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FEDERAL JUDGES IN THE UNITED STATES: PARTY, IDEOLOGY, AND MERIT NOMINATION

by Henry R. Glick*

I. INTRODUCTION

During the 1976 presidential election campaign, Jimmy Carter announced that he favored the selection of all lower federal judges and prosecutors on the basis of merit, without consideration for traditional local constituency and political party demands. In the early weeks of his administration, he issued an executive order¹ creating a judicial nominating commission for federal appeals courts, comparable to the Missouri Plan² used in nearly half the states. He urged United States Senators to adopt similar procedures in their own states to screen nominees for the district courts. While other recent Presidents have acknowledged the significant role of the bar in rating judicial nominees, President Carter is the first Chief Executive explicitly to approve and institute the selection procedure promoted by law reformers. Although not political allies, Carter, the organized bar, and legal reform groups each base their endorsement of merit selection on the same fundamental ideal: to select individuals best suited for judicial service according to legal skills, experience, personal integrity, and other attributes which promote impartiality and quality decision-making. The new procedure officially replaces the traditional and usually more informal and partisan methods of choosing appellate judges.³

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1. Exec. Order No. 12,059, 3 C.F.R. 180 (1979), reprinted in 28 U.S.C. § 44 (1978). On May 11, 1978, Executive Order No. 12,059 established the United States Circuit Judge Nominating Commission. The commission was composed of 13 panels, each of which was required, upon presidential request, to recommend for nomination qualified circuit judges to serve in the federal judiciary. See, *Report Card on Judicial Merit Selection*, 37 CONQ. Q. 189, 191-92 (Feb. 3, 1979) [hereinafter cited as *Report Card*].

2. See Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978) [hereinafter cited as Glick].

3. Several descriptions are available of the creation and purpose of President Carter's merit plan for judicial selection. See, e.g., Carbon, *The U.S. Circuit Judge Nominating Com-*

Although President Carter favored creating merit nominating commissions for the district courts as well as the courts of appeals and federal prosecutors, he immediately encountered strong opposition in the Senate. His proposal interfered directly with the traditional power of Senators from the President's party to initiate the selection of candidates for federal office within their own states. Failing to persuade them to forego this "senatorial courtesy," the President settled for merit nominating commissions for the appellate courts only, where senatorial prerogatives are not controlling and the executive branch has traditionally had more independence and discretion in judicial selection. About half of the Senators have voluntarily created their own district court nominating commissions, but merit selection has become neither well established nor customary for these courts.⁴

The opposition which President Carter encountered in the Senate is not a new or unusual experience in federal judicial selection. Instead, frequent and even caustic debate over judicial selection has been part of American politics since colonial days and the Constitutional Convention.⁵ There has been controversy concerning the size and power of the federal courts. There has also been political competition over the appointment of reliable party faithful as judges. Various state representatives have tried to limit the size and the jurisdiction of the federal courts, and have created selection procedures and customs which help to maximize state influence in the federal courts. Senatorial judicial selection guarantees that federal judgeships will be made available to state and regional political constituencies, fostering political patronage valuable in maintaining a Senator's state political party and his personal support. In addition, new federal judgeships frequently are cre-

mission: A Comparison of Two of Its Panels, 62 JUDICATURE 233 (1978); E. Slotnick, *The Carter Presidency and the U.S. Circuit Judge Nominating Commission* (a paper presented at the 1978 convention of the American Political Association) [hereinafter cited as Slotnick].

4. Cohen, *Choosing Federal Judges—The Senate Keeps Control*, NAT'L J., Mar. 3, 1979, at 355 [hereinafter cited as Cohen].

5. Indeed, the very creation of lower federal courts was an extremely important Convention issue, since the federal judiciary was opposed by many of the smaller and Southern states which feared the initial creation and expected growth of centralized federal power. Inability to agree on the federal courts left the issue for the first Congress. It immediately became a sectional and partisan issue between North and South, Federalists and Jeffersonians, culminating in a constitutional question in *Marbury v. Madison*. The legal significance of judicial review was established in this most famous case, but few realize that the substantive political issues involved the growth of the federal government through the creation and enlarged jurisdiction of federal courts of appeals, as well as the appointment of many new Federalist judges when the opposing political party had just won the presidential election. See R. RICHARDSON & K. VINES, *THE POLITICS OF FEDERAL COURTS* 56-64 (1970) [hereinafter cited as RICHARDSON & VINES].

ated after presidential elections in order to provide a number of prestigious positions for influential and deserving party members. Often these additions are made after a party has been out of the White House for one or two terms and is anxious to reinforce state party organizations. For example, despite lobbying by Chief Justice Warren Burger and others to increase the number of federal judges, the current Democratic Congress avoided enlarging the federal bench until Jimmy Carter had won the presidency. Delayed further by political conflict over reorganization of the Fifth and Ninth Circuits, over 150 new judgeships finally were added to the federal courts, the largest increase in history.⁶ Most of the appointments have gone to activist Democrats.

