will actually be in accomplishing its goals. This part of the paper now turns to this second question.

A. Recruitment Procedures and Goals under the Carter Administration

The Carter administration goal of increasing the representation of women and minorities on the federal bench reflected a value judgment that “a national judiciary should resemble its national demographic constituency.”135 Despite their increasing concern with civil rights and other cases affecting the rights of women and minorities,136 the federal courts had remained the domain of white males.137 In the creation of 152 new federal judges under the Omnibus Judgeship Act, Carter saw an opportunity to diversify the federal bench. The greater number of appointments not only created a greater number of potential places for women and minorities but also gave the administration greater bargaining power in dealing with senators and in exchanging support.138 Also, the wording of the Act itself suggested that the President “give due consideration to qualified individuals regardless of race, color, sex, religion, or national origin.”139

The Carter administration significantly furthered the diversification of the federal bench. For positions in the fifty states, the District of Columbia, and Puerto Rico, Carter appointed thirty-seven blacks, forty women, three Asian-Americans, and sixteen Hispanics.140 When Carter left office, the percentage of women judges had risen from one percent to nearly seven percent, while blacks had increased from four percent to over eight percent.141

135. A. NEFF, supra note 1, at 150.
136. The number of civil rights cases involving the United States as a party increased over 250% from 651 to 1,744 from 1972 to 1976. The number of civil rights cases between private parties almost doubled from 5,482 to 10,585 for the same period. AD. OFFICE OF THE U.S. COURTS, CIVIL AND TRIAL STATISTICAL TABLES: TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979 48-49, 68-69 (1980).
137. Under the Ford, Nixon, and Johnson administrations, blacks had constituted only 5.8%, 3.4%, and 4.1%, respectively, of all district court appointees. The percentage of women nominees reached a high of 1.9% under Ford for the three administrations preceding Carter. Goldman, Reagan’s Judicial Appointments at Mid-Term, supra note 131, at 339.
138. Bell told the Judiciary Committee that he perceived his role as that of an “honest broker” between the President and the senators on judicial nominations. Bell added: “I think I have a duty—and this is a painful one—to say to a Senator: ‘I wish you would reconsider your list. There were some qualified minorities or women in your State and none on the bench, and we are pledged to make the system more representative and wish you would reconsider.’ I have done that in some instances.” Initial Hearing, supra note 9, at 17.
139. Omnibus Judgeship Act, supra note 37.
140. These figures are based on tables prepared by the American Bar Association Standing Committee on Federal Judiciary (on file with the Yale Law & Policy Review).
Judicial Selection Panels

TABLE III-1

COMPARISON OF CARTER PANEL AND NON-PANEL NOMINEES
ACCORDING TO RACE AND SEX

DISTRICT COURT NOMINEES 1979-80

<table>
<thead>
<tr>
<th>Race</th>
<th>Panel Process</th>
<th>Non-Panel Process</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number/Percent of Total</td>
<td>Number/Percent of Total</td>
</tr>
<tr>
<td>Caucasian</td>
<td>83/74.1</td>
<td>45/80.4</td>
</tr>
<tr>
<td>Minority</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Status</td>
<td>29/25.9</td>
<td>11/19.6</td>
</tr>
<tr>
<td>TOTALS:</td>
<td>112/100.0</td>
<td>56/100.0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sex</th>
<th>Panel Process</th>
<th>Non-Panel Process</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number/Percent of Total</td>
<td>Number/Percent of Total</td>
</tr>
<tr>
<td>Male</td>
<td>94/83.9</td>
<td>51/91.1</td>
</tr>
<tr>
<td>Female</td>
<td>18/16.1</td>
<td>5/8.9</td>
</tr>
<tr>
<td>TOTALS:</td>
<td>112/100.0</td>
<td>56/100.0</td>
</tr>
</tbody>
</table>

These figures indicate that the Carter administration had a deep commitment to increasing the number of women and minorities. One might ask to what extent these increases were due to the use of the nominating panels under the Carter administration. One way in which the panels aided the administration was by expanding the number of persons considered. A study of the circuit court panels by the American Judicature Society found that 43% of the candidates felt that they would not have been considered but for the panels, usually because they felt that they lacked political connections.142

This expanded pool of candidates gave the executive branch greater flexibility in choosing nominees.

When one compares the nominees who were selected through panel processes with those selected through non-panel processes under the Carter administration, one finds that the panels were slightly more likely to result in the nomination of women or minority group members. (Table III-1). Of the non-panel system nominees 19.6% had minority status compared to 25.9% for the panel systems.143 Similar results were found for sex: states not employing panels ended in the nomination of women 8.9% of the time compared to 16.1% for the states employing panels.

142. L. BERKSON & S. CARBON, supra note 1, at 138-39. Neff found that 53.1% of the candidates for the district courts believed that they would have been considered absent the commissions. A. NEFF, supra note 1, at 124.

143. Merit panel states were those listed by the Neff study. A. NEFF, supra note 1, at 54-56. Race and sex were based on tables furnished by the ABA Standing Committee on Federal Judiciary. Only those judges nominated in 1979 and 1980 were considered for comparing the outcomes of the two processes. See also A. NEFF, supra note 1, at 135-41 (similar analysis for Carter appointees through February 20, 1980).
Many senators who did not choose to follow the President’s call for panels nevertheless recommended persons from these non-traditional groups; otherwise, a greater difference might have been found when the results of the panel and non-panel systems were compared. Maryland Senator Paul Sarbanes, for instance, recommended one black male and one woman without the aid of a panel, while Texas Senator Lloyd Bentsen recommended three Hispanics, one black woman, and one white woman. Even so, the panels and the Carter guidelines were useful to the administration in establishing a standard by which to judge non-panel processes.

Not all district court panelists or senators shared Carter’s commitment to “affirmative action” in judicial selection.144 A study by the AJS found that 52.3% of the district court panelists agreed with the statement that “[t]he race of an applicant should never be considered in selection.”145 Critics of the Carter administration—such as Senator Harry F. Byrd, Jr. of Virginia—contended that the administration could not maintain its affirmative action goals and still claim that the system was based on merit.146 Defending his position on the Virginia nomination controversy,147 Senator Byrd contended that a system based on “merit selection” should aim solely for the “best qualified.”148

Carter administration officials readily admitted that their idea of “merit selection” went beyond a candidate’s professional background. In response to a question from Senator Paul Laxalt (Rep.-Nevada), Attorney General Griffin Bell told the Senate Judiciary Committee that given a “qualified” black or woman and three “exceptionally well qualified” white males, Bell would support—and had supported—the nomination of the former where that group was not represented on the federal bench.149

The Carter administration defended its position on several grounds. First, the Carter administration felt that in a democracy a national judiciary should reflect its constituency. To achieve that goal, the administration sought to correct an imbalance that it believed the past system had created in favor of white males.150 Second, Carter officials argued

