4-1-1998

The Selection Process and Characteristics of Judges Appointed to the US Courts of Appeal: From Carter to Clinton

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The Selection Process and Characteristics of Judges Appointed to the US Courts of Appeal: From Carter to Clinton

A Thesis

Presented to the

Department of Criminal Justice

And the

Faculty of the Graduate College

University of Nebraska

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

University of Nebraska at Omaha

By Mary K. Burk

April, 1998

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THESIS ACCEPTANCE

Acceptance for the faculty of the Graduate College, University of Nebraska, in partial fulfillment of the requirements for the degree Master of Arts, University of Nebraska at Omaha.

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Date 4-16-98

ABSTRACT

The Selection Process and Characteristics of Judges Appointed to the US Courts of Appeal: From Carter to Clinton

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Judges who are appointed to serve on the US Courts of Appeal have the power to change government policy and influence our daily lives. Each President has the opportunity to make an impact on the United States with the types of judges that he chooses to appoint. This study examines the process of nominating and selecting judges, as well as the characteristics of those who have been appointed to serve on the bench. Using data from previous studies conducted by Sheldon Goldman, as well as data gathered from Senate Judiciary Hearings, this thesis compares the judges appointed by President Clinton, during his first term in office, to those judges appointed by Presidents Bush, Reagan and Carter. President Clinton has surpassed President Carter in appointing well qualified women and minority judges to the bench.

ACKNOWLEDGEMENTS

Nobody writes a thesis by herself. So there are people that I would like to thank for their help and encouragement. First, I would like to thank my thesis advisor, Dr. Cassia Spohn. Thank you for guiding me through this process and reading endless rough drafts. I appreciated your help, encouragement and patience. I would like to thank the other members of my committee, Dr. Kent Kirwan and Dr. Philip E. Secret. Your comments were important and helpful.

On a personal note, I would like to thank my husband Kevin for his support and patience. He will be glad to see my piles of books and papers disappear from our living room. Thanks also to my daughter Katie who found things to do while I read and typed. I would also like to thank my parents, who have given me their unconditional support throughout my education. Thanks to my mother-in law, June, who has given me her encouragement and love. I need to thank Thom for his friendship, and for his continuous nagging that pushed me back into school. Thanks also to my friend Patrick who encouraged me to reach my goals. Finally, thank you to my very special friend, Tom Gressel, I miss your smile and your odd sense of humor.

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INTRODUCTION

THEORY OF JUDICIAL POLITICS

Judicial selection is an important process in both our court system as well as our government as a whole. The choice of an appellate court judge can influence how we live our daily lives. Judges who serve on the US Courts of Appeal are more accessible than the Justices of the Supreme Court. This accessibility makes them an interesting topic to study. As Murray Ball (1987:3) notes "the power of the federal courts to hear cases and controversies, civil and criminal, is quite broad."

Many citizens of the United States believe that the Supreme Court makes the majority of the decisions that create policy. However, the US Courts of Appeal hear more cases than the Supreme Court does. The Supreme Court tends to make large policy changes, and it is up to the appeals courts to enforce and refine those changes (Schmidhauser, 1979:132).

The Supreme Court may review cases sent up from the US Courts of Appeal, but most of the cases they decide come from the state courts. Most of the decisions made in the Courts of Appeal are not overturned; in fact, most of them are never even reviewed by the Supreme Court (Songer: 1991:48). In addition, the number of cases decided each year by the

Supreme Court has been declining. The number of cases decided by the Courts of Appeal increased dramatically until 1993, and declined from 1993-1995 (Songer, 1991:48). Table one compares the number of cases reviewed by the US Supreme Court and the Federal Court of Appeals.

Table I. Comparison of the number of cases reviewed by the US Supreme Court and the Federal Court of Appeals.

	1983	1988	1993	1995
Supreme Court	162	142	114	86
Court of Appeals	29,580	37,465	50,189	49,625

Data in the table was obtained from Posner, 1996:60-61, 80-81.

Federal judges who serve on the Courts of Appeal determine public policies, and interpret the law. Judges are necessary for the resolution of conflicts; they also function to fine-tune the laws and statutes that we live by. According to Songer (1990:39), more that 70 percent of the cases heard by the Courts of Appeal involve some level of the government. Judges who serve on the Courts of Appeal hear appeals based on some specific governmental statute or policy; they are called upon to determine if the specific policy is constitutionally allowed, or if it infringes on someone's statutory rights.

As Ball (1987:11) states "judges have to decide whether lines drawn by other policy makers, laws, statutes, and regulations, were done in keeping with the Constitution and the laws of the land." The words of the

Constitution, wrote one justice, "gain meaning and content from the value judgements one puts into them. These value judgements are not those for robots."

The number of vacant seats on the federal bench that a President has to fill will influence how his appointments affect policy. The President who is able to appoint a majority of the bench can be confident that he has affected the way in which policy is made and interpreted (Carp and Stidham, 1996:264). There are a total of 167 judges who serve on the Federal Courts of Appeal, not including those judges who serve under a senior status. Senior judges decide cases when the caseload is too great for the regular seated judges to handle.

Kevin Lyles (1996) looked at the issue of judicial selection in his paper "Presidential expectations and judicial performance revisited: Law and politics in the federal judicial system." After studying the characteristics of the judges appointed by Johnson through Reagan, Lyles (1996:447) came to the conclusion that "Presidents who are more directly involved in judicial selection and express overt policy objectives are likely to achieve strong measures of congruence between their policy expectations and the performance of their judicial appointees." Lyles (1996:447) further suggested that those who want to protect such issues as their self-interest in business, or their right to privacy, should not wage battles in the courtroom,

but rather should speak to their local Senator about who the next judicial nominee will be. Simply translated, those who want to protect the interests of their business or personal affairs should be more aware of who is being considered for a seat on the bench.

In his book *The Federal Courts*, Richard Posner (1996), a federal judge himself, argued in favor of diversification of the federal bench. Posner believes that diversification will lead to better decision making. As he suggests,

> Law differs from science in lacking cogent, objective methods for determining the truth of its propositions, especially propositions advanced in appeals that are difficult enough to be decided in a published opinion. Lacking such methods, judges are all too likely to fall back on their personal values and experiences. The more homogenous the judges, the more likely they are to agree with one another in a difficult case simply because they are drawing on a common fund of values and experiences. Their agreement will lack epistemic robustness because it will not have been tested on people with different values and experiences. So there is an argument for a method of selection that produces a diverse judiciary (1996:16).

In their article "Lobbying for justice: The rise of organized conflict in the politics of federal judgeships", Caldeira and Wright argue that

> judges, Senators, and interest groups have goals and pursue them instrumentally. More specifically, we assume, first, that judges seek to maximize their policy preferences by etching them into law. If federal judges did not pursue ideological agendas, organized interests on both sides of the spectrum would show less concern about who sits on the federal courts than they in fact do (1995:45).

There are two ways of promoting diversity in the courtroom, two forms of representation. The first form of representation, according to Walker and Barrow (1985: 597) is descriptive or symbolic. Descriptive representation is "the opportunity of groups to have access to position and influence" (1985:597). Specifically, people are appointed to their position of power because of one characteristic that they possess, either race, or gender, or in some cases, both. This method of examining the judges on the bench follows the notion that the bench should reflect the population as a whole. The judges who differ from the norm, based on their gender or race, are more important for what they represent, rather than for what they do.

The second type of representation is substantive. According to Walker and Barrow (1985:597), substantive representation "refers to the advocacy of interests within the halls of political decision making which may or may not be directly linked to descriptive representation." Substantive diversity in the courtroom is significant because of the impact that it can have on society. It creates an opportunity for a judge to use his/her position to create social change. For instance, a female judge could be expected to give harsher sentences for crimes against women, such as rape.

Caldeira and Wright (1995) believe that the Republicans realized the importance of the Courts of Appeal much later than the Democrats did. In

the 1970's, when Carter was appointing non-traditional judges, Republicans realized that he could be making a substantive change to the Federal bench. According to Caldeira and Wright, the Republicans had focused so strongly on the Supreme Court; they disregarded the power of the other judges sitting on the federal bench. However, when President Carter promised to change the face of the Federal judiciary, he did not specifically state if he wanted to make changes due to substantive or descriptive policies.

It seems clear that the US Courts of Appeal are an important part of our government. As illustrated above, the Courts of Appeal influence our daily lives. Those who sit on the federal bench have a great deal of power, more power than many people realize. Policies are made and refined daily in federal appellate courtrooms all over the United States.

BACKGROUND INFORMATION

Federal Court of Appeals

To have an appeal heard in one of the US Courts of Appeal, a case must first be tried in a US District Court. The United States is broken down into 13 districts, including the Washington D.C. Circuit and the Federal Circuit. See Appendix A for a detailed map of the circuits. Cases in the district courts include federal crimes, federal civil cases, as well as the review

and enforcement of the actions and policies of federal agencies (Goldman, 1985:21).

The Courts of Appeal have between 6-28 judges, depending on the caseload. The judges typically decide cases in panels of three. In controversial cases, the judges sit en banc (Goldman, 1985:23). When judges decide cases en banc, all of the judges from the circuit hear testimony and render a decision as a whole. The chief justice in each district makes panel assignments. Most assignments are made using a lottery system.

In their book *Judicial Process in America*, Carp and Stidham (1996:41) write, "since the Courts of Appeals have no control over which cases are brought to them, they deal with both highly important and routine matters." According to Carp and Stidham, there are two purposes of case review in the Courts of Appeal. The first reason for case review is error correction in cases previously heard from the federal district courts and federal agencies.

The second purpose of case review in the Federal appellate court is to sort out and develop those cases that should be sent to the US Supreme Court (Carp and Stidham, 1996:41). The judges who serve on the US Courts of Appeal help shape and determine what types of cases should be decided by the US Supreme Court. Since the US Courts of Appeal are used to

determine policy on a regional level, those cases sent to the US Supreme Court usually deal with bigger, national issues (1996:41)

Carp and Stidham (1996) pointed out an important distinction between the Courts of Appeal and the Supreme Court. The US Courts of Appeal make decisions on cases appealed from a particular district and are not nationwide. Therefore, cases involving policy or legislation may be decided differently depending on the Court of Appeal in which the decision is being made (1996:42). These are often the types of cases that are appealed to the US Supreme Court.

The US Courts of Appeal were created in 1911. Prior to that year, appeals were heard in the circuit courts of appeal. The circuit courts were created in 1789. The circuit courts were different from the current district courts, which were established in 1789 as well. The circuit courts were originally created to hear appeals and free up the Supreme Court to hear only national or important cases. In 1911, the circuit courts were disbanded, and only the district courts remained. In 1948, the district appellate courts were renamed the US Courts of Appeal. Appendix A illustrates the appellate court boundaries. The Courts of Appeal are still often referred to as the circuit courts (Carp and Stidham, 1996:39).

In the United States, the President, with Senatorial advice and consent, appoints federal appellate court judges. A judge is appointed for a life term, barring any misbehavior. It is the judge's job to

> continuously attempt to resolve disputes and, to a lesser extent, create rules for the future resolution of conflict. The federal judges (1) legitimize public policies that have come under attack in the courts, or (2) develop new policy through basic constitutional interpretation. In effect, by functioning in these two ways the federal judges are continuously defining and redefining the boundaries of political authority (Ball, 1987:4).

SELECTION PROCESS

Each President has defined his own method of filling judicial vacancies. President Carter utilized the commission system; President Reagan took nominations from Senators and Representatives, as did President Bush. President Clinton has also relied on nominations from his staff and from the Attorney General, as well as the commissions that are a carry-over from the days of the Carter administration.

The biggest difference among recent Presidents is the type of judge that each was seeking. President Carter made it very clear that he wanted to fill his judicial vacancies with people who were different from the established norm (non-traditional judges). President Reagan set a goal to remake the federal judiciary by appointing those who reflected his own conservative view of politics and policies (Markman, 1990). President Bush

wanted to carry on the tradition set by Reagan (Goldman, 1993). President Clinton has worked to return to Carter's legacy; to fill the positions with women, minorities and other people not normally given a chance to serve on the federal bench (Goldman, 1995).

Selecting Judges

There are two ways to evaluate a potential judicial nominee. Past Presidents have used one or both methods. The first method of evaluation is merit selection. Evaluating a nominee's merit involves determining the candidate's professional training and experience, judicial temperament, intelligence, and integrity (McDowell, 1990:XVI).

The second type of evaluation involves an assessment of the candidate's jurisprudence or political leanings. In the case of a sitting judge, this type of evaluation involves an examination of the types of decisions handed down in cases involving politically relevant issues. These issues include civil rights cases, discrimination cases, affirmative action or the right to privacy (McDowell, 1990:XVI).

There are those who believe that judges should only be appointed based on their merit; President Carter is an example of this. There are others, such as President Reagan, who believe that a judge's judicial philosophy also should be taken into consideration. Senator Paul Simon

(1986:56) believes that there are two reasons why a nominee's legal views should be considered. A nominee's individual ideas about the law will affect the decisions that he/she makes on the bench. Simon believes that it would be better to know these views up front. Simon also believes that a Senator should be able to determine if he or she wants to help appoint a candidate who holds the particular views of the judicial nominee. The Senator should determine if the candidate's views and beliefs are in keeping with the Senator's own (Simon, 1987:57). In addition, the Senator should determine if the nominee would make policy decisions in a manner that would be consistent with the Senator's own beliefs and values.

Posner (1996) believes that it would be impossible to disregard a candidate's views. "The only way to get politics out of the selection process would be either to greatly reduce the political independence of federal judges, which would however reduce the attractiveness of the job to many of the people most highly qualified for it, or (as in England and on the Continent) to reduce the political power of those courts" (1996:20).