The selection of local lawyers as judges helps to sustain a bond between federal judicial and state and local political values. It has long been a tradition, for example, that federal district judges must reside within the district which they serve. In practice, this has meant that judges usually have been born, educated, and politicized in their home state or judicial district. Also, district court jurisdiction is limited to individual states or sections of states, thereby preventing multi-state or "outside" influence in judicial selection or in the decision-making of "local" federal trial courts. The courts of appeals judges are selected from states within the circuit, often on a rotating state representational basis. Localism is not as important in the appellate courts as in the district courts. However, the geographical arrangement of districts and circuits does tend to serve local and sectional interests which seek to limit the bond between federal judicial decision-making and the centralizing power and national values of the federal government. While the courts are officially federal, their decisions and personnel often reflect local political attitudes and interests.⁷

While conflict and competition between state and national interests over judicial policy is a reality of the federal courts, they also constitute the central complaint about judicial selection in the United States. Traditionally, judicial reformers have maintained that in order to improve the quality of courts we need to set aside partisan considerations and choose only those individuals who are the best qualified and have the highest integrity. Federal judges are appointed for life and cannot easily be removed for unpopular decisions, but obtaining quality justice requires more than political insulation. Federal judges should be the best individuals available.

6. *Report Card*, *supra* note 1, at 189.

7. *See, e.g.*, RICHARDSON & VINES, *supra* note 5, at ch. 3; Vines, *Federal Judges and Race Relations Cases in the South*, 26 J. POL. 338 (1964).

Despite the widely respected goal of separating politics from judicial selection, political officials and judicial reformers usually demonstrate some form of partisan or organized politics and personal values in judicial recruitment. Moreover, it is difficult to identify and apply professional standards which reliably produce highly qualified individuals while screening out those unfit for office.

Regardless of problems in administering the ideal standards of merit selection, reforming recruitment is popular and gaining increasing acceptance. In the past quarter century, every state which has changed its method of judicial selection has moved to merit recruitment. In various states, merit selection often is adopted for appellate courts initially and, as it gains approval over the years and becomes routine, legislatures approve it for trial courts also.⁸ Perhaps a similar pattern will emerge at the federal level.

In view of the changing patterns in federal judicial selection, the purpose of this article is to review the history and major political characteristics of federal judicial selection, to examine the evidence about the quality and background of judges chosen in the past, and to evaluate the recent use of merit selection in the federal courts.

II. THE HISTORY OF FEDERAL JUDICIAL SELECTION: DEBATE AT THE CONSTITUTIONAL CONVENTION

The major judicial issue at the Constitutional Convention concerned the selection of Supreme Court Justices, since political division blocked the creation of a lower federal judiciary until the first Congress. Debate centered on the issue of which arm of the new government would be the most appropriate appointing authority for other federal officers.⁹ State governments, in reaction to colonial rule through royal governors, had established legislative dominance in which the assemblies not only enacted all legislation, but also appointed all of the judges and executive officials, including the governor, often for very short terms of office. Fearing the emergence of autocratic rule, many delegates to the 1789 Convention believed that this model should be applied to the new federal government as well. Consequently, early proposals at the Convention called for the selection of judges by the Senate alone, or in combination with the House of Representatives.

8. See generally Glick, *supra* note 2, at 509-41.

9. See generally J. GROSSMAN, *LAWYERS AND JUDGES* 21-24 (1965) [hereinafter cited as GROSSMAN]; J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 1-35 (1953) [hereinafter cited as HARRIS]; J. SCHMIDHAUSER, *JUDGES AND JUSTICES* ch. 2 (1979) [hereinafter cited as SCHMIDHAUSER].

After weeks of debate, the House of Representatives was excluded from federal appointments as a compromise between the large and small states, as delegates from the less populous areas fought to avoid domination by the Northeast. In the Senate, each state had equal representation and the small states conceivably would have equal influence.