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144. For a more detailed analysis of affirmative action under the Carter administration, see Goldman, Should There Be Affirmative Action for the Judiciary?, 62 JUDICATURE 488 (1979); Slotnick, Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration, 1 YALE L. & POL’Y REV. 270 (1983) (this issue).
145. A. NEFF, supra note 1, at 103.
146. Hearings, 96th Cong., Part 8, supra note 84, at 4.
147. See supra text accompanying note 83.
149. Initial Hearing, supra note 9, at 25.
150. Lipshutz & Huron, Achieving a More Representative Federal Judiciary, 62 JUDICATURE 483 (1979); A. NEFF, supra note 1, at 149.
Judicial Selection Panels

that a “pluralistic judiciary” would increase the “confidence of the di-
verse groupings in a pluralistic society . . . [over] a judiciary over-
whelmingly composed of one race, one social class, and one political
orientation. . . .” Finally, administration officials challenged the
contention that quality was being sacrificed. As White House counsel
Robert J. Lipshutz and Douglas B. Huron argued:

The Administration decided early that qualifications could not be ignored.
Judicial positions are among the most critical in government, and the ap-
pointment of mediocre judges would be a disservice to all. Besides, lacklus-
ter appointments are unnecessary: there are well qualified minority and
female lawyers in most jurisdictions today. If the process is open enough to
permit identification of these people, some can and should be
appointed.152

The panels also furthered Carter’s accompanying goal to open the
recommendation process to more participants. According to an AJS
study, in the second round of appointments 42% of the presidentially-
appointed circuit panels were female while 23% were minority group
members.153 The AJS study noted that the number of minorities on the
panels was “approximately proportionate to their numbers in the gen-
eral population.”154 In addition to the panels, Carter encouraged in-
creased participation by including the National Bar Association and the
Federation of Women Lawyers in the pre-nomination screening process.

Critics, however, charged that the panels under Carter failed to “de-
politicize” the selection process and instead only opened it to other
Democrats. The Berkson and Carbon study concluded that “merit se-
lection” under Carter “may simply represent a form of merit selection of
Democrats, by Democrats.”155 The study found that of the circuit court
panelists surveyed, all labeled themselves “moderate” or “liberal” in
political ideology.156 Further, a large majority (86%) of the panelists
were Democrats.157 If Carter’s goal was to appoint judges “strictly on
the basis of merit without any consideration of political aspects or influ-
ence,”158 he fell short of his goal. Administration officials, however, ar-
gued that the goal of merit selection under Carter was not to “preclude
application of [political] factors,” but only to “prevent their crass appli-

152. Lipshutz & Huron, supra note 150, at 484.
153. L. BERKSON & S. CARBON, supra note 1, at 45.
154. Id. at 52-53. Lower figures for women and minority groups were found for the
senatorially-appointed district court panels. Of all district court commissioners, 23.7% were
female and 13.1% minority. A. NEFF, supra note 1, at 92.
155. L. BERKSON & S. CARBON, supra note 1, at 183.
156. Id. at 148.
157. Id. at 146.
158. Miller, supra note 37.
This goal, they argued, was furthered by substituting the panel system with its emphasis on professional qualifications and open procedures for the traditional system based on patronage and closed procedures. The moderate-to-liberal views of the Carter circuit panelists indicate that, like all presidents, Carter was concerned with nominating persons who shared his ideology.

The Carter administration employed the panel process at the circuit level and encouraged similar processes at the district level in order to diversify the federal bench and open the system to more participants. Senatorial courtesy prevented the administration from completely accomplishing its goals. Not all senators responded to the President's call to establish panels, and even among those that did, not all shared Carter's commitment to increase the representation of women and minorities. Still, President Carter appointed an unprecedented number of women and minorities to the bench, and although it was largely limited to other Democrats, Carter succeeded in bringing more public participation to the judicial selection process.

B. Goals and Recruitment Procedures under the Reagan Administration

Aside from nominating judges of high quality, the primary goal of the Reagan administration is to nominate persons who believe in "judicial restraint." Reaffirming the administration's commitment in a speech before the Federal Legal Council, Attorney General William French Smith announced that the administration has "helped to select appointees to the federal bench who understand the meaning of judicial restraint." Smith went on to outline what the administration meant by "judicial restraint":

Three areas of judicial policy-making are of particular concern. First, the erosion of restraint in considerations of justiciability. Second, some of the standards by which state and federal statutes have been declared unconstitutional—and, in particular, some of the analysis of so-called "fundamental rights" and "suspect classifications." And third, the extravagant use of mandatory injunctions and remedial decrees.

To further its goal, the Reagan administration has exercised more influence in the selection of circuit court judges than in the selection of

159. Lipshutz & Huron, supra note 150, at 483 (emphasis deleted).
160. Id. at 484.
161. It should also be pointed out that the Carter administration appointed some conservative jurists, such as Cornelia Kennedy to the Sixth Circuit.
163. Id. at 4.
Judicial Selection Panels

those for the district courts. As we have seen, the administration has selected its own candidates for circuit court positions, even where a senator has publicly announced his own choices. The appellate courts perform a more policy-oriented function than the district courts, giving the administration greater incentive to assure the appointment of judges who will tend toward minimizing the role of the federal judiciary. Moreover, intervention in circuit court nominations does not interfere with the traditional senatorial prerogatives associated with district court positions. Although even here the senators often play a significant role, the administration has maintained a prerogative to select its own candidate when it finds an outstanding conservative jurist or law professor.

For the district courts, the administration has allowed senators (or congressional delegations where there is no senator) to play their traditional role in recommending candidates. For the most part, at least as far as the ideology of the candidates is considered, the administration may often depend on Republican senators who share its views to recommend conservative candidates. The administration, however, has reaffirmed its desire that senators send more than one name per vacancy. Assistant Attorney General Jonathan Rose told one interviewer that although Republican senators initially followed the procedures, many senators began to send only one name per vacancy. The result is "that we haven't had a lot of flexibility at the district court level. We are prepared to make another run at Congress for the next group of district court appointments. . . ."

Even with this resistance by senators, the Reagan administration appears to be accomplishing its goal of appointing conservative judges. Conservative interest groups, such as the Washington Legal Foundation, praise the Reagan appointments. In replying to questions at Senate confirmation hearings, Reagan nominees have generally supported "judicial restraint." Although party affiliation is not a perfect index of ideology, 97.1% of the district judges and 100% of the appellate judges appointed in 1981-1982 were Republicans.