The Senate's Role

When the Constitution was created, the framers set forth how judges should be appointed: "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..." (Reynolds, 1990:16). What they did not stipulate, however, was what was specifically meant by the phrase "advice and consent of the Senate."

Senator Paul Simon (1986) believes that the role of the Senate is very important in the judicial selection process. In a speech to the National Press Club, Simon was quoted as saying "appointments to the judiciary are to a branch of government that is supposed to be independent of the President and for a duration exceeding his own term of office. For the President to control such appointees unilaterally would be inappropriate, especially in a political system where checks and balances are so important" (1986:55). Historically, the members of the Senate have been very involved in the nomination process. Typically, Senators have been relied upon to supply members of the President's administration with the names of potential judges in their district.

When a judicial candidate comes from a Senator's district, and the Senator did not nominate him/her, the Senator has the chance to reject or accept the nominee before a vote is taken. The Senator who serves in the circuit or state of the judicial candidate is given a blue slip. This blue slip is used to determine the Senator's views on the candidate. If a blue slip is not returned to the committee from the Senator, it means that the Senator has no objection to the candidate. However, if a blue slip is returned, the

candidate's nomination is usually rejected. This method of informal voting is still used sporadically, but is not relied upon as consistently as it once was (Ball, 1987:199).

Once a candidate makes it through the selection process, the Senate Judiciary Committee votes to approve the nomination, or returns it to the White House unconfirmed. If a nomination is passed through the committee, the name is voted upon in the full Senate. However, when a nomination makes it all the way to the full Senate, for all intents and purposes, it is confirmed. An appointment requires a majority affirmative vote.

The ABA's Role in Judicial Selection

The ABA Standing Committee on Judicial Selection has played an important role in judicial selection. The role of the ABA committee is to perform an independent investigation of a judicial candidate, and assign a rank according to the results of that investigation. The ABA does not recommend potential judicial candidates, but only acts upon the names of potential candidates provided by the Senate Judiciary Committee (Biskupic, 1989:900).

One representative of the ABA committee performs the investigation. Each judicial district has a representative in the national ABA committee.

The committee member investigates those judicial candidates who reside within his/her district. The investigator then writes a report and returns it to the committee (Slotnick, 1982a: 357).

The investigator contacts other lawyers and judges who have practiced law with the candidate. If the candidate was an academic, publications and books written by the candidate are analyzed. For each candidate, 50 to 75 people are contacted. More people are contacted for a candidate who is considered to be non-traditional or controversial, fewer for more orthodox candidates (Slotnick, 1982:357).

If the candidate had previous judicial experience, his/her decisions would be studied. The committee members evaluate how well the decisions were formulated, how clearly the decisions were written and if the judge seemed to decide cases based on the laws and Constitution of the United States, rather than on his/her own personal beliefs and feelings (Slotnick, 1982a: 358).

The ABA then issues a ranking for each candidate based on the evaluation. Until 1989 each candidate was ranked as Exceptionally Well Qualified, Well Qualified, Qualified, or Unqualified. In 1989, the ABA dropped the Exceptionally Well Qualified rating; Well Qualified became the highest ranking.

Raven (1990:82) described the ABA rankings and the specific qualifications that the ABA required for each rating. In order to be ranked Well Qualified, a nominee must be "regarded as one of the best available for the vacancy from the standpoint of integrity, competence and temperament." In order to be rated as Qualified, the nominee is considered to be an average and generally satisfactory candidate for the vacancy. A judge who is ranked as Not Qualified is considered to be inadequate based on his/her integrity, competence or temperament. These are very general qualifications, and it is possible for the ABA to manipulate them as they choose.

There has been a great deal of criticism of the ABA's role in the selection process over the years. According to Elliot Slotnick (1985b:353), critics of the ABA charge that non-traditional judges are not evaluated fairly. Non-traditional judges are usually ranked lower than those who fit the traditional image of a federal judge: a white, middle-aged man (1982b: 353). Non-traditional judges are typically minority judges; women, and people of color. Judges are also considered non-traditional if they come from a lower socioeconomic background or are disadvantaged in any other way.

In his article "The ABA standing committee on the federal judiciary: A contemporary assessment—part 2" Slotnick (1982a:353) examined the judges appointed to the Courts of Appeal by Carter. Slotnick found that

males were three times more likely than females to receive either an Exceptionally Well Qualified or Well Qualified rating. Whites were three times more likely than non-whites to receive the top two rankings. Interestingly enough, judicial experience was not related to ABA rankings. The candidate's job prior to appointment did not influence the ranking one way or the other.

Another criticism of the ABA is that just one person performs the investigation. Critics argue that the lawyer doing the investigation might be biased in some way for or against the candidate. This may result in a report that could hinder a judge's nomination, or inflate an unworthy judge's credentials (Slotnick, 1982a: 353).

According to Carp and Stidham, the ABA has also been criticized for believing that being wealthy and conservative are good traits; and being liberal and outspoken are undesirable traits (1996:251). The authors continue with "it should come as no surprise then, that the ABA's committee has generally worked more closely with Republican Presidents than with Democratic administrations" (1996:251).

REVIEW OF LITERATURE

There have been relatively few studies focusing explicitly on the selection and characteristics of the judges appointed to the US Courts of

Appeal. What follows is a review and summary of the books and articles that pertain generally to judicial selection and appointment.

History of the Bench

President Carter, as mentioned before, changed the face of the federal judiciary. Prior to Carter's election to office, the US Courts of Appeal were primarily made up of white, middle-aged men. Presidents Nixon and Ford appointed only men to the appeals court. President Johnson appointed one woman. All of President Ford's males were white, as were Nixon's, with the exception of one Asian judge. President Johnson appointed a majority of white males, but he did appoint two African-American judges (Carp, 1996:236-237). As a result of the appointments made by the previous Presidents, President Carter inherited an almost all white appellate court judiciary.

PRESIDENT CARTER

Selection Process

While in office as the Governor of Georgia, Jimmy Carter used a commission system for appointing state judges. According to Griffin Bell (1990), Attorney General during Carter's presidential term, the commission system was a great success on the state level and eventually on the federal level (1990:28). The commission system allowed for more judicial

candidates to be considered for seats on the bench: candidates who may have been otherwise ignored. Carter appointed a record-breaking number of women and minorities to the US Courts of Appeal.

When he was elected President, Carter made it clear that he wanted to create a more diverse federal judiciary. According to Bell (1990), Carter declared his intention to seat more women and minorities on the bench than his predecessors did. Carter wanted more non-traditional judges on the federal bench, and Bell said "President Carter instructed me to make every effort to find blacks, Hispanics, and women, so as to carry out his promise that the federal judiciary would be made more reflective of our general population during his administration" (1990:28).

Bell further stated that President Carter worked closely with activist leaders such as Dr. Martin Luther King and Coretta Scott King to find "at least one black federal judge for each of the states in the old confederacy" (1990:28). Carter managed to seat black judges in federal posts in Mississippi and Virginia. These were two states whose citizens and government vocally resisted equal opportunity for minorities (Bell, 1990:28).

When asked about his affirmative action policies, Carter was quoted as saying "If I didn't have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of my appointees would be Black, and 3

percent would be Spanish-speaking and 40 percent would be women and so forth" (McGuigan, 1987:137).

Creation of the Commissions

President Carter issued an executive order that called for the creation of federal appellate judge nominating commissions. The commissions were made up of groups of people who had one responsibility. Each commission was expected to recruit and recommend candidates for both District and Appellate judicial vacancies. Carter wanted to consider candidates from outside of the usual sources, and he believed that the commissions could bring in individuals that would not have otherwise been considered.

US Senators created these commissions in their home states (Rosenbaum, 1977:125). Judith Rosenbaum wrote an article for *Judicature* about a conference that was held to determine the specific guidelines that the commission should follow. The meeting was sponsored by the American Judicature Society. The objective of the meeting was to answer questions such as "Should the panels rank the nominees they send to the President? How much of the nominating process should be confidential? Should the circuit panels try to maintain geographic balance among the states within the circuit in their nominations? (1977:126).

Since Carter was not specific about the characteristics of the commissions in his executive order, it was up to each panel to determine the composition of its commission and how it would function. As a result, the commissions differed from one another in a number of important ways. For example, the California commission had nine members. Alan Cranston, who was the senior Democratic Senator at the time, selected four of the members. Three of the members were appointed by the State Bar Association: the remaining two members were selected by S.I. Hayakawa, the other California Senator. The California commission held confidential meetings. They presented three to five names of nominees for each judicial vacancy.

In contrast to California, the Georgia commission had 17 members who were jointly appointed by Sam Nunn and Herman Talmadge, both of whom were Democratic Senators. They too held confidential meetings. The Iowa commission members were selected in a manner similar to California; however, they chose to hold public meetings. They encouraged local residents and interested parties to attend the commission hearings (Tydings, 1977:114).

Many Senators believed that it was important to include members of the State Bar Association on their commission. As Tydings (1977:116) said "Bar representation, whether by charter or informal, is important because of

the unique perspective and legitimate expertise lawyers can contribute, and because the bar must have confidence that the judges are worthy representatives of the profession."

Tydings (1977) believed it was important that Carter gave the Senators the power to create and select members for their own commissions. In the past, judicial nomination was "a power jealously guarded by many Senators. It was an extremely important source of political patronage, and many Senators considered judicial selection to be one of the duties they were elected to perform" (1977:113).

The nominating commissions took names for judicial vacancies from all walks of life, rather than only from those candidates who held strong political ties. The commission system encouraged anyone who was interested in the position to apply for consideration (Bell, 1990:25). Carter wanted to make sure that the judicial appointments were made in a fair and organized manner. He promised to select "all federal judges...strictly on the basis of merit, without any consideration of political aspects or influence" (Smith, 1995:137).

Nomination Process

Once names were submitted to the commission for consideration, those candidates who met the basic qualifications were put into the

investigation process. Each prospective judge received a thorough background check by the FBI. This was a common practice established and used by many Presidents before Carter. The FBI spoke to those who knew and worked with the judicial candidates. They also did a complete check of IRS records and past criminal history. For the background checks performed on Carter's candidates, a minimum of 125 people were contacted for each judge (Bell, 1990:28).

The names of the candidates were also given to the ABA committee, which performed its own routine investigation. The ABA committee's rankings during the Carter years were often ignored or disregarded. This was especially true for those judges ranked "Not Qualified" by the ABA.

Once both the FBI and the ABA committees screened the judicial candidates, their names were given to the White House for final consideration. Bell initially believed that President Carter would receive the names of the candidates himself, and he alone would decide whom to appoint. However, this was not the case. In reality, the names of the candidates were circulated among Carter's staff, and each staffer indicated his/her personal choice. Bell believed that this defeated the purpose of the merit system commission and steps were taken to change the process. Rather than circulate the candidate's names throughout the White House, a smaller committee was created to allow the staff to have input in the

selection process. The smaller committee was comprised of Robert Lipschultz, Attorney for the White House; Frank Moore, Congressional Liaison; Jody Powell, head of the White House Press Office; and Hamilton Jordan, the unofficial Chief of Staff (Bell, 1990:29). Bell would present the names of the nominees to the President, along with the recommendations of the staff committee. At this point, the President chose one candidate to nominate for the judicial vacancy.

CARTER'S JUDICIAL APPOINTMENTS

Characteristics of Appointees

During his term as President, Carter appointed 262 district judges and 56 appellate court judges. He consistently appointed a high number of women and minorities to both courts. In fact, he appointed a larger proportion of African-American judges to the bench than any preceding President (Goldman, 1978:251). Carter appointed a total of 11 women and 45 minorities to the Courts of Appeal (Goldman, 1978:251). Goldman concluded that Carter had achieved his goal of diversifying the federal bench.

Goldman found that a large proportion of Carter's appointees had judicial, or prosecutorial experience, or both. Only 38 percent of the

appointees reported that they had neither type of professional experience (1978:251). Many of the judges appointed by Carter were already serving on the bench in a lower court. Forty six percent of the nominees came from the bench (Goldman, 1978:251). Carter appointed three judges who listed politics as their job before being appointed. Eight professors of law were appointed to the US Court of Appeals; this was 14 percent of Carter's total appointees.

A larger percentage of Carter's appointees attended a private or Ivy League institution for both their undergraduate and law school education than attended public schools (Goldman, 1978:251).

The majority of Carter's appointees to the US Courts of Appeal were white, but he did appoint nine African-Americans, two Hispanics and one Asian to the bench (1978:251). Approximately 61 percent of Carter's appointees were white males.

Goldman (1978) also notes that many of Carter's appointees to the Courts of Appeal were politically active in Democratic politics. Almost 75 percent of those appointed to the Courts of Appeal reported that they were politically active. It is ironic that while it was Carter's intention to remove political affiliation from his judicial selection process, he ended up with politically active nominees. However, as Goldman (1978:252) pointed out, each of the candidates was also very qualified for the position of federal

judge. They were all respected for their education and professional experience.

In a thorough study of Carter's nominating commission and judicial appointment during Carter's term, Alan Neff (1980:121) found that 45.7 percent of the judges appointed by Carter made monetary contributions to the Democratic party or to a specific Democratic candidate. Ten percent of the judges had sought a Democratic Party position. In contrast, none of the Republican judges had sought a political party position, and only 4.8 percent had reported making a monetary contribution (1980:121).