Another major conflict centered on the political roles of the Legislature and Executive, and on the overall power of the federal government. The Federalists¹⁰ maintained that national unification and defense required a central government with significant powers. Political experience in the states already had amply demonstrated the disadvantages of legislative government. Judgeships and other appointments frequently were granted as rewards for personal friendship, service in the legislature, factional loyalty, or as trade-offs in compromises for other legislation as well as in response to local pressure for representation on the state courts. With various forms of partisan politics at the core of these appointments, it was argued that judges could not be selected according to legal competence and personal integrity. The defenders of legislative appointment countered that the Senators would be most familiar with the individuals who would serve on the Supreme Court, whereas the President would have limited information on which to base decisions. Presidential isolation from state and local politics was not a detriment, but an advantage, argued the Federalists. The President could maintain a national perspective regarding the needs of the entire country and would be more politically independent to select the most qualified men for the High Court.

Toward the close of the Convention, the current system of choosing Supreme Court Justices (and later, all other federal judges) was accepted as a further compromise between legislative and executive power.¹¹ judges would be selected by the President with the advice and consent of the Senate.¹² As was true for other parts of the federal Con-

10. In contrast to those who feared centralized and executive power, Alexander Hamilton, John Adams, and other Federalists consistently favored a more powerful national government and an enlarged role for presidential leadership.

11. Various delegates initially clung to a plan for senatorial selection of Supreme Court Justices, with the President appointing all executive officials. But this was unacceptable to others who objected to any independent legislative force in choosing federal officials.

12. Although this method has since been used to select all federal judges, the issue of which branch of government would be most influential in judicial selection was not immediately silenced. Reflecting various political movements to make government more responsive to popular political demands, numerous early constitutional amendments were offered which would have given the House of Representatives a role in approving judicial nominees, or which would have made federal judgeships elective offices. None of these was successful,

stitution, the exact political meaning or implementation of senatorial advice and consent was not fully discussed or described by the Convention. Importantly, Alexander Hamilton and others assumed that it meant that the Senate would not have any important initiative in judicial selection, but would be limited merely to approving or rejecting presidential nominees. This pattern of political approval normally has operated in the selection of Justices for the Supreme Court and to some degree for the courts of appeals, but the selection of judges for the federal district courts has involved much more senatorial power and independence.

III. THE POLITICS OF FEDERAL JUDICIAL SELECTION

Selection of judges for the three levels of the federal courts has varied according to the major actors and political values involved. Individual Senators, various executive officials and private organizations such as the bar and civil rights groups have played different roles and have had somewhat different impacts on judicial selection, depending on the court involved. Similarly, major selection values including political party patronage, political ideology, regional representation and legal competence also fluctuate and allow considerable latitude in judicial selection. None of the various actors or values alone adequately accounts for the workings of judicial selection. They must be considered in combination with each other. For example, almost all judge-ships are awarded to members of the President's political party. However, it is clear that there are so many individuals eligible on the basis of political party affiliation alone that this factor does not significantly limit or distinguish potential judges. The allocation of judicial positions to party loyalists does not in any way mean that poor, incompetent or unworthy judges typically are selected. Obviously, there are well qualified as well as poorly qualified Democrats and Republicans available for practically any government position. Thus, political party affiliation as a major factor in judicial selection does not mean that judges are simply party hacks or friends of an influential politician. Frequently, judicial reformers are inclined to conclude that there is a direct and inverse relationship between partisan influence and judicial competence, but this is too narrow a view of judicial recruitment.¹³

however, and the Senate role has been confirmed and well established in American experience.

13. The careers of Justices Marshall, Taney, Hughes, Black, Brandeis, Warren, and others illustrate that many Justices with prior political careers also often have been highly regarded as members of the Supreme Court.

A. Supreme Court

The selection of Supreme Court Justices occasionally has exhibited fierce political conflict and competition. Questions of party patronage, senatorial power, and judicial competence all have been involved, but the paramount issue has been the ideological orientation of the nominees. When questions of judicial competence are raised, they often have masked more fundamental issues about a candidate's political beliefs and affiliations. Ironically, the Constitution is silent on the issue of judicial qualifications, and the Convention itself rarely dealt directly with this question. Nevertheless, beginning with the first appointments to the High Court, at a time when formal legal training was rare, Justices of the Supreme Court typically have been chosen with care and have had outstanding legal credentials and strong records of personal accomplishment. George Washington himself was highly regarded for selecting judges only after a broad and careful screening of individuals widely viewed as the most worthy and capable.¹⁴

