Reply

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Both Slotnick¹ and Fowler² analyze judicial nominee data on multiple dimensions and attempt to account for the variations. Slotnick explains the variations by the imposition of a presidential directive to seek non-traditional candidates. Fowler attempts to trace the variations to the use of a nominating panel during the recommendation stages. For its intended purpose each study stands in its own right. This reply will attempt to transplant their empirical conclusions into the debate over the strength of the influence wielded by the political actors during the selection of federal judges.

Politics and Merit

Federal judges have come to play an increasingly critical role in resolving disputes between citizens and between citizens and institutions of the state. Many disputes can be resolved by a comparatively mechanical application of an established principle to specific facts. Resolution of other conflicts, however, often involves a significant degree of interstitial interpretation by judges. For these cases judges may apply principle to fact in novel ways, articulate new duties, or expand upon extant rights. To the extent that judicial law is made through judicial interpretation, and to the extent that such interpretation is a function of the experiences, characteristics, and orientation of the judge, the nature of law created depends on the type of person selected for judicial posts. Who they are determines what they say. Thus, increasing attention has been focused on the selection process.

A continuing debate is the degree to which politics rather than merit dominate the selection of federal judges. Popular rhetoric portrays the selection process as an exercise in selecting the most qualified, a process untainted by politics. Three considerations, however, support the contrary view.

An examination of the selection procedure reveals a structure designed to incorporate explicitly the “policy,” that is political, desires

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1. Slotnick, Lowering the Bench or Raising It Higher?: Affirmative Action during the Carter Administration, 1 Yale L. & Pol’y R. 270 (1983) [hereinafter cited as Slotnick].
of the executive and legislative branches. Judicial appointees have survived screening by the Department of Justice, review by the White House, and have emerged intact from the rigors of senate confirmation. In contrast, Congress is elected directly by the voters; consent of the judiciary or the executive branch is not required. Similarly, federal agencies draw the vast majority of their members through the shelter of civil service regulations, independent of review or consent by Congress or the courts.

Once appointed, sitting judges are, by and large, insulated from direct political influence of the other two branches through protections afforded by adequate compensation and life tenure. During their metamorphosis from applicant to candidate, from candidate to nominee, and from nominee to appointee, judges undergo a process where opportunities for the White House and the Senate to inject policy preferences for persons of certain backgrounds, status, or qualifications abound. Within this structure of selection, the compromises over candidates who meet minimal qualifications yet do not command universal support may be essentially political in nature.

A second consideration that supports the view that the selection process is predominantly political is that judges who are arguably in the best position to assist in the selection of “good” judges are mute. Judges know, by the trial of experience, the demands and requisites of judicial office. Yet their silence is conspicuous in the selection period during which the ABA submits its rating of the candidates, the FBI initiates full-field background investigations, the Justice Department and the White House winnow lists of recommendations, senate aides are sounded out to anticipate the strength of political opposition or support, local party leaders are consulted, and interest groups litter the landscape with letters of recommendations. The apparently widely shared belief that sitting judges, whose image of non-partisan independence is fiercely defended, should not become involved in the selection of other judges bespeaks the assumption that the selection process must be suffuse with politics.

Finally the data indicate a partisan selection process. The current Republican president with the cooperation of the Republican controlled Senate Judiciary Committee has filled 97% of the judicial vacancies with Republicans. The Democrat president that preceded him, with the cooperation of a Democratic controlled Committee, filled 93% of the vacancies with Democrats.³

Although these considerations support the view that the selection pro-

³ Id. at 68-69; Slotnick, supra note 1, at 274 n.10.
cess is merely another arena where politics in guise exist, the alternative characterization of the process as one designed to select the most qualified cannot be easily discarded. In the aggregate the federal judiciary comprises men and women of distinction and integrity. Over 50% of the nominees during the Carter Administration were rated by the ABA as well-qualified or better.\footnote{Slotnick, supra note 1, Table 7, at 295.} Approximately 50% of Reagan's district court nominees to date achieved this rating.\footnote{Fowler, supra note 2, Table IV-4, at 350.} If politics dominate, why should quality as measured by ABA ratings and collateral indicia be so consistently high across administrations?