164. See supra text accompanying note 105.
165. Rose, supra note 103.
166. Id.
169. Goldman, Reagan's Judicial Appointments, supra note 131, at 339, 345. The Carter administration appointed a high number of judges from its own party: 94.1% of the district judges and 89.3% of the circuit judges were Democrats. Id.
Although all administrations seek to appoint judges who agree with the administration on basic issues, administrations generally turn to "principled" or "apolitical" arguments in justifying their ideological goals. Scholars have long recognized that personal values often influence a judge's decision, but a similar recognition of political goals in judicial selection does not carry over into an administration's public statements. Both the Carter and Reagan administrations have sought a "higher base" in justifying their ideological objectives. While Carter appealed to "merit," Reagan's attorney general, William French Smith, told the National Conference of United States Attorneys that he "did not urge the courts to follow the election returns." Instead, the Reagan administration "will follow the election returns...and urge a return by the courts to neutral principals" since judicial intervention "fosters their politicization" and endangers the legitimacy of courts. The Carter and Reagan justifications for their selection criteria have parallels in the continuing debate concerning law and politics in judicial decisionmaking. Just as the judiciary loses legitimacy when it is perceived as engaging not in "law" but instead in "politics," the selection of the judicial branch by the other two branches loses its legitimacy if it publicly appears too political. If it appears to be aimed at turning the court away from past "law," judicial selection will tend to undermine judicial independence. As one author described, "court curbing" schemes are likely to be rejected and criticized:

[C]ourt curbing is difficult...[T]here is an underlying appreciation in American political thought for a properly independent judiciary. There seems to be a general consensus that tampering with judicial independence is a serious matter and the consequences of rash reprisals against the court as an institution may upset the original constitutional balance that has worked so well for so long.

To be successful, any political attempt to adjust or limit the judicial power must be—and must be perceived to be—a principled rather than a merely partisan response. Only then will the issue of judicial activism be met on a ground high enough to transcend the more common—and generally fruitless—debates over judicial liberalism and judicial conservatism.

In addition to appointing judges who believe in judicial restraint, the Reagan administration has also stated that it wishes to appoint women and minorities. Thus far, the Reagan administration has had less suc-

cess in doing so; officials admit that they would "like to do better." At the end of his second year in office, Reagan had appointed three women, two Hispanics, and one Asian-American to the district courts and one black to the circuit courts out of a total of eighty-eight appointments. Groups representing women and minorities have severely criticized the Reagan administration and have contended that the system is closed to them and their members.

A number of factors are helpful in examining Reagan's lack of success in appointing women and minorities. One such factor is that while both administrations have publicly embraced the goal of appointing women and minorities, their selection criteria in this respect differ widely. The Carter administration, as Attorney General Bell pointed out, was willing to select a woman, black, or Hispanic over a white male who might be viewed as having higher "professional" or "objective" qualifications. Deputy Attorney General Edward Schmults stated the Reagan approach: "We certainly are interested in reaching out and into the applicant pool for well-qualified minorities and women, but I think once people are in that pool, we are looking for the very best judges we can find.

A second factor limiting the nomination of women and minorities is the administration's adherence to a philosophy of judicial conservatism. Assistant Attorney General Rose said: "We're prepared to do our best to open up the judiciary to more women and minorities. . . . The President, however, is unwilling to put someone on the court that does not share his view on the role of the courts in our society, just because that person belongs to a particular group." The pool of blacks and women who agree with the administration may be small since President Reagan received limited support from these groups in the 1980

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173. Rose, supra note 103. Reagan officials received severe criticism for their handling of the proposed nomination of Judith Whittaker for a position on the Eighth Circuit. Although Ms. Whittaker was rated highly by the ABA and enjoyed strong support in the legal community, her nomination encountered political opposition, mostly from pro-life groups. Eventually, the administration chose Judge John R. Gibson for the position. Cohodas, Reagan's Judicial Selections, supra note 42, at 84; see also N.Y. Times, Jan. 7, 1982, at A26, col. 1; Wash. Post, Dec. 23, 1981, at A1, col. 6.

174. Cohodas, Reagan's Judicial Selections, supra note 42, at 83. As of April 1, 1983, Reagan had appointed two more women to district court positions (based on figures provided by the ABA Standing Committee on Federal Judiciary).

175. Susan Ness of the National Women's Political Caucus told one reporter, "His record is absolutely deplorable . . . . I'm surprised because he made a point during the campaign to appoint women to lower courts, and it is not as though he hasn't had ample opportunity." Cohodas, Reagan Slow in Appointing Women, Blacks, Hispanics to Federal Judiciary Seats, 39 CONG. Q. WEEKLY REP. 2599 (1981).

176. Id. at 2560.

177. Rose, supra note 103.
Reagan administration officials also point to the relatively small number of women and minority group lawyers with substantial legal experience. United States Census figures show that only 1.9% of lawyers in 1972 were non-white, compared to 4.2% for 1980. For women, the figure rose from 3.8% to 12.8%. Many of the nation’s women and minority group lawyers therefore have entered the legal profession only in recent years. Since the Reagan administration appears to favor those candidates with at least twelve years at the bar, many of these lawyers would not be considered for a judgeship under Reagan. Administration officials argue that appointing a great number of judges from these groups at this time would strain the quality of the federal bench, while representatives of women and minorities contend that a high number of qualified applicants are available.

Reagan administration officials also argue that a greater number of vacancies would allow them to appoint more women and minorities. The administration, they contend, could then bargain with senators in states where there was more than one judicial vacancy—the administration could honor the senator’s choice of one judgeship in exchange for the senator’s approval of an administration candidate. A possible move to expand the number of judgeships has begun. Last year, the Senate Judiciary Subcommittee on Courts reported favorably a bill to create forty-five new judgeships.

The Reagan administration also lacks procedures, such as the circuit court panels, that the Carter administration used in obtaining a large pool of applicants. (Remarkably, all three of the women nominated

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178. A New York Times/CBS News poll of the 1980 election showed that 82% of blacks voted for Carter while only 14% voted for Reagan. Among females, support for Carter and Reagan was split: 45% for Carter and 46% for Reagan. Among females favoring the Equal Rights Amendment, however, Reagan only drew 32% of the vote. N.Y. Times, Nov. 9, 1980, at 28, col. 4.


181. During the period covered by this study for Reagan nominees (January 20, 1981 to November 15, 1982), no Reagan district court nominee had less than 12 years at the bar.

182. Rose, supra note 103.

183. Susan Ness commented, “This is just malarky... Whenever the administration has passed over well qualified women, the argument has always been they were trying to take the most well qualified people available.” Cohodas, Reagan Slow in Appointing Women, supra note 175, at 2560.

184. 40 CONG. Q. WEEKLY REP. 1380 (1982).