Individuals lacking public stature, experience and legal skills are normally bypassed early in the nominating process. Thus, the major basis for selecting a particular nominee is his political ideology or stand on public policy with possibly additional consideration for regional or broad constituency political support. Although party members typically are appointed, patronage is not the key variable since there are so few appointments made during a four-year term that only a few people can be rewarded. However, appointing a Justice who shares administration views and who also is identified with a particular religious, racial or ethnic group, or a particular region of the country, provides symbolic recognition of the important and legitimate political role performed by these groups in electoral politics.¹⁵ Nominees who are ideologically in the "middle-of-the-road," or who have not become especially visible in public life, are likely to be approved without much debate or opposition; however, occasionally, Supreme Court appointments incur substantial opposition¹⁶ as groups out of power struggle to prevent the extension of administration ideology to the Supreme Court.

Selection of Supreme Court Justices usually has clear policy implications for the entire nation, and recruitment becomes a forum where

14. See generally HARRIS, *supra* note 9.

15. Lyndon Johnson's appointment of Thurgood Marshall and Richard Nixon's nomination of conservatives and southerners both illustrate ideologically opposite but fundamentally similar goals to be achieved partly through Supreme Court appointments.

16. Examples of this are appointments such as Nixon's support for Clement Haynesworth and G. Harold Carswell.

major economic and social groups compete for influence. Cooperating with sympathetic allies in the Senate and the executive branch, interest groups, political party organizations, and influential individuals lobby for access to the federal judiciary.

Before the 1900's, the politics of Supreme Court selection generally were limited to political party and ideology conflict involving the President and the Senate.¹⁷ Party control over elections and the availability of patronage maintained and reinforced the centralizing power of party organizations. In the 1900's, however, political parties began to lose some of their awesome influence in politics. This was due to the reform movement against party domination of state and local politics, as well as to the emergence of more diverse and competitive interest groups, primarily in the growing urban industrial states. Concentrations of large numbers of people and the growth of corporate economic power in the United States contributed to more diffuse political organization and group politics.

1. Legal Values in Judicial Selection

Political parties and individual leaders have been joined by new competing groups, including the growing organized bar. These groups seek to influence judicial selection in order to maximize their influence in public policy. Many nominations illustrate the conflict between lib-

17. The earliest major confrontation occurred in 1795 over the nomination of John Rutledge as Chief Justice. Rutledge had had considerable judicial experience, having served as an Associate Justice of the United States Supreme Court and then as Chief Justice of the Supreme Court of South Carolina. However, after he made a speech opposing the recently Senate-approved Jay Treaty with Great Britain, Rutledge was opposed both as a foe of Federalist Party policy, and as mentally incompetent to serve on the High Court. Washington awarded him a special recess appointment, but his permanent seat on the Court was successfully resisted by the Federalist-dominated Senate.

Similar experiences have faced other Justices. As Attorney General under President Andrew Jackson, Roger B. Taney was strenuously opposed for the Supreme Court due to his sustained opposition to the Bank of the United States and national monetary policy. Rejected in 1834 as Jackson's nominee for Treasury Secretary by the Whig majority in the Senate, he resumed private law practice in Maryland, but the following year he was proposed for a Supreme Court vacancy for the circuit which included Maryland. (During the early 1800's, Supreme Court Justices also "rode circuit," and their seats on the High Court were allocated according to circuit representation, a practice which reinforces geographic representation today.) The Senate's response to Taney's new nomination was to attempt to redraw the boundaries of the circuit to exclude Maryland and force the nomination to be offered to a resident of another state. This tactic failed to gain majority support, but Taney was nevertheless rejected. In 1836, following a Democratic election victory, President Jackson successfully nominated Taney as Chief Justice, and a fellow Democrat, Philip B. Barbour, as an Associate Justice. See generally S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 62-74 (2d ed. 1976) [hereinafter cited as GOLDMAN & JAHNIGE]; HARRIS, *supra* note 9; SCHMIDHAUSER, *supra* note 9.

eral and conservative ideologies. It is also clear that the legal criteria for selection—skills, experience, personal integrity, independence, and judicial temperament—have become time-worn, frequently empty symbols used by many groups in order to legitimize or adorn a particular candidate.¹⁸