The debate over which characterization more accurately captures the essence of the selection process has normative dimensions. That the executive and legislative branches are less influential than imagined may be cause for relief to some. The finding would indicate that the federal judiciary is resistant to political influence even at the most vulnerable stage, selection, and that merit considerations rather than political considerations somehow dominate the search for compromise. For others, the inference that the political branches are not able to work their will during the selection process raises the fear of an insulated federal judiciary, and thus the possibility of a judicial legislature not representative of or accountable to the citizenry.

Setting aside these normative considerations, the question as to the degree and nature of political influence exercised by the White House, the Justice Department, and the senators during the selection process remains. Clearly, both politics and merit operate at threshold levels. Those applicants without a modicum of political support and minimal qualifications are rarely successful. Beyond the threshold levels, it is not clear whether merit considerations or political considerations tend to be the decisive factors in choosing among close candidates. We turn to the studies by Slotnick and Fowler to see whether their findings can be interpreted to provide any insight on this question.

\textit{Slotnick and the Political Directive}

Although Slotnick's study was not designed to test explicitly the strength of political influence, it is possible to draw some inferences from his statistical findings. One connection can be drawn as follows. The strength of the influence wielded by political actors during the selection process is proportional to the degree to which a cohort class of appointees differs from the expected norm in directions consistent with the political directives imposed. This research presumes that the dimensions
of the political directive can be defined and that the differences between the policy-induced appointees and the norm can be measured. Thus, a finding that more women and minorities were appointed to the judiciary, under Carter's policy directive to seek non-traditional candidates, than would have been the case leads to the conclusion that political will does make a difference.

Slotnick concludes that the greater gender and racial representation of the bench resulting from Carter's affirmative action policy resulted in diversification along several other dimensions as well, notably age, wealth, and prior professional activity. Slotnick also concludes that the greater diversity along these dimensions was not, in the aggregate, bought at a price of increased diversity along the cluster of dimensions connoting quality, such as prior judicial experience and education. If the interpretation of the data is accurate, President Carter had his policy cake and ate it too. However, this interpretation depends on several implicit methodological assumptions.

Ideally we would wish to compare the group of appointees produced under Carter's policy regime, the "policy group," with the group of appointees that would have been produced under his administration absent the policy directive, the "control group." While we can measure directly the characteristics of the policy group, we can only estimate the characteristics of the counterfactual control group. One surrogate for the control group is the federal judiciary prior to the imposition of the affirmative action policy. This substitution forms the basis for a pre-post comparison.

Slotnick conducts a pre-post comparison with respect to race and gender. Before Carter, blacks constituted 4% of the judiciary, after Carter 9%; before Carter, women constituted 1%, after Carter 7%. If we are generous we attribute the entire percentage increase to Carter's policy directive. More precisely, we should subtract that portion of the increase that would have occurred despite Carter's policy directive. Such an increase could be caused by a demographic shift that resulted in greater percentages of minorities and women entering and succeeding in the legal profession. The residual increase, after subtracting this demographic effect, is then attributable to Carter's policy directive.

Slotnick does not attempt a pre-post comparison for other dimensions of interest, such as age, wealth, judicial experience, and qualifications. Instead, two surrogate measures are introduced. The subgroup of white

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7. Id. at 285-86, 291, 297.
8. Id. at 280 (quoting Goldman).
male nominees is used as a surrogate for the judiciary that would have been produced absent an explicit affirmative action policy. These nominees form the control group. The entire subgroup of women and minority nominees is used as a surrogate for the judiciary that would result consistent with Carter's policy directive. Because of these substitutions, the resulting comparisons may overstate or understate the true effect and strength of Carter's policy directive.

The ideal control group should have included some women and minority appointees. To the extent that these women and minorities were dissimilar from the white male appointee, Slotnick's comparison between the entire white male subgroup and the entire non-traditional subgroup overstates the true difference between policy group and control group. This overstatement would be analogous to the conclusion that the entire 9% of minorities on the federal bench after Carter were due solely to his affirmative action directive.