185. Assistant Attorney General Jonathan Rose admitted, “[The panels] did achieve a much greater diversity of types of people to go on the bench, and that in and of itself was a desirable thing.” Rose, supra note 103.
Judicial Selection Panels
during the period of this study came from states employing panels.\(^{186}\)
The administration's decision to end the Carter practice of consulting
with the National Bar Association and the Federation of Women Law-
yers also blocked a potential source of information from groups repre-
senting minorities and women. As an alternative, Reagan officials have
urged women and minority groups to bring the names of qualified per-
sons to the attention of senators.\(^{187}\)

Although President Reagan indicated that he sincerely believed in
such appointments through the O'Connor nomination, hopes that the
Reagan administration would appoint a significant number of women
and minorities remain to be fulfilled. As the 1984 election draws closer,
the administration and Republican senators may appoint more judges
from these groups in order to build electoral support. Many Republican
senators have also utilized their first choices for judgships and may be
more willing to recommend women or minority candidates.

In sum, the Reagan administration has aimed at appointing conserva-
tive judges to the federal bench. To accomplish its goals, the adminis-
tration has shown itself willing to go outside the bounds of senatorial
courtesy to select a prominent conservative jurist. At the district level it
has had difficulty in persuading senators to make more than one recom-
mendation per vacancy. This has restricted the administration in nomi-
nating persons for the district courts. Even so, the Reagan
administration has furthered its goal of appointing conservative jurists
at both the district and circuit levels.

In the appointment of women and minorities, the administration has
had less success. This is due largely to a restricted pool of candidates
that can meet administration standards in judicial philosophy and years
of legal experience. Although the panel system aided the Carter admin-
istration in increasing the pool of candidates, it is doubtful that the Rea-
gan administration will create panels for circuit court positions. As an
alternative, the administration has urged representatives of these groups
to give senators the names of possible candidates for district court posi-
tions. The administration may also increase its efforts in urging senators
to send more than one name per vacancy.

\(^{186}\) Carol Los Mansmann (Pennsylvania), Elizabeth A. Kovachevich (Florida), Cynthia
Holcomb Hall (California).

\(^{187}\) Mann, supra note 179.
IV. Initial Recommendation Procedures and the Background Characteristics of the Nominees

A. District Court Nominees

While the implementation and operation of various initial recommendation procedures can determine how successful an administration will be in accomplishing its ideological goals, the operation of these procedures may also influence the type of judges selected and which professional and background characteristics will be emphasized in judicial selection. The two preceding parts of this study make comparisons directly between the Carter and Reagan administrations, but this part of the analysis is somewhat different in making comparisons both within and across the two administrations.

As we have seen, under both Reagan and Carter, some senators have chosen to use panel systems for district court nominees, while others have not. In evaluating the effect of the panel process on the composition of the judiciary, one may ask whether district court nominees chosen through a panel process differ from those chosen through a non-panel process. Conducting such an analysis within a single administration permits the comparison to be made in a framework in which presidential goals, attitudes, and screening procedures following initial recommendation are constant. The background characteristics of panel and non-panel nominees in areas such as experience, legal education, and ABA ratings will be compared first under the Carter administration and then under the Reagan administration. The results of these comparisons may then be used to see if there are similarities in the results of the two administrations.

"Panel nominees" will be compared with "non-panel nominees" in four areas: professional experience (judicial experience, government attorney experience, law professor experience), age and years at the bar, legal education (status of law school attended), and ABA ratings.

188. Although this study categorizes district court selection systems according to "panel" and "non-panel" processes, the processes actually set up by senators within each category differ. For a comparison of panel processes in the Carter administration, see A. NEFF, supra note 1, at 53-85. For the purpose of this analysis, "Carter panel nominees" are nominees from states listed by Neff as employing panels. "Reagan panel nominees" are from states listed in Table II-3. Senators who did not elect to use formal panel processes often stressed to the author that a careful, informal search was conducted before submitting recommendations to the President. See, e.g., letter from Sen. John W. Warner of Virginia to Gary Fowler (Nov. 23, 1982) (on file with the Yale Law & Policy Review).


190. Only nominees for the fifty states, the District of Columbia, and Puerto Rico were
Judicial Selection Panels

The background characteristics examined here are not exhaustive of the variables that one might consider in defining "merit" or in evaluating panel and non-panel procedures, but they do offer an initial basis for comparisons of the outcomes of the two procedures.\textsuperscript{191} The data consist of biographical information collected on all 1979 and 1980 district court nominees and all Reagan district court nominees nominated by November 15, 1982.\textsuperscript{192} (The study was limited to the last two years of the Carter administration since the push for panels in district court nominations increased significantly with the passage of the Omnibus Judgeship Act of 1978.)

The working hypothesis for these comparisons was that the emphasis of the panel process on legal experience, professional accomplishments, and outreach to those who would not otherwise be considered would

\textsuperscript{191} Many authors have debated and pondered the question of what constitutes a "good judge." See, e.g., Rosenberg, The Qualities of Justices—Are They Strainable?, 44 TEX. L. REV. 1063 (1966); Goldman, Judicial Selection and the Qualities that Make a "Good" Judge, 462 ANNALS 112 (1982). The difficulty is that many such qualities (such as fairness, judicial temperament, and logical reasoning) are intangible and therefore beyond the reach of empirical study.

\textsuperscript{192} Judicial experience was verified with data compiled by Sheldon Goldman.
lead to the nomination of persons who, as a whole, would be more likely than non-panel nominees to exhibit certain characteristics in these areas. For instance, nomination panels under the Carter administration were instructed to consider judicial experience, familiarity with governmental processes, and legal scholarship as positive characteristics.\textsuperscript{193} In addition, the Berkson-Carbon study of circuit court panelists found that 96\% of the respondents held the professional experience of the candidates to be an "important" or "very important" factor.\textsuperscript{194} Thus it was expected that panels would produce a higher percentage of nominees with judicial, government attorney, and law professor experience than would the non-panel processes.\textsuperscript{195} Berkson and Carbon also found that panelists considered legal education as an important factor.\textsuperscript{196} This finding led to the hypothesis that panel nominees would be more likely to have graduated from schools with "prestigious" reputations than would non-panel nominees. In age and professional experience, administrations generally prefer those with substantial experience, but who are also young enough to enjoy a long tenure on the bench.\textsuperscript{197} The study here assumed a "prime" age bracket of 44 to 57, which was approximately within one standard deviation from the mean for all nominees.

\begin{table}[h]
\begin{center}
\begin{tabular}{|c|}
\hline
TABLE IV-1  \\
\hline
\end{tabular}
\end{center}
\begin{center}
\textbf{EXPECTATIONS}
\end{center}
\begin{center}
Panel nominees will be more likely than non-panel nominees:
\begin{enumerate}
\item to have judicial experience
\item to have experience as a government attorney
\item to have experience teaching law on a full-time basis
\item to be between the ages of forty-four and fifty-seven
\item to have graduated from law schools with prestigious reputations
\item to have more than twelve years at the bar at the time of nomination
\item to have ABA ratings of "Well Qualified" or "Exceptionally Well Qualified".
\end{enumerate}
\end{center}
\end{table}