Slotnick (1989) also examined the effect that Carter's affirmative action policy had on the federal bench. Slotnick found that the biggest differences between the traditional white male judges and the non-traditional female, black, and Hispanic judges were in age and income. The non-traditional judges were much younger and in much lower income brackets than the traditional judges. Of the non-traditional nominees, 62 percent were under the age of 50, as compared to 39 percent of the white judges (Slotnick, 1989:299). Possibly as a result of the youth of the non-traditional judges, white judges earned a more substantial income. More than 25 percent of the white judges earned more than $100,000 per year during the five-year period directly preceding their appointment to the bench. This was true for only nine percent of the non-traditional judges. In fact, 60 percent

of the non-traditional judges earned less than $60,000 before their appointment to the bench (Slotnick, 1989:299). Slotnick (1989:303) suggested that these differences in income could also be due to differences in the type of law practiced by the non-traditional judges. They were more likely to work as public defenders or in smaller law firms than the more traditional judges were. In addition, twice as many non-traditional judges were recruited from law school professorships than the traditional judges.

Another result of the youth of the non-traditional judges was that the white judges had more years of legal experience. According to Slotnick (1989:304), only 19 percent of the white male nominees had less than 20 years of experience, while 46 percent of the non-traditional judges fell into this category (1989:304). In addition, 58 percent of the white males had more than 25 years of legal experience, compared to only 27 percent of the non-traditional judges (Slotnick, 1989:304).

When looking at the educational backgrounds of the judges, there were no differences between the traditional and non-traditional judges. Slotnick did not look at law school honors and awards, but focused solely on where the judges attended law school, and whether or not the school was considered to be an Ivy league institution (1989:300).

Neff (1980) suggested that the commission system established by Carter contributed to the diversity of his appointees. When examining the

relationships between the judicial candidates and the members of the nominating commissions, Neff found that out of 186 potential candidates, 79 had no relationship with a commissioner. Most of the candidates had only a passing acquaintance with the commissioners. Most of the candidates surveyed by Neff (1980:124) learned of the judicial vacancy from a published notice, and only 14 of the survey respondents reported that they learned of the vacancy directly from a commissioner. Neff also asked the candidates about the benefits of the nominating commission. Neff stated "almost one-half of the respondents believed that they would not have sought or been considered for appointment absent the commissions" (1980:124). Most of the respondents also reported that "they preferred the use of the nominating commissions to traditional selection, and believed that better judges are selected by commission than by the traditional process" (1980:127).

Overall, Slotnick (1989:305) seemed to believe that the added diversity was an important improvement to the bench. As he stated "along with great diversity within their ranks, enhanced gender and racial representation on the bench added substantially to pluralism in the federal judiciary with increased representation of, among others, the young, the relatively less affluent, the less politically active, the attorney with non-traditional and especially, criminal law practices, and the attorney with public defender/legal aid backgrounds."

Affirmative Action and the Quality of the Bench

It is clear that President Carter successfully fulfilled his campaign promise to create a more diverse judiciary. There is considerable disagreement, however, about whether his affirmative action policy had a detrimental effect on the quality of the judiciary.

Elaine Martin (1982) examined the backgrounds and assessed the qualifications of female judges appointed to the US Courts of Appeal by Carter. Martin found that by opening up the nomination process, the commission system allowed more women to be initially considered for judgeships. Martin said that "women, as a group, are not as politically active and powerful as men." "De-emphasizing political activism and influence, allowed qualified women to compete more effectively for federal judicial office" (Martin, 1982:308).

According to Martin, the women who were appointed to the Courts of Appeal were qualified to be there. Many of the women came from academic backgrounds, rather than large law practices or the lower courts, as the men did. In addition, the women were all academically outstanding. Martin learned that 82 percent of the female judges received a special honor in law school (1982:312). This figure is much larger than that of the men appointed to the Court of Appeals between 1933-1976 (1982:312). Only 26 percent of the men studied received such honors.

While it would seem that Carter's quota system of filling the federal bench was unorthodox for its time, it was not detrimental to the quality of the judges sitting on the bench. As Martin (1982:308-309) concluded "racial and sexual diversification of the federal bench has not changed its overall quality."

There are those who would disagree, however, with the idea that Carter filled the judicial vacancies with qualified people. In his monograph "Judicial qualifications and confirmation: The Carter years", George C. Smith (1985) made it clear that many Republicans did not approve of the judges that Carter appointed. They did not approve of the commission style of merit selection either. Smith (1995:135) believed that a double standard was used to compare the judges appointed by Carter and those appointed by Reagan. Reagan was accused of favoring "ideology over excellence." However, Smith believed that Carter was more guilty than Reagan of appointing judges for ideological reasons rather than based on the nominee's merit.

Smith based his conclusions on the fact that Carter adopted an affirmative action policy when filling judicial vacancies. However, rather than look at the policy as affirmative action, Smith looked at it as a strict quota system. Smith (1995:136) contends that in trying to meet his quotas, Carter compromised the integrity of the federal bench. "He demonstrably allowed

racial or gender criteria to override basic standards of qualification for the bench" (1995:138). Smith (1995:136) implied that Carter did this by nominating two candidates who were rated "unqualified" by the ABA standing committee. Smith felt that these candidates made it through the nomination process simply because they were both minorities, and not because they were qualified.

Slotnick (1982b:387) disaggregated the ABA ratings for the judges appointed by President Carter by both gender and race. He found that women were less likely than men to receive the highest rating of Well Qualified. A large majority of the women received only a Qualified rating. The same pattern was found for non-white judges. White judges received an Exceptionally Well Qualified or a Well Qualified rating significantly more often than non-white judges did. The majority of non-white judges earned the lowest rating of Qualified.

The ABA ratings depend, in part, on the length of time that the candidate has practiced law. Slotnick found that many of the women and minority candidates had not been in practice for as long as the ABA preferred. The ABA considers a lawyer who has practiced law for 12 years to be experienced (Slotnick, 1985b:387). Slotnick believes that the ratings for Carter's women and minority candidates were lower because the ABA rating

system is tilted toward the perspective that a white, middle-aged male is the prototype for a Well Qualified judge (1985b:393).

Sheldon Goldman has become a respected voice on the topic of judicial selection and appointment. He has investigated the characteristics of the judges appointed by Carter, Reagan, Bush and Clinton. In an article entitled, "Should there be affirmative action for the judiciary?" Goldman (1989) addressed several questions about the impact that an affirmative action policy could have on the federal judiciary. Goldman (1989) argues that because the federal judiciary has been off limits to blacks, women and Hispanics "it does not seem unreasonable to make special efforts to recruit from these groupings of Americans for federal judgeships. Deliberate considerations of race and sex should not be given negative connotations as long as the government demonstrates positive, anti-racist, anti-sexist motives and purposes" (1989:294).

Merit selection is supposed to be one of the basic goals of judicial selection. One of the questions posed to Goldman by a panel of politicians was about giving special preference to women, blacks and Hispanics. One of the panel members, whose name was not given, made the statement that "Merit selection emphasizes individual qualities; affirmative action stresses group affiliation" (Goldman, 1989:294). Goldman replied to the question by saying that there never has been a judicial selection process that has been

based solely on merit. Politics has always played a part. However, Goldman argues that affirmative action will force those who appoint judges to cast their nets wider in order to look for qualified nominees (1989:295).

Decision Making of the Appointees

There has been one study designed to determine whether substantive changes have occurred as a result of Carter's appointees. In his article "Carter's judicial appointments: The influence of affirmative action and merit selection on voting on the U.S. Courts of Appeals", Jon Gottschall (1983) compared decisions made by Carter's appointees and those made by judges who were seated by other Presidents. As stated previously, Carter appointed 56 of the 121 judges on the US Court of Appeals. This was a significant number of judges to be seated by one President.

Gottschall (1983) used three issues to determine if Carter's judges voted differently than the other judges. He examined criminal procedure cases, specifically prisoner's rights cases; racial discrimination against minorities; and cases that involved sexual discrimination against females (1983:168). He chose these three issues because they had been particularly divisive in the past.

Gottschall tested a number of hypotheses regarding the differences in decision making among judges appointed by Carter and those appointed by

previous Presidents. The first hypothesis stated that "Carter appointees would vote much like appointees of previous Democratic administrations and unlike appointees of previous Republican administrations" (1983:169). The second hypothesis was that female judges would vote similarly to the male judges on all three issues. Finally, he hypothesized that "among the Carter appointees to the Courts of Appeal, blacks would vote more liberally than whites on the three issues under consideration" (1983:169).

Gottschall (1983) found that the Carter appointees did cast votes similar to appointees of other Democratic administrations. Carter appointees voted in favor of the prisoners in 58 percent of the cases, and the Johnson appointees voted for the prisoners in 55 percent of the cases. For the purposes of his study, Gottschall (1983:169) combined the decisions of the Johnson and Kennedy judges. In contrast to the Democratic judges, the Nixon and Ford judges voted in favor of the prisoner in 30 percent of the cases.

Similar results were found when looking at the sexual discrimination cases. Carter appointees voted in favor of the claimant in 59 percent of the cases, and the Johnson-Kennedy judges voted for the claimant in 63 percent of the cases. The Nixon and Ford appointed judges voted for the claimant in 39 percent and 40 percent, respectively (1983:170).

When examining the voting differences between white men and women, Gottschall found that, overall the white female judges appointed by Carter were more liberal than the white male judges appointed by Carter. However, the differences in voting between the white men and women were not statistically significant. As Gottschall stated "Carter's female appointees are representative of the general public and do not constitute a new wave of radical feminism" (1983:172).

Finally, when comparing the voting patterns between Carter's African-American and white male appointees, Gottschall (1983) found that there were some slight differences. African-American males voted more often for prisoner's rights than did white males; the figures were 79 percent for African-American judges and 53 percent for the white judges. There was also a difference in the voting patterns in sex discrimination cases. African-American male judges supported the claimants more often than the white judges did; 65 percent compared to 57 percent (1983:172).

It is interesting to note that African-American males were less likely to vote for the claimant in racial discrimination claims than were white judges. The difference in voting was slight, however; 57 percent of African-American males voted in favor of those claims, as compared to 59 percent of white males. Gottschall believes that this difference may be due to an effort on

behalf of the African-American judges to appear neutral about racial matters (1983:171).

Carter had an important impact on the Federal judiciary. His innovative method of nominating and selecting judges set a higher standard for those who followed. He proved that it was possible to increase diversity in the court system without sacrificing quality. There are few who doubt that Carter forever changed the face of the Federal bench. As Sheldon Goldman said, "these appointees of Carter's are primarily liberal to moderate in their outlook. Unless there is a succession of conservative Republican Presidents, a potent and long lasting moderate to liberal political perspective will characterize a substantial proportion of the federal judiciary" (Gottschall, 1983:166).

PRESIDENT REAGAN

Stephen J. Markman was the Assistant Attorney General under President Reagan. In his monograph "Judicial selection: The Reagan years", Markman said that President Reagan was as serious about appointing judges as President Carter was. According to Markman (1990:33), Reagan's goal was to appoint to the federal courts only those individuals who were committed to the rule of law and to the enforcement of the Constitution and statues as those were adopted by 'We the people' and their elected representatives.

More specifically, Reagan wanted to ensure that he did not appoint judicial activists, i.e., judges who would rule from their experience or from their feelings, rather than make a ruling based on the law and the Constitution. Edwin Meese defined judicial activists as judges who "go beyond their authority and legislate from the bench, issuing rulings that have little basis in law or address matters the conservatives feel are best left to elected officials" (Carney, 1997:367). President Reagan wanted to appoint judges who would carry out what Justice John Marshall felt was the function of a judge; "to say what the law is, rather than what they think it should be" (Markman, 1990:35).

There is evidence to suggest that Democratic judges are more likely than Republican judges to be judicial activists. Nagai et al (1987:56) sent out a questionnaire to federal judges. When asked about judicial philosophy, most Republican judges stated that they believed that their job is to "apply the law and not make it" (1987:56). The Democratic judges were split almost evenly between believing their job was to apply the law or interpret the law.

Selection Process

President Reagan eliminated President Carter's Appellate Court Nominating Commission. Reagan chose to establish an Office of Legal Policy

in the Department of Justice to handle judicial appointments. His system once again relied on recommendations from Senators and other political leaders. However, some Democratic Senators chose to keep their commissions active. When given an opportunity, the commissions would put forth a candidate's name for nomination (Markman, 1990:36).

Once an initial recommendation was made, a preliminary investigation was made for each potential nominee. The Office of Legal Policy would look at the candidate's written work. They would read published opinions, of those nominees who were currently seated on a lower court bench. The investigators read books and articles from academics who were under consideration. They would also speak to members of the Bar in the community where the nominee was currently working. During the investigation, they checked newspapers or other media to determine public opinion about the candidate (Markman, 1990:38).

If the candidate was considered to be a potential match for the type of judge that Reagan was seeking, he/she would be asked to go to the Department of Justice for a series of interviews. The staff of the Office of Legal Policy, as well as other offices in the Department of Justice, conducted these interviews. According to Markman (1990), each interview lasted approximately 30 minutes. The interviews were used to verify the information that the Office of Legal Policy already had on the candidate, as

well as gather new information. One important component of the interviews involved learning about the candidate's political and judicial experiences. As Markman (1990:38) stated, they wanted to "determine whether he or she appreciated that the source of law for a self-governing citizenry is the consent of the people themselves as expressed in the Constitution and legislatively-enacted statutes, and not the judiciary: in other words, whether a candidate reasoned from constitutional premises."