In the early 1900's, bar organizations had little influence or organizational responsibility in federal judicial selection. Nevertheless, legal values often were explicitly involved in the selection of Supreme Court Justices, although usually linked to partisan considerations. For example, if a candidate possessed outstanding formal credentials and experience, ideological objections to his appointment might be raised, or other vague criteria might be offered to undermine the nominee's accomplishments. If a candidate had weak credentials, supporters might emphasize his personal qualities making him attractive as a judge, while his opponents might dwell on his poor qualifications and partisanship. In many instances, legal and political criteria have been indistinguishable.¹⁹

18. For example, the American Bar Association, the most influential private organization involved in federal judicial selection, frequently has applied its legal standards in a partisan manner, conservative or moderate candidates while opposing the nomination of explicitly liberal lawyers. By the 1950's, the ABA had obtained a significant, semi-official role in screening judicial nominees according to their own organizational standards. The ABA made claims to professionalism, but had a record of partisanship in Supreme Court as well as lower court nominations.

19. In 1925, for example, liberal Senators unsuccessfully objected to the nomination of Harlan Stone, who had been Dean of the Columbia Law School and Attorney General of the United States, and also a member of the law firm which counseled financier J. P. Morgan. Similarly, Charles Evans Hughes, former member of the Supreme Court, Republican candidate for President, former governor of New York, former Secretary of State, and prestigious corporate lawyer, was opposed by liberal Senators for his unseemly political involvement and experience as well as his affiliation with corporate interests. Finally, United States Court of Appeals Judge John J. Parker was successfully resisted in the Senate as President Hoover's Republican nominee from the South. Senate Democrats and Progressive Republicans opposed the nomination on party and national policy lines. Also significant was the role of other groups, notably the NAACP and the American Federation of Labor, which objected to Parker's decisions in labor cases and his racist campaign rhetoric ten years earlier as a Republican gubernatorial candidate in North Carolina. Most legal groups considered Parker qualified for office.

Similar claims have been made against contemporary nominees. In 1970, for example, opponents argued that Judge Harold Carswell of Florida, one of Richard Nixon's southern Republican nominees to the Supreme Court, had made racist public statements and supported segregated facilities early in his political career, and currently was hostile to civil rights lawyers who appeared in his court. Judge Carswell was also opposed because he was not an especially able jurist, an important professional qualification for selection to the Supreme Court. The Carswell and the similar Clement Haynesworth nominations may be more easily recalled as current events but they were *not* novel occurrences in the selection of Supreme Court Justices. See generally GOLDMAN & JAHNIGE, *supra* note 17. See also J.

In the rare instances when fundamental political and legal issues are raised, judicial appointments are doubly difficult for their sponsors to defend. Nevertheless, it is clear that even individuals who are widely recognized as outstanding and skilled lawyers, and who have achieved numerous personal accomplishments, may also be characterized as *legally* unfit for office if they are viewed as having undesirable *political* values. This blurring of political attitudes and legal qualifications is best illustrated by the appointment of Justice Louis D. Brandeis. The political parties were perfectly divided on this nomination. The Brandeis appointment highlights the fundamental social and economic conflicts and competing interests which are sometimes involved in Supreme Court appointments.

Brandeis was the legal champion of unpopular social causes and challenger of the status quo.²⁰ His skill as a lawyer was widely recognized, but his practice of giving free legal counsel to opponents of corporations and railroads made him feared and despised by the business elite. In terms of contemporary legal strategies, Brandeis often worked as a one-man public interest law firm. He became politically eligible for the Supreme Court through his campaign efforts and advice to Woodrow Wilson and his role in winning the important political support of the third party Progressives in the 1912 election. Wilson first considered Brandeis for appointment as Attorney General, but excluded him after other Democratic Party leaders, railroads and the prestigious corporate bar of Boston opposed the appointment.

In 1916, however, President Wilson nominated Brandeis for the Supreme Court despite continued opposition from industrialists, railroad tycoons and bar leaders. In a letter which predicted the tenor of Senate hearings on the Brandeis appointment, and which graphically summarizes many other controversial judicial appointments, District Court Judge Charles F. Amidon warned Brandeis: "By your zeal for the common good you have created powerful enemies. They will do their utmost to defeat your confirmation in the Senate. . . . You will be accused of everything from grand larceny to a non-judicial tempera-

Grossman & S. Wasby, *Haynesworth and Parker: History Does Live Again*, 23 S.C. L. REV. 345-59 (1971).