\textsuperscript{193} Department of Justice, Supplemental Instructions § B.3-B.4 (Oct. 2, 1978), reprinted in \textit{L. Berkson & S. Carbon, supra note 1}, at 222-23.
\textsuperscript{194} \textit{L. Berkson & S. Carbon, supra note 1}, at 108.
\textsuperscript{195} Slotnick performed similar tests on Carter nominees using data obtained from Senate Judiciary Committee questionnaires. Slotnick, Judicial Selection Systems, \textit{supra} note 189, at 9-10, 13, 18-20.
\textsuperscript{196} \textit{L. Berkson & S. Carbon, supra note 1}, at 108.
\textsuperscript{197} Under President Carter, circuit court panels originally were instructed to consider a candidate over the age of 60 "only in unusual circumstances and if especially meritorious." Department of Justice, Supplemental Instructions § B.7 (Apr. 22, 1977), reprinted in \textit{L. Berkson & S. Carbon, supra note 1}, at 219.
Judicial Selection Panels

under both administrations. Earlier versions of Carter executive orders and supplemental instructions also emphasized that candidates normally should have twelve years at the bar. Use of panels therefore was expected to result in the nomination of fewer persons who fell below this standard. Finally, ABA ratings are considered as an index of merit, and it was expected that panel nominees would be more likely to be found “Well Qualified” or “Exceptionally Well Qualified” than non-panel nominees. (Expectations are summarized in Table IV-1.)

As we shall see, the differences between panel and non-panel nominees—especially in the Carter administration—are not dramatic in all cases. Indeed, the level of statistical significance for comparisons in the Carter administration indicates that factors other than the process used in recommendation may have had a greater impact on the type of judge selected. With the exception of education and age, however, results in the Carter administration are consistent with expectations. This consistency suggests a pattern in the comparison of panel and non-panel nominees that is mirrored in the Reagan administration. Moreover, the differences between Reagan panel and non-panel nominees tend to be greater than those found between Carter panel and non-panel nominees.

1. Comparison of Background Characteristics of Carter Panel and Non-Panel Nominees

A higher percentage of the Carter panel nominees was expected to have experience as a judge, government attorney, or law professor than the Carter non-panel nominees. This was the case, although the difference in judicial experience was not large. As Table IV-2 indicates, the greatest difference between the two groups lay in teaching experience (10.7% for Carter panel nominees compared to 1.8% for Carter non-panel nominees). In fact, all but one of the thirteen nominees with full-time teaching experience were selected through a panel process. Since law professors on the whole may be less politically prominent than judges or government attorneys, they particularly may have benefitted

199. Results are summarized in Tables IV-2 and IV-3. Significance tests are of limited utility since the size of the population is small and since the “sample” consists of the entire population. See H. WEISBERG & B. BOWEN, AN INTRODUCTION TO SURVEY RESEARCH AND DATA ANALYSIS 110 (1977). Levels of statistical significance are given in the tables, along with measures of covariation. Kendall’s tau is a commonly used measure of association that measures the extent to which a change in one variable is accompanied by a change in another variable. Id. at 153-54.
TABLE IV-2

COMPARISON OF CARTER PANEL AND NON-PANEL NOMINEES
DISTRICT COURTS
1979-80

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Non-Panel Nominees</th>
<th>Panel Nominees</th>
<th>Tau</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Nominees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Experience</td>
<td>51.8</td>
<td>58.9</td>
<td>.07</td>
<td>.19</td>
</tr>
<tr>
<td>Govt. Atty. Exp.</td>
<td>32.1</td>
<td>46.4</td>
<td>.14</td>
<td>.04</td>
</tr>
<tr>
<td>Teaching Experience</td>
<td>1.8</td>
<td>10.7</td>
<td>.16</td>
<td>.02</td>
</tr>
<tr>
<td>Age between 44 and 57</td>
<td>66.1</td>
<td>66.1</td>
<td>.00</td>
<td>.50</td>
</tr>
<tr>
<td>12 or less years’ at bar</td>
<td>10.7</td>
<td>8.9</td>
<td>.03</td>
<td>.36</td>
</tr>
<tr>
<td>Degree from “prestige” law school</td>
<td>37.5</td>
<td>33.9</td>
<td>-.04</td>
<td>.32</td>
</tr>
<tr>
<td>ABA rating of WQ or EWQ</td>
<td>41.1</td>
<td>48.2</td>
<td>.07</td>
<td>.19</td>
</tr>
</tbody>
</table>

Chart covers Carter nominees from January 1, 1979 to January 20, 1981.

WQ = Well Qualified
EWQ = Exceptionally Well Qualified

from panel emphasis on legal scholarship and outreach to candidates who would not otherwise have been considered. The group of Carter panel nominees was also more likely to have had government attorney experience (46.4% compared to 32.1%) and slightly more likely to have had judicial experience (58.9% compared to 51.8%).

In comparing the age at nomination of the Carter panel and non-panel nominees, the study examined the percentage of nominees who fell in the 44-57 age bracket. This eliminated those who fell in both the youngest and oldest categories. The two groups were remarkably identical.200 The panel systems operating during the Carter administration selected a slightly lower percentage of nominees that had twelve or less years at the bar than the non-panel systems (8.9% for Carter panel nominees compared to 10.7% for Carter non-panel nominees).201

The comparison of the educational backgrounds is contrary to expectations and indicates that Carter non-panel nominees were more likely to have graduated from a “prestigious” institution than the panel nominees (37.5% compared to 33.9%). This suggests several possibilities.

200. The two groups were also identical in the groups younger and older than the “prime” age bracket. Of the panel and non-panel nominees 21.4% were under 44 while 12.5% were above 57.

201. When one excludes those who had exactly twelve years at the bar, the relationship is reversed. Of the panel nominees 6.3% had less than twelve years at the bar compared to 3.6% of the non-panel nominees. Only nine (5.4%) of the Carter nominees had less than twelve years at the bar.
Judicial Selection Panels

While studies of panelists' attitudes indicate that some weight is attached to an applicant's educational background, there are obviously many more ways that one may present an impressive educational record than by graduating from a "major" law school. Editorship of the school's law review, class standing, and moot court prizes are but a few. Unfortunately, this study did not permit analysis of all these factors. Furthermore, the emphasis on outreach in Carter panel systems may have created a more "egalitarian" view that led panels to select a person who had excelled at a school with less national prestige.

A higher percentage of Carter panel nominees received a rating of "Well Qualified" or "Exceptionally Well Qualified" from the American Bar Association. Of the panel nominees 48.2% received such ratings compared to 41.1% of the non-panel nominees. This indicates that the panels and the ABA committee may have had similar emphases that led to awarding higher ratings to the panel nominees.