According to Markman (1990:39) the main objective of the face to face interviews was to determine if the judicial candidate was a judicial activist or not. The Reagan administration wanted to counterbalance what they saw as "judicial activism" from the judges appointed by Carter. As noted earlier, Carter's judges tended to vote in a slightly more liberal direction than those judges appointed by previous Republican judges. The Reagan administration was actively looking for very conservative judges. They evaluated the candidates based their own idea of merit; which included partisan views and policies.

If the results from the interviews indicated that the candidate would fit the Reagan criteria, the Office of Legal Policy would prepare a summary of the information that had been gathered. These summaries would then be given to the Attorney General, Edwin Meese. After he met with other members of the Federal Judicial Selection Committee, Meese would select

one candidate to recommend to the President's Federal Judicial Selection Committee (Markman, 1990:40).

The Federal Judicial Selection Committee was made up of Attorney General, Edwin Meese, and the Assistant Attorney General. James A. Baker, Chief of Staff, and John Herrington, Assistant to the President for Legislative Affairs, served on the committee, as did M.B. Oglesby, who was Assistant to the President for Legislative Affairs, and the Presidential Counsel, Fred Fielding. From the Justice Department the Attorney General and the Assistant Attorney General for Legal Policy, Stephen Markman, also served on the committee. This committee would perform their own background checks on the candidate (Markman, 1990:41).

If the President's committee approved of the candidate, the name was submitted to the FBI for a criminal and personal background check. This process was similar to that done during Carter's Presidency. The FBI interviewed sixty to seventy people who knew the candidate in order to determine if there was any reason why the candidate should not be given an important governmental position.

At the same time that the FBI was conducting its background check, the American Bar Association's Standing Committee evaluated and rated the candidate. The ABA works in strict confidence and would never reveal the

report on the background check to anyone. Not even the President's staff had access to the information that the ABA gathered (Markman, 1990:41).

According to Sheldon Goldman (1985:316), the Reagan administration did not always actively use and consult the ABA committee. They would only submit the names of candidates that they had already decided to officially nominate. The ABA standing committee ranking was just a formality.

If the background checks did not reveal any reason why the candidate should not be appointed, Edwin Meese and the Federal Judicial Selection committee would make a formal recommendation to the President. According to Markman, there was usually only one person recommended for an open judicial position. Once a candidate made it through the selection process, he was the only one being considered for the position. All that Reagan had to do was add his name to the nomination as it made its way through the Senate.

REAGAN'S JUDICIAL APPOINTMENTS

Characteristics of the Appointees

Reagan's First Term Appointments. Sheldon Goldman (1985) used the same formula to examine Reagan's judicial appointments that he used for Carter. In his article "Reaganizing the judiciary: The first term

appointments," Goldman (1985) compared Reagan's appointments with those made during the previous four administrations: Carter, Ford, Nixon and Johnson.

Since Reagan served two terms as President, he had the opportunity to appoint many judges to both the district and appellate courts. During his first term as President, Reagan appointed 31 judges to the Federal appellate court. Out of Reagan's 31 appointees, 19 were already seated on a lower bench. Sixteen were on the district court and the other three were on the state bench (Goldman, 1985:323). Reagan also appointed several law school professors to the bench. Five of his 31 nominees, 17 percent, were professors of law; compared to 14 percent for Carter and 2 percent for both Nixon and Johnson (1985:324).

When looking at the professional experience of Reagan's appointees, three out of four had judicial or prosecutorial experience. As mentioned above, over half of the judges had prior judicial experience. In a pattern that is opposite of President Carter, Reagan did not appoint any lawyers who practiced alone or in a small firm. He appointed an equal number of lawyers from medium sized firms as from large firms.

During his first term in office, all of Reagan's appointees were members of the Republican Party. In fact, he is the first President since Johnson to appoint strictly from his party. Carter appointed 17 percent of his

judges from both the Republican and Independent parties. Presidents Ford and Nixon each appointed one Democrat to the bench (Goldman, 1985:326).

When examining the education of Reagan's appointees, Goldman (1985:326) found that one in four of Reagan appointees earned their undergraduate degree from an Ivy League school. This was the highest proportion of the five administrations. Conversely, the proportion of Reagan appointees who graduated from an Ivy League law school was the lowest of all five administrations.

It is obvious that Reagan did not share President Carter's views concerning affirmative action policies. Out of his 31 appointments to the Courts of Appeal, only one was a woman. Reagan also appointed only one African-American and one Hispanic. This was a significant departure from President Carter's record. During his presidency, Carter appointed eleven women, nine black people, two Hispanics and one Asian. While Carter did have more vacancies to fill, overall he appointed a more diverse judiciary.

When comparing the ABA ratings of Reagan's first term appointments and those judges appointed by previous Presidents, Goldman (1985) found that Reagan's appointees had the highest proportion of Exceptionally Well Qualified ratings, but they also had the highest proportion of the lowest rating of Qualified. The ABA dropped the Exceptionally Well Qualified rating in 1989. Goldman pointed out that all five of the law professors received a

Qualified rating. This is the lowest rating without being declared "Unqualified." Goldman suggested that "the ABA ratings are biased against legal academics who are not active practitioners" (1985:326).

Goldman (1985) believed that the Reagan administration actively sought out younger people to appoint to the federal judiciary, reasoning that the younger the appointee, the longer that he could serve on the bench and influence law and policy. Goldman (1985:327) found that the average age for Reagan's appointees was 51.5, which was the lowest of any of the five previous administrations.

Howard (1981:119) argued that a younger judge is considered to be more desirable.

> I believe in young judges. The old judges who get on the court as a capstone of their careers don't turn out well. They look upon it as retirement. That's what's wrong with the system. In my view, it's a profession. It takes three-four years to get into it and more than that to develop judges who are scholars (1981:119).

When looking at the net worth of the Reagan appointees, Goldman found that one in five of the judges were millionaires. This compares to one in ten of the Carter appointees. Conversely, one in ten of the Reagan appointees had a net worth of $200,000 or less, but one in three of the Carter appointees did (1985:327).

Reagan's Second Term Appointments

At the end of Reagan's second term as President, Goldman (1987) reviewed all of the judges appointed by Reagan in his article "Reagan's Second Term Judicial Appointments." Goldman again compared Reagan's appointments, both first and second terms, to the previous four administrations.

During his second term as President, Reagan appointed an additional 32 judges to the Courts of Appeal. Unlike his first term appointees, Reagan's second term appointees had less judicial experience than judges appointed during the last four administrations. In addition, Goldman found that "the proportion of second term appointees with neither judicial nor prosecutorial experience was twice as high as the first term appointees and was dramatically higher than the proportions for the Carter, Ford, Nixon and Johnson appointments" (Goldman, 1987:333).

During his second term, Reagan appointed two judges who had been members of his administration; one was a former U.S. Senator and one was chairman of his state's Republican Party (Goldman, 1987:331). Reagan appointed the same number of law professors (five) during his second term as he did in his first.

Reagan's second term appointees all had very strong party affiliation. Most of Reagan's appointees were Republican. During his second term as

President, Reagan appointed 2 judges from outside the Republican party. Moreover, a full 78 percent of the second term appointees reported that they were politically active. This is compared to 58 percent of the first term appointees who said that they were active in the Republican Party (Goldman, 1987:332).

The number of second term appointees who attended Ivy League undergraduate and law schools was slightly higher than Reagan's first term appointments. However, the numbers were consistent with the previous administrations (Goldman, 1987:334).

When looking at the number of women that Reagan appointed during his second term, Goldman found an improvement over the first term. During his first term, Reagan appointed only one woman to the Courts of Appeal. During his second term, Reagan appointed three women. He still did not come close to matching the number of women appointed by Carter, but he did exceed the number appointed by Nixon, Ford and Johnson (Goldman, 1987:331).

Reagan did not improve his record of appointing racial minorities, however. All thirty-two of his second term appointments were white. During his first term he appointed one black judge and one Hispanic judge. Reagan's minority appointments pale considerably when compared to Carter's (Goldman, 1987:331).

Jane Wilcox, who was the Justice Department's Special Counsel for Judicial Selection, blamed the lack of minorities appointed by Reagan on the Senate (Cohodas, 1984:3076). She asserted that the Senators simply did not nominate blacks. Since Reagan relied on Senators to supply him with qualified candidates, he was not to blame that he had no qualified blacks to appoint (Cohodas, 1984:3076). Sheldon Goldman was interviewed for the same article. He said that the Reagan administration did not appoint any blacks because "the administration had no political commitment to blacks. They felt they owed nothing to blacks" (1984:3076). In response, Wilcox said that there are "just not that many black Republicans who are excited about the President's emphasis on judicial restraint" (1984:3076).

Goldman (1987:334) found that, when compared to the previous four administrations, a lower proportion of Reagan's second term appointees earned an Exceptionally Well-Qualified rating. This was in sharp contrast to the first term Reagan appointees, who had the highest proportion of Exceptionally Well-Qualified ratings. Goldman also found an increase in the proportion of second term appointees who earned the lowest Qualified rating. Over 50 percent of the second term appointees earned the Qualified rating. Additionally, Goldman wrote "more than half of those with the Qualified rating received a split Qualified/Not Qualified rating" (Goldman, 1987:334).

Reagan followed the pattern that he set during his first term and appointed young judges to the bench. The average age of his second term appointees was 48.3, which is lower than the average age of judges appointed during the four previous administrations, or during Reagan's first term. The average age for Reagan's first term appointments was 51.5. Goldman (1987) believes that Edwin Meese actively recruited younger judges who could be expected to serve on the bench longer than older appointees. In doing so, he wanted to keep the "Reagan legacy" on the bench for as long as possible (1987:335).

The net worth of the second term appointees was lower than the first term appointees. There were fewer millionaires appointed during the second term. This is consistent with the fact that the second term appointees were younger and thus did not have as much time to build their practice or accumulate wealth (1987:335).

Overall, Reagan's judicial appointments were white, middle-aged men. These men differed in a number of important ways from the women and minorities appointed by President Carter. Reagan's appointees were not as highly regarded by the ABA committee as Carter's appointees were. According to Goldman (1987:331), Reagan's judges all had strong Republican political ties.

Decision Making of the Appointees

There is one study (Gottschall, 1986) comparing the voting behavior of the judges appointed by Reagan with votes cast by judges appointed by Carter, Ford, Nixon, Johnson and Kennedy. Gottschall (1986) compared decisions handed down by judges in the following types of cases: prisoner's and defendant's rights, race discrimination, sex discrimination, First Amendment, combined civil rights and liberties, labor/management relations, welfare, death/injury, and combined economic distribution cases (1986:51).

For the purpose of his study, Gottschall (1987:51) assigned a label of liberal or conservative to the judges. Judges were liberal if they

> decided in favor of one of the classes of litigants described above, or when they dissented in whole or part from a majority decision adverse to the claims of one of the specified groups. Panel or en banc decisions of the Courts of Appeal have been characterized as liberal when they reverse, in whole or part, decisions of lower courts or administrative agencies adverse to the claims of the specified groups or when they have affirmed lower court and administrative rules favorable to the claims of the specified groups.

Gottschall (1987) looked first at the cases in which the judges disagreed. The overall rate of dissent for the seven categories was 17 percent, which was higher than the rate of dissent found in similar earlier studies (cf., Gottschall, 1983). Gottschall (1987:51) cautioned, however, that this increased rate of dissent may have been due to the diversity on the federal bench, or it may have been due to his decision to focus on politically

sensitive cases. In the cases that involved a dissent, those judges who were appointed by a Democratic President were twice as likely as the Republican judges were to vote liberally, in all cases except for personal injury and wrongful death. The results in the latter two cases were mixed (Gottschall, 1987:51).

Gottschall's examination of the voting behavior of the Carter and Reagan judges revealed that the judges agreed in 74 percent of the cases and disagreed in 26 percent of them. In the cases in which the two groups disagreed, 95 percent of the Carter appointees, but only 5 percent of the Reagan appointees, either opted to uphold the claims of the litigant or dissented from a ruling adverse to their claims (1987:52).

Another interesting finding of the study was that the Reagan appointees were fairy homogenous in their voting patterns. They agreed among themselves in 91 percent of the cases. Carter's appointees, however, agreed among themselves only 79 percent of the time. As Gottschall (1987:52) said "Carter appointees agreed among themselves only slightly more often than they agreed with the Reagan appointees."

Gottschall (1987) believes that in reality, there hasn't been much overall change on the bench with Reagan's appointment of conservative judges. There is, however, a continuum on which the judges seem to fall. From most liberal to most conservative, the judges would run in the

following order: Carter, Johnson/Kennedy, Nixon, Ford, and Reagan. However, the gradations between the judges are very small (1987:53).

While Reagan may have intended to produce a significant impact on the US Courts of Appeal, his appointments did not create a judicial revolution. The judges appointed by Reagan and Carter voted similarly in a clear majority of the cases that they were called upon to decide. Reagan may have influenced the face of justice, but he did not change it.

While President Carter specifically made symbolic judicial appointments, it is obvious that President Reagan did not. President Carter used his affirmative action program to appoint women and minority judges. He wanted to leave a federal judiciary that proportionally represented the population of the United States. President Reagan, however, did not seem to believe that symbolic representation on the bench was necessary. On the other hand, he may have wanted to make substantive changes on the bench. It is plausible that Reagan appointed white males to the bench because he wanted to affect case outcomes. White conservative men are likely to have similar ideas and would reach similar decisions in cases. It is ironic that, as Gottschall (1989) demonstrated, there were so few differences in the voting behavior of Reagan's judges and Carter's judges.