20. In a type of legal argument which bears his name, the *Brandeis Brief*, he sought to persuade the courts to weigh the vast social injustice in industrial working conditions, child labor, and other business practices common in his time. What we assume today as routine governmental regulation of the economy, Brandeis worked for endlessly in the early 1900's. See HARRIS, *supra* note 9, at 99-114; A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946); SCHMIDHAUSER, *supra* note 9, at 24-26; A. TODD, *JUSTICE ON TRIAL* (1964).

ment.”²¹ The charge of a non-judicial temperament illustrates the inconsistent attitude of the organized bar toward the application of legal qualifications in judicial selection.

In the Brandeis appointment, the ABA and others generally did not question Brandeis’ political views, for that would have undermined their credibility as guardians of legal professionalism, and revealed them instead as conservative opponents to a liberal, but qualified, candidate. Instead of criticizing his social causes, opponents emphasized Brandeis’ personal integrity and legal strategies. They argued that he had engaged in unethical and sharp business practices, thereby creating numerous conflicts of interest. Extensive Senate hearings investigated many such charges, but could substantiate none. Most were only hearsay, and could be traced to the railroad-financed advertising campaign against the appointment. While his opponents in industry and the bar generally concentrated on his legal credentials, several important legal reformers and bar leaders nevertheless denounced Brandeis’ political loyalties. Seven former presidents of the American Bar Association, all of whom were closely connected with conservative economic interests, declared Brandeis unfit for the Supreme Court. Former President and Chief Justice Taft attacked Brandeis as “a muckraker, an emotionalist for his own purposes, a socialist.”²² It seems clear that Brandeis’ supposed lack of judicial temperament actually meant that he frequently opposed the unregulated power of the wealthy and promoted the interests of the underdog. Brandeis was narrowly supported by the Senate Judiciary Committee, with the ten Democrats voting in favor and the eight Republicans opposed to confirmation. On the Senate floor he won by a comfortable, but partisan margin of forty-seven to twenty-two: all Democrats (except one) and three Progressives voted in favor, and all Republicans were opposed.²³

2. The Organized Bar and Judicial Selection

The influence of the organized bar in judicial selection has increased since the Brandeis period. The Missouri Plan, which *requires* bar participation in screening candidates, has been adopted in many states, and partially at the federal level. The power of bar associations to persuade Presidents and governors to rely informally on their approval of judicial nominees is also much greater now than ever before. Their evaluations, however, are not neutral and their power depends on

21. HARRIS, *supra* note 9, at 103.

22. *Id.* at 102-03.

23. *Id.* at 112-13.

which party controls the executive branch. Generally, the ABA has been politically conservative and continues to be perceived as committed to the status quo. Consequently, the organization has most influence under Republican administrations. Presidents Eisenhower and Nixon provided the ABA with a virtual veto power over federal judicial appointments. Under Democratic Presidents, though, the bar has been limited to lobbying against nominees.

The special political significance of the organized bar in judicial selection lies in its persuasive assertion that it is capable of determining, for the benefit of society, which lawyers are qualified to serve on the courts. The bar suggests that, like medical doctors and hospital boards which review medical procedures and investigate charges of malpractice, bar associations possess professional skills which permit them to determine who is qualified for a judgeship. The difficulty, however, is that the criteria for judicial qualification are vague, and partisan politics frequently obscure professional skill.²⁴ Growing dissatisfaction with ABA dominance in judicial selection, as well as its conservative history in approving nominees, has been partly responsible for stimulating new "public interest" organizations such as Common Cause, the Judicial Selection Project, and various legal defense organizations to challenge bar influence in judicial selection. The leaders of these newer groups, including both laymen and lawyers, typically have socio-economic and political backgrounds and affiliations broader than the

24. In the Brandeis nomination, conservative lawyers committed to business interests opposed an individual for the Supreme Court who is still highly regarded as one of the nation's finest jurists. Recently, bar associations have behaved almost identically in the selection of Supreme Court Justices and other federal judges. In 1969, for example, the ABA continued to support Richard Nixon's nomination of conservative Clement Haynesworth for the Supreme Court even after investigation revealed that the judge had purchased stock in companies which were actively involved in litigation before him, and that he had avoided full financial disclosure during his Senate confirmation hearings. Despite these violations of the Canons of Judicial Ethics, and widespread agreement that Haynesworth had created serious conflicts of interest, the ABA leadership barely waived in supporting his appointment. Yet, only months earlier, the ABA had condemned liberal Democrat Justice Abe Fortas for accepting honoraria and gifts from universities and from a financier whose investment business was the subject of various official investigations and litigation, although not before the Supreme Court. Calls for impeachment from Republican Congressmen and a Justice Department threat to investigate Fortas' old law firm quickly produced his resignation from the Court.