In sum, the analysis of the Carter administration produced the expected results in all areas but education. The differences between Carter panel and Carter non-panel nominees, however, were not strong except in teaching and government attorney experience and, to a lesser extent, in ABA ratings. These results will now be contrasted with those for the Reagan administration.

2. Comparison of Background Characteristics of Reagan Panel and Non-Panel District Court Nominees

Differences in background characteristics between Reagan panel and non-panel district court nominees were greater than differences between Carter panel and non-panel nominees (see Table IV-3). This was particularly true in the area of judicial experience. Reagan panel nominees were more likely to have such experience than Reagan non-panel nominees (51.4% compared to 32.1%). Similar results were found for government attorney experience (37.1% compared to 25.0%). As under the Carter administration, district court nominees with prior teaching experience were selected almost exclusively through panel processes. Higher percentages of panel nominees therefore were found in all three experience fields in both administrations. Increased use of the panels

202. L. BERKSON & S. CARBON, supra note 1, at 108.
204. For the period considered under the Reagan administration, four of the five district court nominees with full-time teaching experience originated through panel processes.
TABLE IV-3

COMPARISON OF REAGAN PANEL AND NON-PANEL NOMINEES
DISTRICT COURTS
1981-82

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Non-Panel Nominees</th>
<th>Panel Nominees</th>
<th>Tau</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Nominees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Experience</td>
<td>32.1</td>
<td>51.4</td>
<td>.19</td>
<td>.06</td>
</tr>
<tr>
<td>Govt. Atty. Exp.</td>
<td>25.0</td>
<td>37.1</td>
<td>.13</td>
<td>.15</td>
</tr>
<tr>
<td>Teaching Experience</td>
<td>3.6</td>
<td>11.4</td>
<td>.14</td>
<td>.13</td>
</tr>
<tr>
<td>Age between 44 and 57</td>
<td>67.9</td>
<td>85.7</td>
<td>.22</td>
<td>.02</td>
</tr>
<tr>
<td>12 or less yrs. at bar</td>
<td>0.0</td>
<td>0.0</td>
<td>—</td>
<td></td>
</tr>
<tr>
<td>Degree from “prestige” law school</td>
<td>42.9</td>
<td>22.9</td>
<td>-.21</td>
<td>.05</td>
</tr>
<tr>
<td>ABA rating of WQ or EWQ</td>
<td>28.6</td>
<td>65.7</td>
<td>.37</td>
<td>.00</td>
</tr>
</tbody>
</table>

Chart covers Reagan nominees through November 15, 1982.

WQ = Well Qualified
EWQ = Exceptionally Well Qualified

therefore might lead to the nomination of more persons with such experience.

The Reagan panel nominees were also more likely to be between the ages of 44 and 57 than the non-panel nominees (85.7% compared to 67.9%).205 Since no Reagan district court nominee had less than twelve years at the bar, no difference occurred between Reagan panel and non-panel nominees on this test.

As under the Carter administration, results in educational background were contrary to expectations. Reagan non-panel nominees were much more likely than panel nominees to have graduated from a prestigious law school (42.9% compared to 22.9%). This is a larger difference than that found in the Carter administration between non-panel and panel nominees. Again, this reflects a tendency among panelists to recommend candidates who graduated from less prestigious schools. This result still leaves open the question of whether panels place heavier emphasis on law school honors than on the “prestige” of the law school attended.

When one compares the ABA ratings of Reagan panel and non-panel nominees, a sharp distinction is noted between the two categories. Reagan panel nominees were much more likely than Reagan non-panel

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205. Of the Reagan non-panel nominees, 10.7% were under 44 while 21.4% were 60 or above. For the Reagan panel nominees, 14.3% were below 44 while none were above 57. This indicates that the panels were more likely to choose younger candidates.
nominees to receive a rating of “Well Qualified” or “Exceptionally Well Qualified” from the ABA. Of the Reagan panel nominees 65.7% received such ratings compared to only 28.6% of the non-panel nominees—a difference of 37.1%. This is a much greater difference between panel and non-panel nominees than that found under the Carter administration.

In sum, the comparison of Reagan panel nominees with non-panel nominees produced the expected results in all areas but education. To this extent, the results of the Carter and Reagan administrations are similar. Dissimilarity arises when one looks at the magnitude of those differences between panel and non-panel nominees. Reagan panel nominees were much more likely than Reagan non-panel nominees to have judicial experience, to be in the prime age bracket, and to have higher ABA ratings, and these differences exceeded those noted in the same areas for the Carter administration.

3. Possible Explanations for Differences in the Magnitude of the Results Between the Carter and Reagan Administrations

The consistency of the results with those expected supports the idea that panels produce nominees with stronger background characteristics in professional experience, age, and ABA rating. Moreover, these differences occur within single administrations in which screening procedures following initial recommendation are constant. They are also in line with the expectations drawn from previous studies of criteria that panelists emphasize in screening applicants.206

Several explanations for the greater differences in background characteristics between panel and non-panel nominees in the Reagan administration should be explored. First, it should be noted that the size of the two populations is different. For the period of this study, Carter nominated more district judges than Reagan (168 nominees compared to 63). This may account for some differences since additional nominations may eventually even out the results in the Reagan administration. In interpreting the results from the Reagan administration, one should keep in mind the relatively small number of nominees; for example, a shift in just four of the non-panel nominees in teaching and government attorney experience would have reversed the results. Further, the smaller differences in the Carter administration may be due partly to different screening procedures following recommendation under the Carter administration. The Carter screening procedures could have created a greater consistency in the background characteristics of the Carter nominees.

206. See supra text accompanying notes 193-197.
The reasons for greater differences in the Reagan administration between panel and non-panel nominees does not seem to lie in differences in background characteristics between the nominees of the two administrations. In fact, Carter and Reagan district court nominees are roughly similar in most categories when they are compared as a whole without regard to the recommendation process employed (see Table IV-4). In government attorney experience, teaching experience, status of law school attended, years at bar, and ABA ratings, no difference was greater than 10.0%. Only in judicial experience and age are there notable differences. 

### TABLE IV-4

**COMPARISON OF REAGAN AND CARTER NOMINEES**

**DISTRICT COURT**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Carter % of Nominees</th>
<th>Reagan % of Nominees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Experience</td>
<td>56.5</td>
<td>42.9</td>
</tr>
<tr>
<td>Govt. Atty. Experience</td>
<td>41.7</td>
<td>31.7</td>
</tr>
<tr>
<td>Teaching Experience</td>
<td>7.7</td>
<td>7.9</td>
</tr>
<tr>
<td>Age between 44-57</td>
<td>66.1</td>
<td>77.8</td>
</tr>
<tr>
<td>12 or less yrs. at bar</td>
<td>9.5</td>
<td>0.0</td>
</tr>
<tr>
<td>Degree from “prestige” law school</td>
<td>35.1</td>
<td>31.7</td>
</tr>
<tr>
<td>ABA rating of WQ or EWQ</td>
<td>45.8</td>
<td>49.2</td>
</tr>
</tbody>
</table>

Chart covers district court nominees from January 1, 1979 to November 15, 1982.