In an article in the *Wall Street Journal*, Robert Friedman and Stephen Wermiel made an interesting observation. They stated that

> because conservative judges are likely to be noticed for what they refuse to do, their impact is subtle and difficult to measure. In contrast to more liberal judges, they are inclined to restrict access to the federal courts, deny class-action status in discrimination cases, and reject pleas to administer school systems, prisons and other institutions (1985:A1, p 1).

In this sense, then, the impact of the judges appointed by President Reagan may be less visible than the impact of more activist judges.

PRESIDENT BUSH

Selection Process

President Bush used a judicial selection process similar to that used by Reagan. However, Bush's selection process was centered in the Attorney General's office, rather than the Deputy Attorney General's office as Reagan's was. The Office of Legal Policy, in the Department of Justice, was disbanded and Bush established the President's Committee on Federal Judicial Selection (Goldman, 1993:285).

Bush was not as vocal in what he was looking for in a judge as the previous Presidents were. Biskupic (1990:38) stated that "Bush's presidential philosophy is elusive, and so is his agenda for the judiciary." Unlike Reagan, Bush did not actively set out to remold the federal bench.

When Bush began his term, he worked with Attorney General Dick Thornburgh and his assistant Murray Dickman (Goldman, 1993). Thornburgh and Dickman left to campaign for a vacated Senate seat, and

the brunt of the judicial selection process went to Barbara Drake, who worked in the Justice Department. It was Drake's job to interview the candidates, work with the Senators, and coordinate with the ABA and the Senate Judiciary Committee. According to Goldman (1993:286), Drake was grossly overworked. During her time with the Bush administration, she was in charge of 90 district court nominations and 19 nominations to the Courts of Appeal. However, she was the first woman to play such an important role in the judicial selection process. The Bush administration did not devote enough time and energy to judicial selection. As mentioned above, most of the previous Presidents used some type of commission or committee to handle most of the work of selecting and nominating candidates. Bush relied on one woman and her staff (Goldman, 1993:285).

Goldman (1993) noted that Bush did make a significant change in how the FBI investigation reports of the candidates were handled. After the "debacle" of the Clarence Thomas confirmation hearings, Bush felt that Senate staff members should not have access to the sensitive materials contained in the FBI reports. Bush wanted to stop the information leaks to the press that occurred during the Thomas hearings. Bush said in a speech to public employees

> I have ordered that the FBI reports be carried directly to committee chairmen and any members designated by the chairmen. The members will read the reports immediately in

> the presence of the agent, and then return them. No FBI reports will stay on Capitol Hill. And furthermore, members only will have access to these reports (Goldman, 1993:283).

The members of the Senate Judiciary Committee did not like Bush's new policy (Goldman, 1993). Committee Chairman Joseph Biden made it clear that he resented the restrictions placed on the FBI reports. Biden told Bush that the committee would need more money in its budget so that they could perform their own investigation of the candidates. If the committee members couldn't read and use the FBI reports, they would create their own. Biden told Bush that he would delay the nominations currently being considered until the new investigative procedures were in place (Goldman, 1993:284).

After three months of bickering with the Senate Judiciary Committee over the FBI reports, Bush relented on his initial policy and allowed the reports to be read by the staff of the committee members. However, he did demand a stricter accounting of where the reports went, and who was allowed to read them (Goldman, 1993:284).

In addition to the dispute over the FBI reports, the Bush administration had a problem with the ABA committee. The dispute involved the consideration of political philosophy when evaluating a candidate. The ABA refused to use political ideals and goals when assigning a rank to the

nominees (Biskupic, 1990:39). However, Bush, like Reagan, wanted to avoid judicial activists. In order to accomplish this, the Bush Administration wanted the ABA to ask questions about political philosophy and ideology and take that information into account when issuing a rating.

Bush left a very large number of judicial vacancies when he left office. When Clinton took office, he had 18 vacancies to fill on the Courts of Appeal. This is the greatest number of vacancies ever left by an exiting President. Many political analysts believe that Bush was so confident that he would be re-elected that he left the appointments to complete during his second term (Biskupic, 1990:42).

Goldman, however, believed that the delays generated by Biden and the ABA committee were the reason that Bush left so many vacancies on the bench when he left office. Before the situation with the FBI reports, 95 percent of Bush's nominations were confirmed. However, in 1991, after his confrontation with the Senate Judiciary Committee, the confirmation rate fell to 74 percent. In 1992, the rate fell further to 41 percent confirmed judges (1993:284).

BUSH'S JUDICIAL APPOINTMENTS

Characteristics of Appointees

Goldman (1993) examined the characteristics of the judges appointed by President Bush. Bush appointed a total of 37 judges to the US Court of Appeals.

Many of Bush's nominees came from large law firms; in fact, three out of 10 of the appointments came from law firms that had 100 or more members. Bush also elevated judges from the lower courts. A total of 22 judges were brought to the Courts of Appeal from federal district and state courts. Goldman (1993:287) believed that Bush's goal was to maintain a federal judiciary similar to that created by Reagan. Elevating judges whom Reagan had appointed to the lower courts was one way to keep the same judicial ideology on the higher courts.

When looking at the experience of Bush's nominees, Goldman (1993) found that the proportion of judges with prosecutorial experience was the lowest of the previous six administrations. Goldman felt that the Bush administration, like the Reagan administration, was looking for career judges. Those judges who were appointed while still in their youth would

serve out their lives on the bench. This would explain why Bush's nominees did not have much experience outside of a large law firm (1993:288).

Goldman (1993:292) also found that a large proportion of the Bush nominees attended private undergraduate and law schools. Only 11 of the 37 appointees attended a public school for both their undergraduate and law school degrees. Most of Bush's appointees attended a private school or an Ivy League school.

Similar to President Carter, Bush asked Senators to forward the names of women and racial minorities. As a result of this policy, Bush appointed a higher proportion of women to the bench. He was second only to Carter, and exceeded the number of female appointments by Reagan. Bush appointed a total of seven women to the appeals court.

Bush was also more successful than Reagan in appointing racial minorities to the Courts of Appeal, but the overwhelming majority of Bush's appointees were white men. He did appoint two African-American judges and two Hispanic judges. Reagan appointed only one of each (Goldman, 1993:193).

When questioned about the low number of minorities Bush appointed, a member of Bush's administration was quoted as saying "women and minorities still are not at the top of the profession, from which nominees are drawn" (Biskupic, 1991:173). President Carter, however, was able to find

qualified women and minorities to appoint to the bench. In response to the Republican's comments, Paul Simon of Illinois was quoted as saying, "there surely is no shortage of women Republican attorneys. Their excuses don't hold water" (Biskupic, 1991:174). Some political analysts believe that Bush had a difficult time finding women and minorities to appoint because minority candidates who shared the conservative Bush political philosophy was rare (Idelson, 1993:319). The Republican Senators were also partially to blame. They usually nominated white males to the bench (Idelson, 1993:319).

A larger percentage of Bush's appointees received an ABA rating of Extremely Well Qualified/Well Qualified than Reagan's appointees. However, Carter's nominees still received a greater percentage of Extremely Well Qualified ratings overall (1993:293).

Unlike Reagan, President Bush appointed two Democrats to the Court of Appeals. Bush also appointed two members of the Independent party to the bench. The clear majority of his appointees were Republican, however (1993:292).

A larger percentage of Bush's appointees than of any other President's appointees were millionaires at the time that they took the bench. Sixteen of the 37 judges that Bush appointed had a net worth of one million dollars or more (1993:293). This seems logical, since a large proportion of Bush's

appointees worked at large law firms, where they had a greater earning potential.

When comparing the age of the appointees, it is evident that Bush followed the pattern set by Reagan: He appointed young people to the Court of Appeals. Bush's appointees were even younger than Reagan's were; the average age of Bush's appointees was 48.7. This was slightly younger than the average age of Reagan's appointees, and almost 3 years younger than Carter's judges.

During his one term of serving as President, Bush managed to carry on Reagan's judicial legacy of conservatism. Although Bush did manage to appoint more women and minorities to the bench than Reagan did, in many ways the judges appointed by Bush are indistinguishable from those appointed by Reagan. This was one of Bush's goals. He wanted to preserve and continue Reagan's judicial legacy.

Joan Biskupic (1991:171) wrote an article entitled "Bush boosts bench strength of conservative judges." Biskupic interviewed George Kassouf, who was the director of the Alliance for Justice's Judicial Selection Project. When asked about Bush's judicial appointments, Kassouf said "Bush's nominees don't bring out the same kind of controversies as the Reagan nominees, but they are the same good soldiers in the conservative movement" (1991:171).

Decision Making of the Appointees

A large study of the decision making of the Bush appointees has not been undertaken, such as the studies done by Gottschall. However, Daniel Troy (1996) compared the decisions of the Reagan and Bush appointees to those of their predecessors. Troy used case studies in order to determine how the judges arrived at their decisions, as well as to identify the similarities and differences between judges when handling the same types of cases. Overall, Troy (1996:6) found that due to the judges appointed by Reagan and Bush, the courts are now "harder on criminal defendants, slightly tilted against increased regulation, and decidedly less hostile to businesses. They defer more to both the legislative and executive branches."

The article by Troy (1996) offers some evidence that Reagan and Bush kept their promise to remake the federal judiciary. Since their appointees are fairly young, they will continue to influence public policy for many years to come.

It thus appears that the judges appointed by Reagan and Bush may have effected a substantive change on the bench. However, in their quest to create a US Court of Appeals that is tougher on crime and friendlier to big business, the Republicans may have had to sacrifice the symbolic representation of women and minorities.

PRESIDENT CLINTON

Since President Clinton has only just begun his second term in office, the focus here will be on his first term appointments. Jeff Rosen (1992:15) made the statement that "As the first President since Woodrow Wilson to have taught constitutional law (at the University of Arkansas, from 1973 to 1976), Clinton would be uniquely qualified to meet the challenge of judicial selection." Apparently, Rosen believed that as a person who has studied and taught constitutional law, Clinton would have a deeper understanding of the qualities that were necessary to be a good judge.

As mentioned before, Clinton inherited a large number of judicial vacancies from Bush. Those in the Bush administration assumed that Bush would be reelected, and they did not rush to fill the empty seats. When Clinton took office, there were 18 vacancies on the Court of Appeals (Dumas, 1992:2718).

Selection Process

President Clinton's judicial selection is done jointly by the Office of Policy Development and the White House Counsel's Office. Eleanor Acheson, who is the Assistant Attorney General for Policy Development, is in charge of the Justice Department's involvement in the process (Goldman, 1997:254).

Suggestions for candidates come from the recommendations of Democratic Senators, or if there are no Democratic Senators in the district that has the vacancy, suggestions are taken from Democratic members of the House. Suggestions for nominations also taken from any other high ranking Democrat (Goldman, 1997:254).

When a candidate's name is mentioned for a specific vacancy, his or her name is given to a Justice Department lawyer. The candidate's professional credentials are analyzed. If the candidate is already serving on the bench, previous judicial decisions are read and analyzed. Once a candidate passes this step in the process, an in-depth telephone interview is done. After the telephone interview, calls are made to people who work or come in contact with the candidate (Goldman, 1997:255).

If it is determined that the candidate meets the professional requirements, his or her name is given to the Judicial Selection Group. Members of the Judicial Selection Group are from both the White House administration and the Justice Department. The White House counsel chairs the committee. According to Goldman (1977:255), members of the committee from the White House include the Associate White House Counsel, a representative of the Office of Legislative Affairs; the Vice-President's Counsel, and the Assistant to the President. Representatives of

the Justice Department include the Attorney General, and the Chief of Staff in the Civil Rights Division of the Justice Department.

If a candidate makes it through the Judicial Selection Committee screening, the usual steps are taken. The candidate's name is given to the FBI for a thorough investigation, and the name is also given to the ABA to be assigned a ranking. However, in February 1997, Orrin Hatch wrote an open letter to the members of the Senate Judiciary Committee to announce that "the ABA will no longer play a special, officially sanctioned role in the confirmation process" (Wagner, 1997:15). The Senate Judiciary Committee will still accept rankings for judicial candidates, but they will no longer use them as a major tool for evaluating candidates. Orrin Hatch believes that the ABA ratings are more liberal than unbiased (Wagner, 1997:15).

When all of these steps are complete, the candidate's name is given to the Senate Judiciary Committee for consideration. The committee will either vote and pass the candidate's name to the full Senate, reject the candidate, or fail to vote, which will eventually cancel the nomination.

Clinton has not made judicial selection a large part of his presidential agenda. He does not want to use the candidate's ideology as a "litmus test" for screening potential judges. According to Robert Carp, a political scientist, Clinton wants to appoint judges who are "well-thought of locally, who are top-quality people, but without much interest in their ideology. When you

don't consider ideology as a factor, then you are going to get some who are fairly liberal and some who are fairly conservative" (Beckman, 1996:A21).

Clinton answered an American Bar Association questionnaire in 1992. According to the ABA, Clinton had this to say about judicial selection, "I believe that public confidence in our federal judiciary is furthered by the presence of more women lawyers and minority lawyers on the bench, and the judicial system and the country benefit from having judges who are excellent lawyers with diverse perspectives" (Idelson, 1993:317). Clinton also pledged to nominate judicial candidates who had a strong regard for an individual's rights, specifically the right to choose a legal abortion. He also wants to appoint judges who believe in equal opportunity (Idelson, 1993:317). While these are interpreted as liberal views by many, they are certainly not radically leftist views.

In a prepared statement in the *National Law Journal*, President Clinton said:

> A most troubling aspect of judicial appointments during the Reagan-Bush era has been the sharp decline in the selection of women and minority judges...Mr. Bush's appointments fail to reflect the breadth and diversity of the bar, much less that of our nation. The narrow judicial appointments of George Bush have resulted in the emergence of a judiciary that is less reflective of our diverse society than at any other time in recent memory. I strongly believe that the judiciary thus runs the risk of losing its legitimacy in the eyes of many Americans (Wilson, 1994:66).