It is also possible that aggregating all women and minorities together and comparing this subgroup of nominees to the white male subgroup understates the efficacy of the policy directive. Slotnick suggests that there is diversity within subgroups and that non-traditional applicants must possess extraordinary qualifications before they are considered for appointment.9 A hierarchy among nominees may thus exist. Women and minorities who would have been selected regardless of an affirmative action policy, that is, those who would have been in the control group, may be older, wealthier, and possess more traditional credentials than their white male counterparts. This group in turn may be older, wealthier, and possess more traditional credentials than minorities and women, that is those in the policy group, who but for the affirmative policy would not have been selected. If this hierarchy holds, then aggregating all women and minorities into one subgroup masks the degree of difference between the policy and control groups and thus understates the strength of Carter's policy directive.

There is another manner in which Slotnick's empirical comparisons between subgroups of nominees understate the diversification due to Carter's affirmative action policy. Not captured in these comparisons is the possibility that the entire class of nominees, both traditional and non-traditional, submitted to the 96th Congress differs from the expected norm. The overall diversification wrought by Carter's policy would then consist of: the general difference consisting of the variation between Carter's traditional nominee and the norm, and the special difference, presumably in the same direction, reflecting the variation be-

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9. Id. at 285-86, 298.
tween the non-traditional nominee and the traditional nominee. Slotnick's comparisons measure only the special difference.

Finally, there is a condition not controlled for in Slotnick's study which may cause the statistical comparisons to overstate generally the influence enjoyed by the White House. The Omnibus Judgeship Act of 1978 provided Carter with an unprecedented number of new vacancies. Carter could fill these slots with non-traditional nominees and still accommodate traditional senatorial prerogatives. The tactical advantage that accrued to the Carter Administration due to these vacancies has been recognized by the Reagan Administration.10

In sum, insofar as the inferences are limited to statements regarding differences between subgroups of nominees, the conclusions are robust. These conclusions are noteworthy in their own right. Slotnick has demonstrated that the women and minority nominees supported by the Carter Administration do not differ appreciably from Carter's white male nominees on a cluster of dimensions connoting qualifications. Inferences regarding the efficacy of Carter's affirmative action policy in diversifying the federal judiciary are less robust. Such conclusions are not invalid, but merely more sensitive to underlying assumptions. To the extent that surrogate measures are used, the inferences must be bracketed by the likelihood that the actual comparisons between subgroups of nominees may overstate or understate the true effect of the policy directive and the strength of the political influence.

Fowler and Procedural Variation

While Slotnick explains the diversity among nominees submitted to the 96th Congress by the imposition of a presidential policy directive, Fowler focuses on the recommendation process employed, panel or non-panel, as a possible explanatory variable. Fowler controls for the level of appointment and the administration supporting the nomination.

Ideally, we would wish to measure the pure effect of panel usage. The available data, unfortunately, do not permit direct measurement. Surrogate measures are introduced in Fowler's analysis as well, and the following comments footnote the kinds of biases in the conclusions that may be introduced by the necessary substitution of these measures.

It should first be noted that the groups being compared are not composed of the immediate result of panel recommendation, a "candidate" in Fowler's terminology. Rather, the comparisons are conducted between groups of "nominees," that is, between groups that are the prod-

10. Fowler, supra note 2, at 332, 340.
uct of panel recommendation and intervening executive branch screening. This substitution is necessary in large part because candidate data are confidential and nominee data are public. This substitution introduces the risk, however, that influence in fact exercised by the Justice Department or the White House may be attributed to the panels. This risk is especially acute when these political actors disregard panel recommendations and support their own nominee. Similar difficulties with attribution hold when nominees from non-panel states are treated as candidates produced by the traditional recommendation process.

For those cases where the Justice Department and the White House concur with the panel recommendation, using nominee data in place of candidate data may understate the diversity of the candidate pool. The nominee pool can exhibit characteristics no more diverse than the candidate pool from which it is produced: the candidate list submitted to the Justice Department would contain a richer diversity than a profile of the nominee pool would suggest. This bias would apply equally to panel and non-panel states.

The difficulties of isolating the pure panel effect go deeper than substituting public nominee data for confidential candidate data. Panels operate in a dynamic system. The degree to which panel members anticipate executive and congressional attitudes toward their recommendations varies among panels. Those panels that are worried about long-term credibility, tenure, or bargaining position will devise their candidate list cautiously. To the extent that panel decisionmaking is anticipatory and impounds likely White House or senate attitudes, it is empirically difficult to isolate the panel effect from distorting system feedback.