Clearly, the ABA was not responsible for Republican Party strategy to remove a liberal Justice from the Supreme Court. However, its vocal public opposition to Fortas certainly did not help him to withstand the political assault. Most important, the ABA's attack was clearly contradicted later by its own staunch support for a conservative judicial nominee charged with similar but probably more serious violations of proper judicial conduct. *See generally* SCHMIDHAUSER, *supra* note 9, at 28-36.

ABA. Their experiences and values generally produce different perspectives and political demands in judicial selection. Those with legal credentials offer politically credible alternatives to the ABA's claim of exclusive legal expertise.

As private organizations, the ABA and state bar associations legitimately lobby and compete with other groups to promote appointments and public policies which coincide with their political values. But their past political conduct warns against accepting promises that the organized bar has the *professional* ability to scrutinize the qualifications of judicial candidates *on behalf of the government and the governed*. Judicial selection for any court, especially for the Supreme Court, inevitably is linked to discretionary decision-making and governmental policy. As there is disagreement over important social, economic and political values which are legalized through court decisions, there is understandable and legitimate conflict over judicial appointments and the political values implicit in them. This competition is substantially different, however, from the relatively easy choice between the incompetent or dishonest nominees and the able ones. As indicated, practically all Supreme Court Justices have been clearly qualified for office and personally beyond reproach. If the bar limited itself to passing on the basic credentials of potential justices, it probably would have very little to do in Supreme Court selection. But even highly trained and qualified judges will disagree on public policy. Since everyone is affected directly or indirectly by Supreme Court decision-making, considerable conflict will always exist regarding who sits on the Court. It is this issue which attracts the ABA and other interest groups to judicial selection.

B. District Courts and The Courts of Appeals

While political ideology probably is the most crucial factor in selecting Supreme Court Justices, selection criteria are ranked differently for the lower courts. Political views certainly are not ignored but they usually play a secondary role to other requirements.²⁵ There are several important reasons for this difference. First, there are many more lower court positions to be filled, requiring much time and energy to determine the best nominee. Unlike the few Supreme Court appointments

25. See generally GOLDMAN & JAHNIGE, *supra* note 17, at 49-86; GROSSMAN, *supra* note 9; HARRIS, *supra* note 9, at 314-24; RICHARDSON & VINES, *supra* note 5, at ch. 4; Chase, *Federal Judges: The Appointing Process*, 51 MINN. L. REV. 185 (1966); Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WIS. L. REV. 186; Jackson, *Federal Roulette*, in AMERICAN COURT SYSTEMS 261 (S. Goldman & A. Sarat eds. 1978) [hereinafter cited as Jackson].

which he personally may make during his term, the President cannot devote much time and resources to the details of lower court selection. Instead, he relies on subordinates in the White House, and particularly in the Justice Department, to mobilize executive power in judicial selection. A President may provide broad guidelines and general criteria, such as instructions to avoid political extremists or to resist clearly poor senatorial choices, but he usually accepts recommendations from the Justice Department in making his formal recommendations.

More important than limited presidential resources, however, is the historically important role of the Senate in influencing lower court selection, and the bond between the federal courts and state and regional politics. Using the courts to fulfill the high level patronage needs of state political parties is a crucial feature of federal judicial politics. Satisfying constituency demands outranks ideology as a major factor in staffing the lower courts. Finally, judicial ideology is less important in the lower courts because those courts are not perceived as so deeply involved in important policy-making. The Supreme Court still is seen as the paramount judicial policy-making body. The lower courts are considered filters to screen out unimportant cases, or vehicles to apply Supreme Court rulings to local jurisdictions. The need to make dozens of appointments routinely to these courts strengthens the view that they are subsidiaries in the judicial hierarchy and not central policy-makers.

1. Political Affiliation and Legal Qualification in District Court Judicial Selection

Ideology is of secondary importance to most Senators and the Justice Department. However, the organized bar, civil rights groups, labor, and business, which are involved frequently in litigation before the lower courts, *are* very conscious of the policy-making power of the judges, and they attempt to influence selection of individuals who best reflect their political views. But interest groups cannot control judicial selection and they must compete with others, primarily in political parties, who are not oriented primarily to the policy preference of the judges.