Confirmation Process

For Clinton, the nomination process worked very smoothly, but the confirmation process proved to be the problem. Goldman (1997) reported that during the 103rd Congress, 21 appellate court judges were nominated, and 18 of those were confirmed. During the 104th Congress, Clinton nominated 18 candidates for the Courts of Appeal and 11 of those were confirmed during the first session. Goldman (1997:255) said "As these figures suggest, the confirmation process underwent a stunning transformation from a Senate controlled by Democrats to one controlled by Republicans."

When the Republicans gained control of the Senate, Clinton lost a great deal of his power. He was not able to push candidates through the confirmation process quickly and quietly. This was, and continues to be, a significant problem for Clinton. As Goldman stated "A vindictive and mean-spirited Congress appeared to be in the offing for Bill Clinton" (1997:256).

There are several reasons for the atmosphere in the Senate. The first reason is Bob Dole. Dole, who began his presidential campaign while he was still in control of the Senate, made judicial selection a large part of his platform. He campaigned for a return to the types of judges who were appointed by Reagan, and accused Clinton of nominating judges who were "judicial activists" (Goldman, 1997:256). According to an article by Holly

Idelson (1996:1304), "Dole has accused President Clinton of appointing liberal judges, and warned that another four years of Clinton nominees could dangerously tilt the composition of the federal bench."

In addition to Dole's campaign, there was a change in the Senate Judiciary Committee. Republican Orrin Hatch replaced Democrat Joseph Biden as Chairman of the Senate Judiciary Committee. Hatch had been involved in battles over judicial selection during his Senate career (Goldman, 1997:256). According to Ted Gest et al. (1997:23), "the Republicans are resisting Clinton nominees aggressively in part because they had to fight so long to get the judiciary to their liking." The Republicans finally filled the bench with conservative judges appointed by Reagan and Bush. A Republican President appointed the majority of those serving on the bench. The Senators did not want to see the face of the bench changed.

Hatch was a supporter of both Robert Bork and Clarence Thomas. George Bush nominated Bork to the Supreme Court. Bork was strongly opposed by the Democrats in the Senate. After a long battle, Bork's nomination was rejected. Thomas was also nominated to the Supreme Court. There was a similar battle over his nomination as well. Republicans supported Thomas, while Democrats fought vehemently to keep him off the bench. Thomas' nomination was eventually confirmed, but both nominations created some bad blood in the Senate (Carp and Stidham, 1996:253).

The controversy surrounding Clinton's judicial appointments is ironic because Clinton did not make judicial selection a crucial element in his presidency. Clinton made it clear that he wanted to follow Carter's example of appointing women and minorities; however, he also stipulated that he did not want to fill the bench with liberals from the far left.

According to Michael Gerhardt (1997:263), the Dean of Case Western Reserve University School of Law, Clinton wanted to nominate

> mainstream judges who construe the Constitution and statutes fairly and pragmatically; and to keep his judicial nominations below radar, i.e., to look for consensus in the Senate on judicial candidates, not to make any political waves in nominating judges and not to spend any more of his political coinage on his judicial nominations than he absolutely had to.

In an attempt to smooth over the confirmation process, the Judicial Selection Committee from Clinton's Administration began working closely with Orrin Hatch. Hatch was included in as much of the process as possible. The committee actively sought out Hatch's advice on candidates. Eleanor Acheson, Assistant Attorney General for Policy Development, was quoted as saying, "It is a better way of doing business. Hatch gives good advice and a good sense of what's going to work and what's not going to work" (Goldman, 1997:256).

Allison (1996) examined the speed of the confirmation of nominees to the district and appellate courts and found some interesting results. In the

lower courts, Allison found that the ABA ratings and the year of the President's term were the two most influential factors in determining how fast a judge's nomination would be confirmed (1996:10). If a candidate had a high ABA rating, his chances of being confirmed quickly were much higher than those who received a Qualified or Not Qualified rating. Allison (1996:11) found that the speed of confirmation decreases after the President has been in office longer. This pattern was apparent in Clinton's appointments. During 1993, the average number of days from referral to confirmation was 78. The number of days rose to 103 in 1994.

Allison (1996) pointed out that although the process for appellate court judges differ from that for district court judges, the same factors influence both. Carney (1997:370) wrote, "fights over judges tend to flare up when the two parties are not preoccupied with legislation. Second-term Presidents often turn to judges as they begin to think of their legacy. Perhaps for the same reason, a Senate ruled by the opposition party tends to raise more objections to nominees during a second term" (1997:370).

All of these factors combined to create an atmosphere in which it was difficult to nominate and appoint judges. Clinton simply wanted to appoint judges who would do the best job. He did not want to reshape the bench in the way that either Carter or Reagan did. Yet, he has encountered the most problems in the confirmation stage of judicial selection and appointment.

To summarize, a majority of the judges currently sitting on the Federal Courts of Appeal are men. The judges are mostly white, middle-aged men; many of these judges came to the Federal bench with experience in the lower courts. Many of the judges have strong political ties, either Republican or Democratic, depending on the President who appointed them. Despite the differences in their political backgrounds, however, there seems to be little overall difference in the decisions made by the judges.

RESEARCH DESIGN AND METHODS

This study is a replication of the work done by Sheldon Goldman (1995). It will examine the characteristics of the judges appointed by President Clinton. The judges appointed by Clinton will be compared to those judges appointed by the previous three Presidents; Reagan, Bush and Carter.

Hypotheses

There are two hypotheses to be tested. The first hypothesis is that President Clinton will appoint a larger percentage of women to the US Courts of Appeal than any of the three previous Presidents. Secondly, President Clinton will appoint a larger percentage of ethnic and racial minorities to the US Courts of Appeal than the previous three presidents. There are two justifications for these hypotheses. First, both Reagan and Bush wanted to

appoint conservative Republican judges to the appellate bench. Women and racial/ethnic minorities are less likely than white males to be conservative Republicans. Secondly, President Carter had a smaller "pool" of qualified women and minority candidates from which to choose. President Clinton will be able to utilize this larger candidate pool to diversify his judiciary.

I expect a number of additional results, based on the main hypotheses. When President Carter was in office, women and minorities were underrepresented in the legal professions. There were women and minorities that practiced law, but not as many as there are today. The women and minorities who worked in the legal profession during Carter's administration were more likely to work for smaller law firms, or in solo practices. They were usually not invited to practice at the larger, corporate law firms. Carter's appointees were also Democrats, who were more likely to work for a public defenders office or as a criminal defense attorney (Goldman, 1978).

President Clinton, on the other hand, has a large pool of qualified female and minority candidates from which to choose. Consequently, I expect to find that his appointees will have prior judicial experience, those who practiced law worked at a large law firm at the time of their appointment. Based on their work experience, I expect that Clinton's appointees will have a large net worth. The judges appointed by Clinton will

earn high ratings from the ABA. Overall, they will be well qualified, experienced and diverse.

Research Design

The purpose of this study is to determine the characteristics of President Clinton's first term federal appellate court judges. The research will be a replication of the work done by Sheldon Goldman (1995). Since many of Clinton's current nominees have been stalled in the Senate, his second term nominees will not be considered.

Subjects

During his first term as President, Clinton appointed 32 judges to the US Courts of Appeal. These judges were appointed to the bench between 1993 and 1996. The judges used in this study were appointed to the 11 US Circuits, and the Federal Circuit. The judges appointed to the Washington D.C. circuit were also included. For a view of the US circuits, see Appendix A. For a complete list of the judges appointed by Clinton that were used in this study, see Appendix B.

Procedures

The names of the judges were obtained from *Want's Federal, State Court Directory.* Transcriptions of the Senate Judiciary Committee hearings were used to gather information about each judge. A copy of the ABA

ratings was obtained from Irene Emsellem, who works in the Governmental Affairs office of the American Bar Association. The race or ethnicity of each judge was obtained by calling and speaking to either a law clerk or secretary in each judge's chambers. It was the most reliable way to obtain accurate information.

A form was created to consistently gather the same information for each judicial candidate (see Appendix C). The types of information gathered about the judges included marital status, judicial experience, age, gender, race, education, ABA ratings, net worth, previous occupations and past party activism.

Measures

Data was gathered for the Clinton appointees. The data was then compared to that of Presidents Carter, Reagan and Bush. The data for the three previous Presidents, Bush, Reagan and Carter was obtained from Sheldon Goldman's (1991) article "Bush's judicial legacy: Completing the puzzle and summing up."

Comparisons were made using the percentages of the total number of judges appointed by Clinton and the total number of judges appointed by the other Presidents. For example, a comparison was done between the percentage of minority judges appointed by Clinton, and the percentage of

minority judges appointed by Carter, Reagan and Bush. In the case that the total number of judges being compared in a hypothesis was too small to create a meaningful percentage, the total number of judges appointed by all four Presidents was used. Chi-Square and similar statistical tests were not used because the sample size was too small.

RESULTS

Table II. US Appeals Court Appointees Compared by Administration

	CLINTON % (N)	BUSH % (N)	REAGAN % (N)	CARTER % (N)
GENDER				
Male	71.8% (23)	81.1% (30)	94.9% (74)	80.4% (45)
Female	28.1% (9)	18.9% (7)	5.1% (4)	19.6% (11)
ETHNICITY/RACE				
White	75.0% (24)	89.2% (33)	97.4% (76)	78.6% (44)
African American	12.5% (4)	5.4% (2)	1.3% (1)	16.1% (9)
Hispanic	6.3% (2)	5.4% (2)	1.3% (1)	3.6% (2)
Asian	3.1% (1)	0	0	1.8% (1)
Other	3.1% (1)	0	0	0
Percent White Male	53.1% (17)	70.3% (26)	92.3% (72)	60.7% (34)
OCCUPATION				
Politics/government	9.0% (3)	10.8% (4)	6.4% (5)	5.4% (3)
Judiciary	53.0% (17)	59.5% (22)	55.1% (43)	46.4% (26)
Large Law Firm				
100+ Members	12.5% (4)	8.1% (3)	3.9% (3)	1.8% (1)
50-99	3.1% (1)	8.1% (3)	3.9% (3)	14.3% (8)
25-49	3.1% (1)	0	6.4% (5)	3.6% (2)
Medium Size Firm				
10-24	3.1% (1)	8.1% (3)	3.9% (3)	14.3% (8)
5-9	0	2.7% (1)	6.4% (5)	1.8% (1)
Small Firm				
2-4	0	0	1.3% (1)	3.6% (2)
Solo	0	0	0	1.8% (1)
Law Professor	15.6% (5)	2.7% (1)	12.8% (10)	14.3% (8)
Other	0	0	1.3% (1)	1.8% (1)
EXPERIENCE				
Judicial	65.6% (21)	62.2% (23)	60.3% (47)	53.6% (30)
Prosecutorial	50.0% (16)	29.7% (11)	28.2% (22)	32.1% (18)
Both	37.5% (12)	--	--	--
Neither	21.9% (7)	32.4% (12)	34.6% (27)	37.5% (21)
EDUCATION				
Undergraduate				
Public	50.0% (16)	29.7% (11)	24.4% (19)	30.4% (17)
Ivy League	3.0% (1)	10.8% (4)	24.4% (19)	19.6% (11)

Table II (Continued)

	CLINTON % (N)	BUSH % (N)	REAGAN % (N)	CARTER % (N)
Graduate				
Public	43.8% (14)	29.7% (11)	39.7% (31)	39.3% (22)
Private	18.8% (6)	40.5% (15)	37.2% (29)	19.6% (11)
Ivy League	37.5% (12)	29.7% (11)	23.1% (18)	41.1% (23)
ABA RATING				
Extremely Well/ Well Qualified	75.0% (24)	64.9% (24)	59.0% (46)	75.0% (42)
Qualified	3.1% (1)	35.1% (13)	41.0% (32)	25.0% (14)
Not Qualified	0	0	0	0
Split	21.9% (7)	0	0	0
Well Qualified/Qualified	85.7% (6)	--	--	--
Qualified/Not Qualified	14.3% (1)	--	--	--
POLITICAL IDENTIFICATION				
Democrat	93.8% (30)	5.4% (2)	0	82.1% (46)
Republican	3.1% (1)	89.2% (33)	97.4% (76)	7.1% (4)
Independent	3.1% (1)	5.4% (2)	1.3% (1)	10.7% (6)
Other	0	0	1.3% (1)	0
PAST PARTY ACTIVISM	62.5% (20)	70.3% (26)	69.2% (54)	73.2% (41)
NET WORTH				
Under $200,000	3.1% (1)	5.4% (2)	15.6% (12)	33.3% (13)
$200,000-499,999	16.0% (2)	29.7% (11)	32.5% (25)	38.5% (15)
$500,000-999,999	28.1% (9)	21.6% (8)	33.8% (26)	17.9% (7)
$1 million +	62.5% (20)	43.2% (16)	18.2% (14)	10.3% (4)
AVERAGE AGE AT NOMINATION	51	48.7	50	51.9
TOTAL NUMBER OF APPOINTEES	32	37	78	56

Data for Presidents Bush, Reagan, and Carter was obtained from Goldman (1993), "Bush's judicial legacy: The final imprint", p. 293.