Fowler notes another aspect of the difficulty of measuring the effect of panels when they form a component of a system. The use of a panel may not be an independent variable that explains variations in the types of nominees supported. Panel usage may itself be dependent upon the attitudes of the senators of a state. Thus, the observed correlation between the use of a panel and certain characteristics of the nominees, such as the likelihood of a high ABA rating, may be spurious in the sense that both panel usage and a high ABA rating are caused by a prior variable, such as the predisposition of a senator to support nominees who will eventually receive high ABA ratings and to use panels.

That several states still employ panels to recommend district court candidates, even when free from presidential bullying, is consistent with the view that panels fulfill multiple needs some of which are consistent

11. Id. at 354.
with political predispositions. It seems unlikely that a senator would retain a panel that consistently produced disfavored candidates, unless the panel produced countervailing benefits, such as the assumption of administrative burdens.\textsuperscript{12}

The dual identity of panel usage as both independent and dependent variable creates problems of causal attribution. Moreover, the duality makes it difficult to draw from Fowler's empirical findings direct implications to the debate on the dominance of politics or merit in the selection process.

A finding of significant difference between the nominees produced by states that employ panels and those that do not would lead to the conclusion that panels make a difference. To link such conclusions regarding the efficacy of panel usage to the desirability of panel usage based on a normative preference for or fear of political influence during the selection process requires additional assumptions. If panel usage is identified as a means to enhance merit considerations,\textsuperscript{13} then we can plausibly infer from a finding of significant difference between panel and non-panel nominees that political influence is large yet it can be mitigated by panel usage. An alternative interpretation, however, also consistent with the finding of a large difference is that panels are captured by political actors and serve to amplify rather than silence their voices.

If the comparisons between panel nominees and non-panel nominees indicate slight or mixed differences, the implications regarding the strength of political influence are similarly ambiguous. A finding of slight difference could mean that the selection process is fundamentally apolitical and that panel usage only marginally affects the kinds of nominees put forward. An alternative interpretation also consistent with a finding of slight difference is that politics dominate, unabated by panel usage.

However efficacious panels may be, we do not know empirically whether panel usage mutes politics and amplifies merit or vice versa. Thus, answers to the question "Do panels make a difference?" can not unambiguously guide us in the decision to retain or discard panels, if that decision is in large part determined by the desirability of political influence in the selection of federal judges. The experiment with panel usage is still young; time may tell what theory cannot.

\textsuperscript{12} Id. at 317.
\textsuperscript{13} See, e.g., Fowler, supra note 2, at 350-51.
Speculations

If we begin with the hypothesis that the selection process is merely another political arena, we would be surprised by a demonstration that the nominees when measured along a cluster of dimensions that connote quality or personal characteristics are generally similar, despite diverse political directives imposed by presidents, despite different recommendation procedures employed, and despite varying approaches taken toward senate blue slip privileges. Fowler appears to reach this finding when he states that 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.14 Similarly, Slotnick concludes that Carter's women and minority nominees do not differ in the aggregate from Carter's traditional nominees on various dimensions measuring qualifications.15

Perhaps the ability of political actors to work their will independent of merit considerations is not as great as first hypothesized. Alternatively, our initial picture of politics necessarily opposing merit in a zero sum context may be inaccurate. At times political will may operate tangentially to merit considerations. At other times political will may even secure merit appointments. Just as panels may or may not serve political ends, politics may or may not serve merit ends.

There is a corollary. A finding of uniformity across a variety of dimensions may indicate that selection occurs at a more fundamental level than the screening imposed by the panels, the Justice Department and the White House, and the Senate. Minimum threshold requirements for judicial posts seem to be a qualified rating by the ABA and a successful decade of legal experience unmarked by political controversy. In meeting these requisites, applicants are culled for whom explicit political preferences subsequently imposed—whether it be for women rather than men, for Democrats rather than Republicans, or for judicial activists rather than conservatives—carry little discriminating import.

If during the formal selection process the judiciary is mute and political will ineffectual, who then is selecting the judges? It may be that the constraints imposed by the legal profession, in part articulated through its professional organizations such as the ABA, have more influence than the political preferences imposed by presidents or the procedural mechanism chosen by senators in determining the judges selected. A look at

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14. Fowler, supra note 2, at 350.
15. Slotnick, supra note 1, at 298.
the candidates further upstream may be fruitful in explaining why the judges are who they are.