WQ = Well Qualified

EWQ = Exceptionally Well Qualified

Another explanation that is not supported is that the “dual purpose” of the Carter panels in promoting “merit” and “affirmative action” diluted the differences between the panel and non-panel nominees. One might argue that where the panels chose a woman or minority candidate, the panels weakened their standards in other areas. As Slotnick points out in this issue, however, nominees in the Carter administration who were women or members of minority groups had educational backgrounds similar to those of white males. They were actually more likely

207. The difference in judicial experience is due to the relatively low percentage of nominees with judicial experience selected through Reagan non-panel processes. While approximately 50% of the nominees selected through Carter panel (58.9%), Carter non-panel (51.8%), and Reagan panel (51.4%) had judicial experience, only 32.1% of the Reagan non-panel nominees had such experience.
to be sitting judges and law professors. Women and minority group members, however, were more likely than white male nominees to have had less than twelve years at the bar and to have lower ABA ratings, although these differences do not account for the relatively small difference in ABA ratings between Carter panel and non-panel nominees.\[208\]

Another possible explanation is that the difference in the magnitude of the panel/non-panel comparison in the two administrations may reflect the background preferences of the senators creating the panels rather than the difference in the recommendation procedure.\[209\] Individuals involved in the judicial selection process told the author that the procedure used is not as important as the senator involved in the particular selection.\[210\] The senators who wish to emphasize judicial experience, trial experience, and the attributes that lead to higher ABA ratings are the ones who take greater care in judicial selection and are the ones who are inclined to create panels under Reagan. In the Carter administration, the senators who would have created the panels on their own were joined by senators who created the panel only in response to the President's call. Some of these latter panels may have acted only under the control of the senator. They may well have suggested the nomination of the person who would have been recommended by the senator under the traditional, non-panel process. That these nominees were included with those of the “willing” senators could have diluted the difference between the two groups of panel and non-panel nominees in the

\[208\] Slotnick, Affirmative Action and Judicial Selection, supra note 144, at 285, 291-93 (this issue). Since women nominees were more likely to have low ABA ratings than men, we might expect the difference in ABA ratings between Carter male panel and non-panel nominees to be larger than the difference found between panel and non-panel nominees when all Carter nominees are considered. When only Carter male nominees are considered, however, the difference between panel and non-panel nominees compared to that found in the original relationship is only slightly larger. Among Carter nominees, 56.4% of the male panel nominees had high ABA ratings compared to 45.1% for male non-panel nominees. This is a difference of 11.3% compared to a difference of 7.1% in the original relationship.

When only the white nominees under Carter are considered, the difference between panel and non-panel nominees compared to that found in the original relationship is again only slightly larger. Of white Carter panel nominees 56.6% had higher ABA ratings compared to 48.9% of white Carter non-panel nominees. This produced a difference of 7.7% compared to the 7.1% difference found in the original relationship for Carter panel and non-panel nominees.

Thus, it does not appear that the “affirmative action” goals of Carter panel processes caused the difference in ABA ratings between panel and non-panel nominees to be smaller than that found in the Reagan administration between panel and non-panel nominees. For a discussion of the ABA and its evaluation of women and minorities, see Slotnick, ABA Standing Committee (pt. 2), supra note 203, at 387.


\[209\] Slotnick, Reforms in Judicial Selection (pt. 1), supra note 33, and supra text accompanying note 66.

\[210\] This observation is based on interviews with Senate aides and interest groups lobbyists involved in judicial selection.
Carter administration. Under the Reagan administration, the panels are more likely to be employed by senators who are willing to allow the panels to function independently. The differences between panel and non-panel nominees, under Carter, therefore, would be much smaller than the differences in the Reagan administration where the decision to employ the panel is the senator’s own.

B. Circuit Court Nominees

Comparison of the background characteristics of Reagan and Carter circuit court nominees does not lend itself as easily to the panel/non-panel comparison employed for district court nominees since only one method was used in each administration. Carter relied exclusively on his presidentially-appointed panels while Reagan chose not to use the panels. Differences in background characteristics between “Carter panel” and “Reagan non-panel” may reflect more the differences in administration goals, attitudes, and screening procedures rather than the differences in the initial recommendation procedures. Nevertheless, some observations can be made (see Table IV-5).

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Carter % of Nominees</th>
<th>Reagan % of Nominees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Experience</td>
<td>56.7</td>
<td>73.7</td>
</tr>
<tr>
<td>Govt. Atty. Experience</td>
<td>40.0</td>
<td>42.1</td>
</tr>
<tr>
<td>Teaching Experience</td>
<td>20.0</td>
<td>26.3</td>
</tr>
<tr>
<td>Age between 44-57</td>
<td>58.3</td>
<td>68.4</td>
</tr>
<tr>
<td>12 or less yrs. at bar</td>
<td>0.0</td>
<td>5.3</td>
</tr>
<tr>
<td>Degree from “prestige” law school</td>
<td>61.7</td>
<td>42.1</td>
</tr>
<tr>
<td>ABA rating of WQ or EWQ</td>
<td>75.0</td>
<td>68.4</td>
</tr>
</tbody>
</table>

Chart covers circuit court nominees from January 1, 1979 to November 15, 1982.

WQ = Well Qualified
EWQ = Exceptionally Well Qualified

The most notable difference between the Carter and Reagan appellate court nominees is in judicial experience. Of the nineteen Reagan circuit court nominees, fourteen (73.7%) had judicial experience prior to nomination as either a state or federal judge. Of the remaining five,
Judicial Selection Panels

four were law professors. In all, 26.3% of Reagan circuit court nominees had teaching experience. These compare to Carter administration figures of 56.7% for judicial experience and 20.0% for full-time teaching experience. Reagan nominees were more likely to be between 44 and 57 while Carter nominees tended to be younger.211 Carter administration nominees were more likely to have graduated from "prestigious" law schools (61.7% compared to 42.1%) and to earn ABA ratings of "Well Qualified" or "Exceptionally Well Qualified" (75.0% compared to 68.4%).212