FINDINGS

Gender of the Appointees

The characteristics of the judges appointed by Presidents Clinton, Bush, Reagan and Carter are displayed in Table II. It is clear from these comparisons that the first hypothesis was confirmed. President Clinton appointed a higher percentage of women to the US Courts of Appeal than any of the previous three presidents. The women appointed by President Clinton represent 28 percent of his total appointments. Almost 19 percent of President Bush's appointees were women. This is comparable to President Carter whose appointees were 19.6 percent women. Only five percent of Reagan's appointees, on the other hand were women.

Racial Diversity of the Appointees

A similar pattern is found when examining the appointments of racial and ethnic minorities. Figure 1 illustrates the racial diversity of the judges appointed by each president. One fourth of Clinton's appointees were from racial and ethnic minorities. Almost 13 percent of Clinton's appointees were African-American, six percent were Hispanic, three percent were Asian and one appointee was of Syrian descent. Almost 90 percent of Bush's appointees were white. Only five percent of Bush's appointees were African-American and five percent were Hispanic. In comparison, President

Reagan's judicial appointees were almost all white. He appointed one African-American judge, and one Hispanic judge. Overall, a total of 92 percent of Reagan's appointees were white men.

The racial and ethnic characteristics of the judges appointed by Clinton and Carter are very similar. Seventy-nine percent of Carter's appointees were white, compared to 75 percent of President Clinton's appointees. Carter appointed a larger percentage of African-Americans than Clinton, 16 percent compared to 13 percent. President Clinton appointed a larger percentage of Hispanics (six percent) to the Courts of Appeal; four percent of Carter's appointees were Hispanic.

Occupation

When looking at the occupation of the judges at the time of appointment, it is evident that all of the Presidents relied on the lower courts as a source of nominees for the US Courts of Appeal. Fifty-three percent of Clinton's appointees came from the judiciary, compared to 60 percent of Bush's, 55 percent of Reagan's appointees and 46 percent of Carter's appointees. Most of Clinton's appointees were serving on the District Court at the time of their appointment. Several came from state court systems. Of the 17 judges who came from the lower courts, seven (41 percent) were serving as Chief Justice at the time of their appointment. The number of

Clinton's judges that came from politics or government was also comparable to those judges appointed by the three other Presidents. Clinton appointed a larger percentage of judges from large law firms than any other President. Clinton appointed almost 22 percent of his judges from large or medium sized law firms. Conversely, he did not appoint any judges from small law firms or solo law practices. Carter and Reagan did appoint judges from both large and small law firms. Clinton also appointed the largest percentage of judges from law schools, 16 percent of his judges held a faculty position, compared to three percent of Bush's judges, 13 percent of Reagan's judges and 15 percent of Carter's judges.

Past Work Experience

Clinton's appointees had more judicial experience than the judges appointed by the previous three Presidents; sixty-six percent of Clinton's judges had judicial experience. This compares to 62 percent of Bush's appointees, 60 percent of Reagan's judges and 54 percent of Carter's. Exactly half of Clinton's judges had experience in the prosecutor's office. This percentage is much higher than the judges appointed by the previous three Presidents. Only 30 percent of Bush and Reagan's judges had prosecutorial experience, and a little over 30 percent of Carter's did.

Education

The judges appointed by President Clinton were much more likely than those appointed by the previous Presidents to have attended a public college or university. Fifty percent of Clinton's appointees, but only 30 percent of Bush's judges, 25 percent of Reagan's judges and 30 percent of Carter's judges earned their undergraduate degree at a public university. Conversely, Clinton appointed the smallest percentage of judges who attended either a private or Ivy League university. Almost half of Clinton's judges attended a publicly supported law school as well. Forty-four percent of Clinton's judges attended a public law school. It is interesting to note that almost 38 percent attended an Ivy League law school. This percentage is higher than the judges appointed by the Republican Presidents, but lower than the judges appointed by Carter.

ABA Ratings

Despite the problems that Clinton faced in getting his judges through he confirmation process, most of his judges were highly regarded by the American Bar Association. Figure 2 illustrates the ABA ratings of the judges appointed by each President. Seventy five percent of Clinton's judges were rated Well Qualified by the ABA. One judge was given the Qualified rating, and seven judges received a split rating. Of those judges who received a

split rating, six received a Well Qualified/Qualified rating, and one received a Qualified/Not Qualified rating. None of Clinton's judges were rated Not Qualified. Sixty-five percent of Bush's appointees earned the highest rating of Well Qualified. Sixty percent of Reagan's judges and 75 percent of Carter's judges earned the highest rating.

Political Background

When comparing the appointee's political backgrounds, Clinton's judges were the least involved in party politics. However, 63 percent of Clinton's appointees reported political activism at some level. Goldman has used the term political activism in each of his judicial studies, but has never defined it. I interpreted it to be as simple as contributing time or money to a candidate's campaign, or as extensive as running for a public office. Overall, the clear majority of Clinton's judicial appointees were from the Democratic Party, almost 94 percent. President Bush appointed 11 percent of his judges from other political parties. Reagan appointed two judges who were not Republicans. President Carter appointed the most judges from outside of his party; he appointed 4 Republicans and 6 judges from the Independent Party.

Net Worth of the Judges

Clinton's judges had the highest net worth of any of the appointees. Figure 3 illustrates the net worth of the judges appointed by each President.

Almost 63 percent of President Clinton's appointees reported having a net worth of one million dollars or more. In fact, many judges reported having considerable wealth; one judge reported having a net worth of 25 million dollars. Many other judges reported a net worth that exceeded 5 million dollars. Of those judges who earned between $500,000-900,000, more were closer to the high end of the scale than the lower end. The one judge who reported a net worth of less than $200,000 was young, and had not been in private practice. He worked as a law clerk, then in the prosecutor's office, and was then appointed to the bench. Most of Clinton's judges who were appointed from law firms worked on civil cases, most often on federal cases. Very few reported doing any criminal defense work at all. It is probable that these lawyers only worked on high profile, high profit cases. It is interesting to compare the net worth of the judges appointed by Clinton with the judges appointed by the other Presidents; 43 percent of Bush's judges were worth over a million dollars, but only 18 percent of Reagan's judges and 10 percent of Carter's judges were worth over a million dollars.

Age of the Appointees

The average age of Clinton's judges was higher than the judges appointed by Bush and Reagan. Clinton's judges had an average age of 51, while Bush's judges had an average of 49, and Reagan's judges had an

average age of 50. Carter's judges had an average age of almost 52. On average the age difference is not that large.