The results of the comparison between Reagan and Carter circuit court nominees differ from the expectations that were stated for comparing nominees solely on the panel/non-panel basis. "Carter panel" nominees were more likely than "Reagan non-panel" nominees to have high ABA ratings and to have graduated from "prestige" law schools. At the same time, "Reagan non-panel" nominees scored higher percentages in judicial experience. They were also more likely to be in the "prime" age bracket than "Carter panel" nominees. To some degree, this reflects the Reagan administration concern for nominees with proven records of judicial decisionmaking that give administration officials more confidence in the nominee's background and philosophy. The comparison of circuit court nominees reminds us of the importance in differences not only in the procedures but also in the personalities of those employing the procedures.213

Summary and Conclusion

The Carter and Reagan administrations adopted different frameworks in judicial recommendation and selection procedures. Carter's framework emphasized the use of nominating commissions, creating its own system at the circuit court level and actively encouraging senators to use panels at the district court level. The Reagan administration's framework is more traditional in leaving largely to senators the responsibility of initiating district court selection but in reserving to itself the prerogative to select its own circuit court candidates. The purpose of this paper has been to observe senatorial responses to these frameworks, to examine how the operation of the initial recommenda-

211. Of the Reagan circuit court nominees 68.4% were between 44 and 57 compared to 58.3% of the Carter nominees. Of the Carter nominees 13.3% were younger than 44, compared to 5.3% of the Reagan nominees.
212. Three of the six Reagan nominees who received "Qualified" ratings were law professors who may have lacked the trial experience the ABA considers important.
213. For a more detailed comparison of Carter and Reagan nominees without regard to panel process, see Goldman, Reagan's Judicial Appointments at Mid-Term, supra note 131.
tion procedures can affect the furtherance of the administration's ideological and political goals, and to explore how different initial recommendation procedures may lead to the selection of judges with particular background characteristics.

(1) **Senatorial responses to presidential initiatives in judicial selection.** Although President Carter put more emphasis on the use of panels for district court positions than President Reagan, a majority of the nominees in both administrations during the period of this study were recommended through panel procedures. This continued use of the panels suggests that senators have found them useful in fulfilling their own political and administrative needs. It also strongly suggests that the nominating panels have acquired a permanent place in the selection of district court judges.

In the selection of circuit court judges, the Reagan decision to discontinue the panels creates a sharp distinction between the two administrations. Although both administrations have allowed senatorial participation in the pre-nomination process, the Carter panels forced senators who wished to promote the candidacy of a particular person to go through a presidentially-created mechanism. Under the Reagan administration, senators may recommend candidates directly to the Justice Department—much as they do for district court positions. The Reagan administration, however, has shown itself willing not only to scrutinize candidates for circuit court positions more carefully but also to act on its own candidates, even after a Republican senator has formally announced his own choices.

In choosing initial recommendation procedures and putting them into practice, administrations are limited by the policies of the Senate Judiciary Committee. This is particularly true of the committee's role in enforcing senatorial courtesy through the blue slip custom. Thurmond's policy differs from Kennedy's in failing to guarantee committee action when a blue slip is withheld. Thurmond's decision to hold a hearing on the nomination of Sam Bell without a blue slip from Senator Metzenbaum may have been a significant development. It strongly suggests that holding the blue slip will not be sufficient by itself to delay action on a judicial nomination. Neither the Kennedy nor the Thurmond policy, however, has been tested by a senator belonging to the President's party. Until that happens, ambiguities in the blue slip policy will remain.

(2) **Initial recommendation procedures and accomplishing the President's ideological and political goals.** The Carter administration attempted not only
Judicial Selection Panels

to appoint judges who agreed with it philosophically but also to reform
the selection process itself in order to open it to more public participa-
tion and to encourage the selection of women and minorities. The
panels were useful to the Carter administration in accomplishing both
goals. In aiding its affirmative action goal, the panels created a broader
pool of applicants and candidates, particularly at the circuit court level.
At the district court level, panel systems were more likely to end in the
nomination of women and minorities than non-panel systems. The
panels also opened the selection process to greater participation, but the
administration was criticized for largely limiting that increased partici-
patation to other Democrats.

Unlike the Carter administration, which sought to appoint judges on
the basis of both ideology and "affirmative action," the Reagan admin-
istration has been more concerned with the former. The primary ideo-
logical goal of the Reagan administration is to appoint judges who will
follow "judicial restraint" in their decisionmaking. At the circuit level,
the administration has furthered its goal through the appointment of its
own candidates. At the district level, it has had some difficulty in per-
suading senators to send more than one name per vacancy. On both the
district and circuit levels, however, conservatives generally praise the
Reagan appointments.

The Reagan administration has also expressed its desire to appoint
women and minorities but has had difficulty in accomplishing this goal.
This is largely due, especially at the circuit level, to a restricted pool of
candidates that can meet administration standards in judicial philoso-
phy and legal experience. Since the administration generally relies on
the recommendations of senators in filling district court vacancies, it has
urged representatives of women and minority groups to give senators the
names of potential candidates. Since the 1984 election will bring in-
creased pressure on Republicans (senators as well as President Reagan)
to build electoral support and since many senators have already filled
vacancies with their first choices for judgeships, we may see an increase
in the number of women and minority appointees.

(3) Initial recommendation procedures and the background characteristics of the
nominees. Whether different recommendation procedures may lead to
the selection of judges with particular background characteristics has
long remained uncertain. While differences between panel and non-
panel nominees were strong in only a few cases, the data here indicate
that the emphases of panelists in screening applicants for federal judge-
ships were reflected in differences between the nominees selected
through panel systems and those selected through non-panel systems. In
both administrations, panel nominees to the district courts were more likely than non-panel nominees to have had judicial experience, service as a government attorney, and law professor experience. They were more likely to have high ABA ratings. Only with respect to the "prestige" of the law school attended were results contrary to expectations based on the qualities that panelists might emphasize. The differences in background characteristics were more dramatic in the Reagan administration than in the Carter administration. Nominees selected through panel systems in the Reagan administration were more likely than those selected through non-panel systems to have judicial experience and higher ABA ratings.

For the circuit courts, the difference between "Carter panel" and "Reagan non-panel" did not follow the expectations derived for comparing district court nominees within a single administration. This may be attributed to the differences in the goals and screening procedures of the two administrations.

Discussion of the selection and confirmation of federal judges has been complicated too long with the idea of eliminating "politics" in order to establish "merit." Rather, a recognition that political and ideological factors play a role in judicial selection may help in evaluating the utility of different recommendation procedures. Nominating panels introduce a new bureaucracy; they will not eliminate political considerations; they may not even markedly improve the quality of a federal bench which already enjoys a high reputation. At the same time, however, they open the process to more participants; they invite greater public scrutiny; they focus the selection process on professional qualifications. When an act of Congress creates a large number of judgeships—as under the Omnibus Judgeship Act—the increased pressure on participants in the judicial selection process may justify the use of the panels. In any event, panels continue to be used in the selection of district court judges and may well be on their way to a permanent position in the history of the federal judicial selection process.