Figure 1. Race of Judges by President

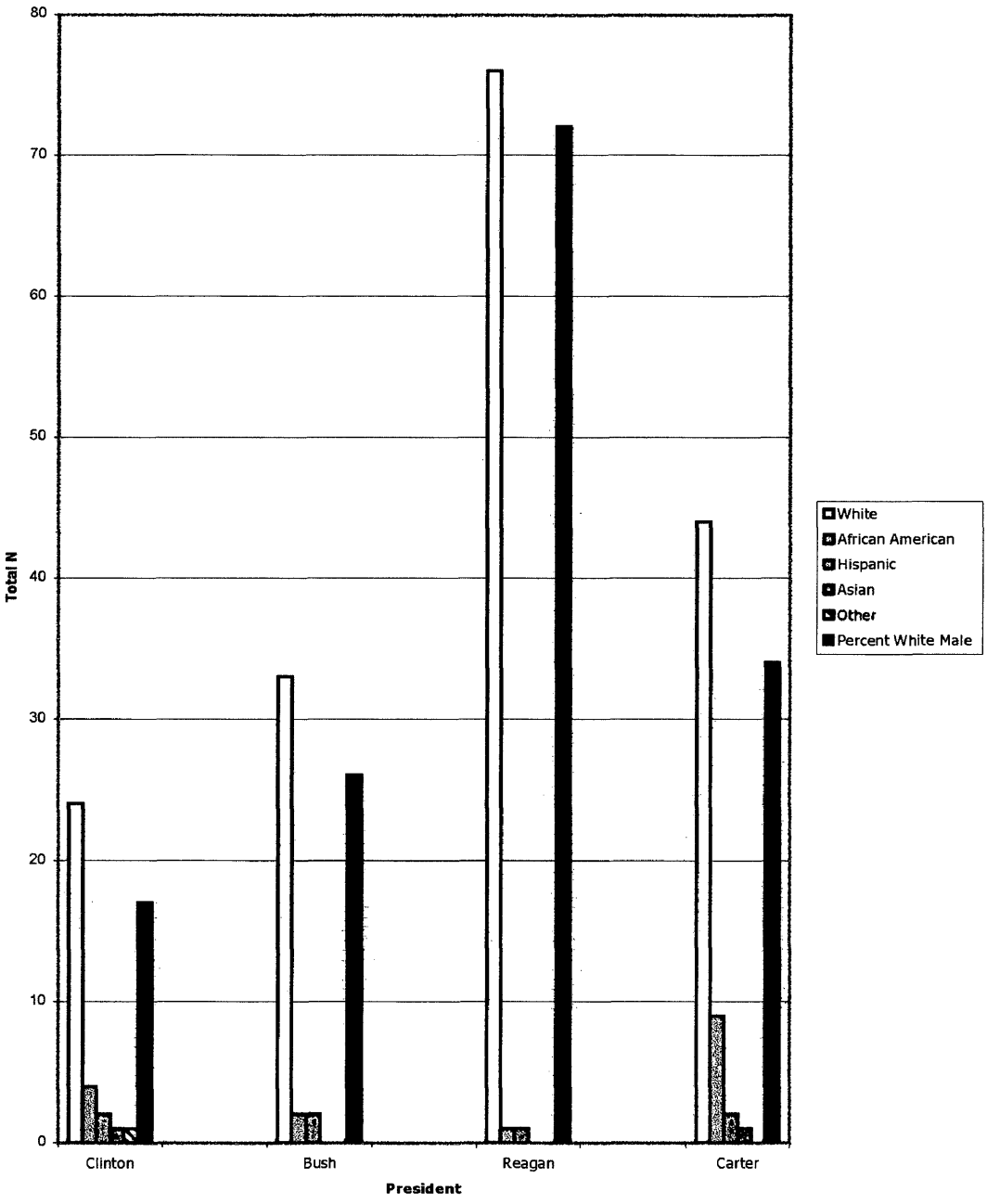


Figure 2. ABA Ratings of Judges by President

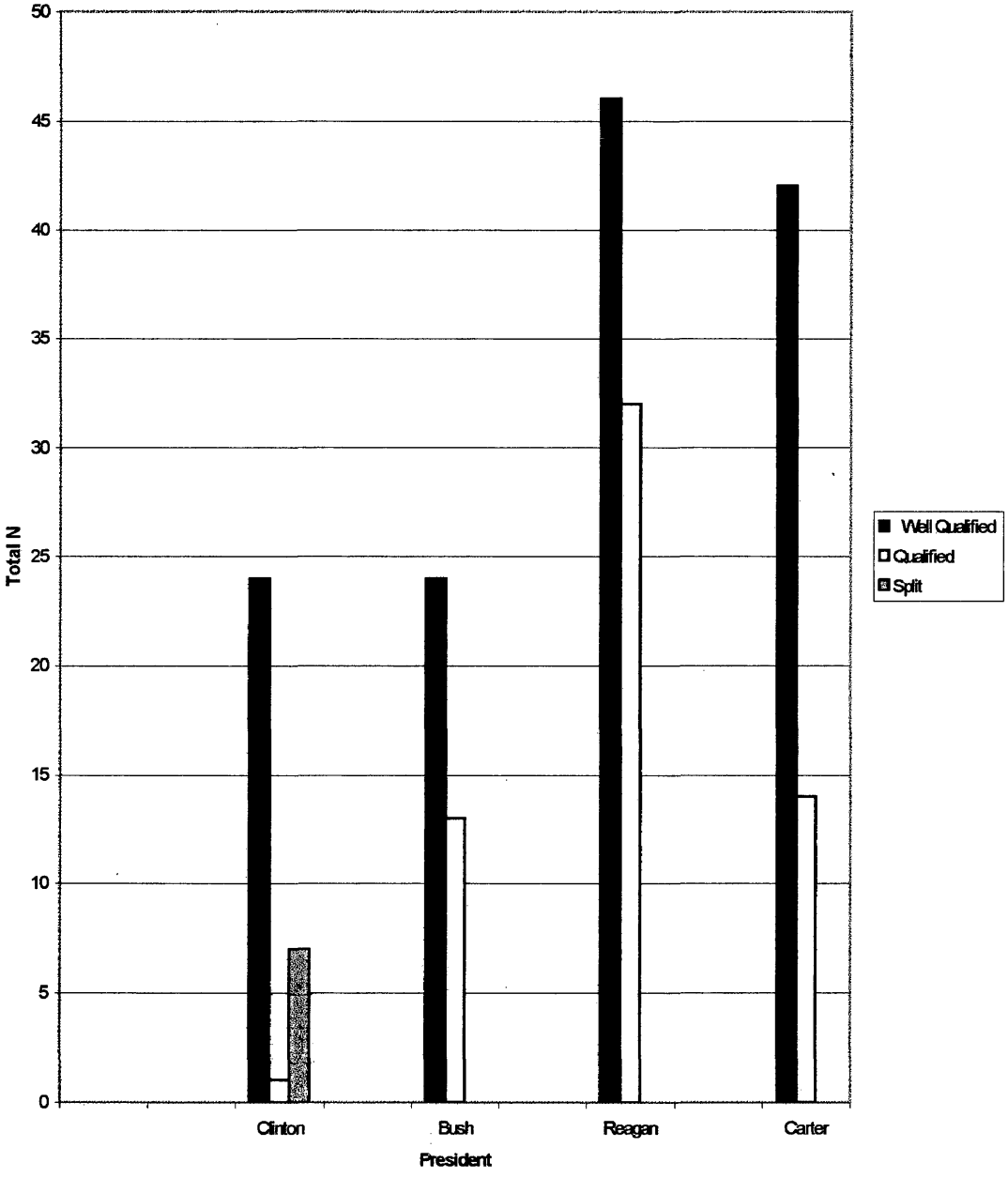
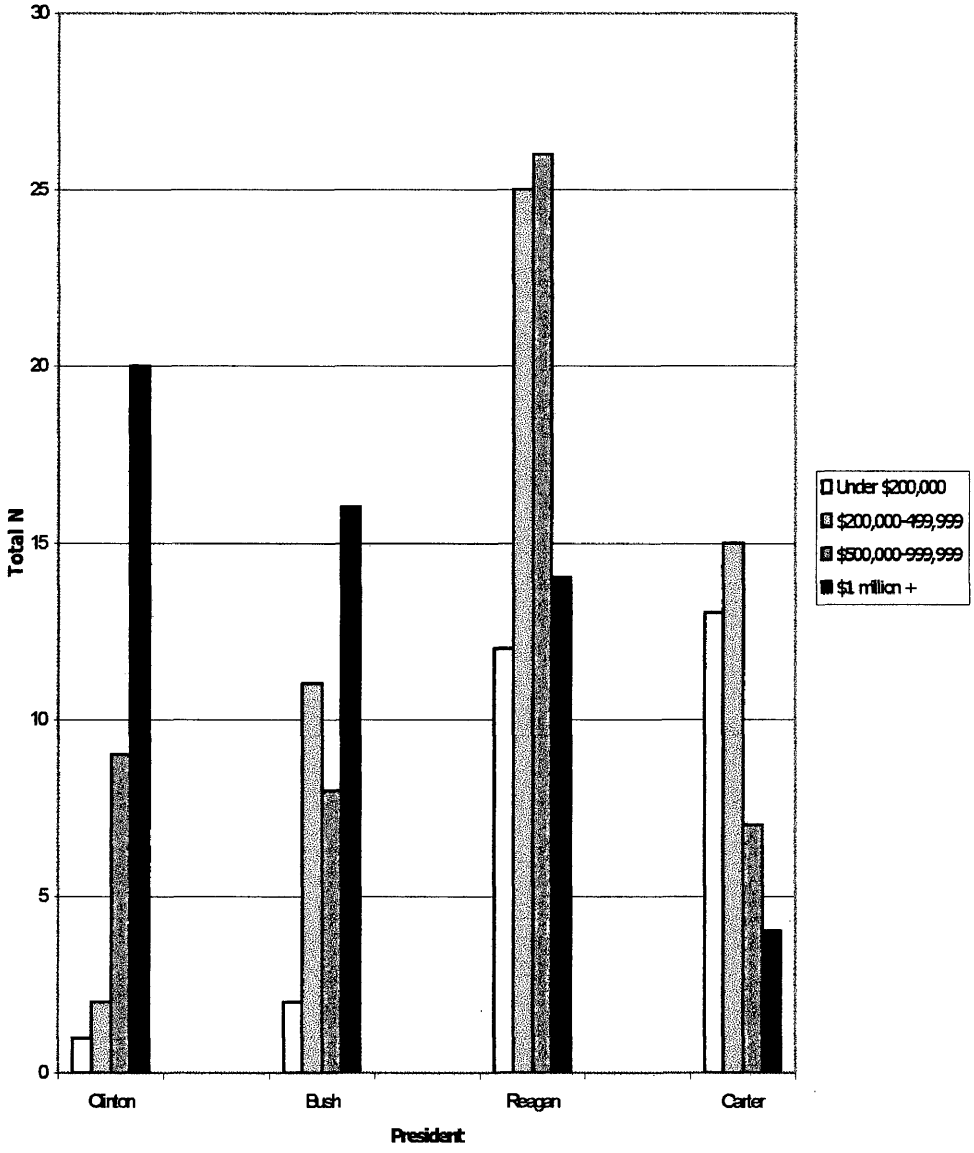


Figure 3. Net Worth of Judges by President



DISCUSSION

The objectives of this thesis were to examine the selection process and the characteristics of the judges appointed by President Clinton to the US Courts of Appeal. The judges appointed by Clinton were compared to those judges appointed by Bush, Reagan and Carter.

Overall, the judges appointed by President Clinton are a qualified and diverse group. Clinton's judicial appointees are experienced; half of the appointees came to the US Courts of Appeal with prior judicial experience. Almost half of the appointees had prior experience as both a prosecutor and a judge.

Clinton's judges were very highly regarded by the ABA committee. A very large percentage of Clinton's judges earned the highest rating of Well Qualified. Only Carter equals his appointment of Well Qualified judges.

Overall, it can be concluded that President Clinton managed to diversify the bench, without sacrificing quality. He has seated the largest percentage of women and minorities on the federal appellate court. When compared to the previous Presidents, he appointed the lowest percentage of white males to the bench. The record of his appointees contradicts Bush's statement that women and minorities are not qualified to be judicial nominees. Clinton and Carter both managed to diversify the bench and appoint judges who were experienced and qualified.

As mentioned in the introduction, there are two arguments for having a diverse judiciary. The first argument is that there should be substantive representation of women and minorities on the US Courts of Appeal. As was seen in the studies by Gottschall and Troy, there were no significant differences found in the decision making of those judges appointed by a Republican President and those appointed by Democratic Presidents.

There are, however, symbolic differences found between the judges appointed by Reagan and Bush, and those appointed by Carter and Clinton. Carter and Clinton were able to create a federal judiciary that, in part, reflects the population of the United States as a whole. By appointing women and racial minorities, Carter and Clinton have made important, symbolic changes to the face of the federal judiciary. The Democratic Presidents were able to appoint high percentages of women and minorities to the federal courts, while still maintaining the integrity of the bench.

It is important to analyze and understand who is being appointed to the federal courts. The judges who serve on the US Courts of Appeal have influence on laws and government policy. They are the keepers of the Constitution. A President has the opportunity to create a legacy on the bench that will last far beyond his years in office. A President who recognizes that wields this power has a valuable tool to enact change in the United States.

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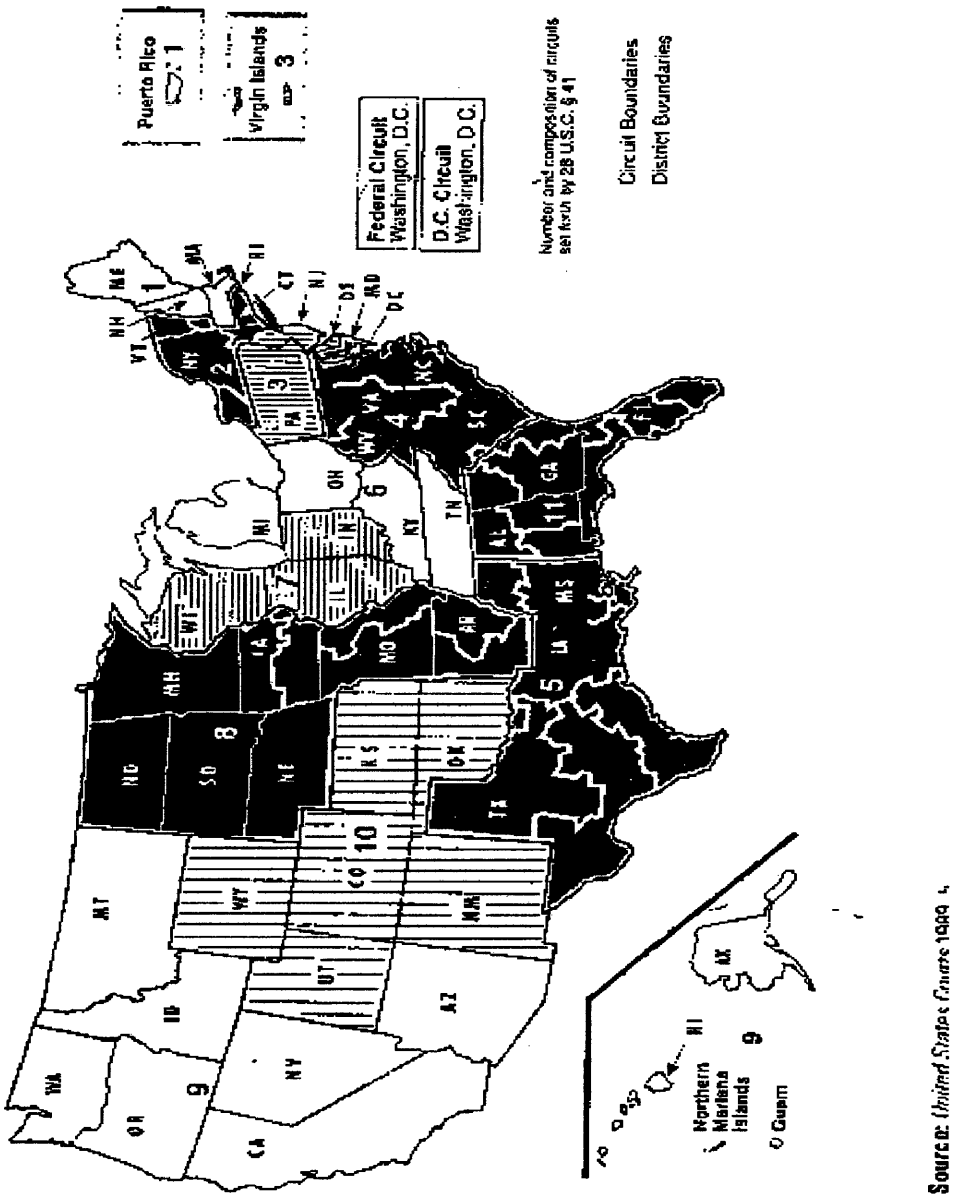
APPENDIX A

Map obtained from Carp and Stidham (1996:40).



APPENDIX B

Judges appointed during President Clinton's first term in office.

FEDERAL CIRCUIT
William C. Bryson
10/7/94

DISTRICT OF COLUMBIA
Judith W. Rogers
3/21/94

David S. Tatel
10/11/94

Merrick Garland
3/19/95

FIRST CIRCUIT
Sandra L. Lynch
5/1/95

SECOND CIRCUIT
Pierre N. Leval
11/8/93

Guido Calabresi
7/25/94

Jose Cabranes
8/12/94

Fred I. Parker
10/12/94

THIRD CIRCUIT
Theodore A. Mckee
6/9/94

Hilee Sarokin
10/4/94

FOURTH CIRCUIT
M. Blane Michael
10/12/93

Diana G. Motz
6/27/94

FIFTH CIRCUIT
Fortunato P. Benavides
5/9/94

Carl E. Stewart
5/9/94

Robert Parker
6/16/94

James E. Dennis
10/2/95

SIXTH CIRCUIT
Martha Craig Daughtrey
11/22/93

Karen Nelson Moore
3/24/95

R. Guy Cole
12/26/95

SEVENTH CIRCUIT
Diane P. Wood
6/30/95

Terence T. Evans
8/14/95

EIGHTH CIRCUIT
Diana E. Murphy
11/28/94

NINTH CIRCUIT
Michael Daly Hawkins
9/15/94

Sidney R. Thomas
3/11/96

William A. Fletcher
3/5/95

TENTH CIRCUIT
Robert H. Henry
5/11/94

Mary Beck Briscoe
6/1/95

Carlos F. Lucero
7/22/95

Michael Murphy
10/16/95

ELEVENTH CIRCUIT
Rosemary Barkett
5/12/94

APPENDIX C

1. Judge _____

2. Gender
   1 Male
   2 Female

   _____

3. Occupation
   1 Politics/Government
   2 Judiciary
   3 100+ Partners/Associates
   4 50-99 Partners/Assoc.
   5 25-99 Partners/Assoc.
   6 10-24 Partners/Assoc.
   7 5-9 Partners
   8 2-4 Partners
   9 Solo Practitioners
   10 Professor of Law
   11 Other

   _____

4. Undergraduate Education
   1 Public Supported
   2 Private not Ivy
   3 Ivy League

   _____

5. Net Worth
   1 Under $200,000
   2 $200,000-499,999
   3 $500,000-999,999
   4 $1,000,000 +

   _____

6. Martial Status
   1 Single
   2 Married
   3 Divorced
   4 Separated
   5 Unknown

   _____

7. Health
   1 Excellent
   2 Good
   3 Fair
   4 Poor
   5 Unknown

   _____

8. Law School Education
   1 Public Supported
   2 Private not Ivy
   3 Ivy League

   _____

9. Party Activism
   1 High Level
   2 Medium Level
   3 Low Level
   4 Not Indicated

   _____

10. Party in Control During Nomination
    1 Democrat
    2 Republican

    _____

11. Party of nominee
    1 Democrat
    2 Republican

3 Independent
4 Other

_____

12. Race
1 White
2 Black
3 Hispanic
4 Asian
5 Other

_____

13. Age of nominee

_____

14. District of Appointment

_____

15. Date of Appointment

_____

16. Experience
1 Judicial
2 Prosecutorial
3 Neither One
4 Both

_____

17. ABA Rating
1 Well Qualified
2 Qualified
3 Not Qualified
4 Split

_____

18. Committees

_____
_____
_____

19. Affiliations or Club Membership

_____
_____
_____

20. Public Offices Held

_____
_____
_____

21. Military Service

_____
_____
_____

22. Senate Judiciary Committee Chairman

_____
_____
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23. Publications and Books

_____
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_____

24. Other Information

_____
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