Primary concern with party organization does not mean that judicial qualifications are insignificant in judicial selection. However, legal criteria for nomination often are not very precise or explicit, nor do they sharply distinguish among potential judges. Nearly ninety percent of all judicial appointments have been accorded at least qualified acceptance by the ABA, and there is no clear evidence that recent administrations have actively considered many nominees who were obviously

poor choices for the federal courts.²⁶ There are occasional exceptions, of course, of serious political conflict over the selection of lower court judges, or of unqualified nominees strongly supported by Senators or the Justice Department in the face of unified bar opposition. The role of these factors can be seen through an examination of the selection process.

Just as ninety percent receive bar approval, the same percentage have the same party affiliation as the President. Through the routine operation of senatorial courtesy or consultation with other state party leaders, Presidents typically have permitted or encouraged the use of the federal courts as vehicles for sustaining party organizations. The bond between state party politics and judicial appointments has been nearly automatic in the district courts where the operation of senatorial influence has been so well established that it is rare to see any public conflict over the nomination of judges.²⁷

Different Senators perform somewhat different roles in the nomination process. A few have indicated that they care little about using the district courts for party patronage. They have largely abdicated their

26. RICHARDSON & VINES, *supra* note 5, at 66.

27. Senatorial courtesy became fairly well established in the United States about 1840. It is a custom by which all federal appointments within a particular state will be substantially influenced by the Senators from that state when they and the President are of the same political party. In keeping with the custom of reciprocal treatment, all Senators will vote to approve a particular Senator's nominee. In most administrations, this means that federal patronage is made available to Senators to reward party supporters, contributors, and other allies in state politics. The President often acquiesces in the choices made by individual Senators, substantially shifting the nomination process from the Presidency to the Senate. Despite the formal control which the Executive has in submitting nominations, it is clear that in most cases Senators have had the initiative and ultimate political control over district court nominations. A typical procedure is one in which the Senators from the state involved and officials in the Justice Department begin to review individuals who may be considered both politically and legally eligible for the position, such as long-term members of the party who have held other political positions and who appear to be at least fundamentally qualified for the position. Traditionally, top level Justice Department officials have delegated most of their screening of candidates and negotiating with Senators to assistants, who lack visibility, public prestige, and independent political power. Thus, Senators are given a major advantage in obtaining the appointments they favor. Handling by subordinates also minimizes the political significance of the appointments, and deters overall planning or policy direction by shaping the national judiciary according to administration policy goals. Justice Department officials will review a Senator's choice through contacts with other state officials, judges, prominent lawyers, and others, but the major initiative lies with the Senators. Efforts are made to reach agreement privately on a nominee in order to avoid controversy and the appearance that partisan politics are involved. The Justice Department usually is pleased to be able to accept a Senator's choice because the appointment becomes routine and invisible, yet still satisfies political expectations. If both the Justice Department and Senator(s) agree, and the candidate is approved by the ABA committee, there is little doubt that he will receive the position.

influence through senatorial courtesy to the executive branch, bar groups, or other interests at the state level. Most Senators, however, cherish their traditional power.²⁸ Each court position may provide several opportunities to reward party loyalists. A Senator might simply select one individual for a vacancy and obtain Justice Department support for the appointment. Other Senators, however, may make a list of individuals they consider deserving and submit the names to the Deputy Attorney General to make a final choice. Sometimes, the Senator may privately indicate to a Justice Department official which of the individuals on the list he actually wishes to be nominated. In this way, a Senator may obtain the judge he wants, but he also satisfies a larger number of supporters by publicizing their active consideration, with the Justice Department taking the responsibility as the final decision-maker.

In those rare cases in which Senators and the Justice Department cannot agree on an appointment, the Senators ultimately have been most successful. Many Presidents have had to accept senatorial prerogatives and a personal defeat, but occasionally an especially adept Executive can produce at least minimally acceptable compromises through executive powers. For example, Presidents can withhold formal nomination indefinitely. However, few Senators welcome a lengthy vacancy in one of "their" judicial districts, for along with the credit of patronage may go some of the blame for increasing the workload of other federal judges, and the resulting court delay. Presidents also can make interim appointments during a Senate recess which are more difficult to challenge in the next session of Congress because the candidate is then a sitting judge.

Conflict between President and Senate can be traced to the First Congress, long before senatorial courtesy was firmly established. Incidents from recent administrations amply illustrate the difficulty that Presidents have in challenging senatorial influence in district court appointments. For example, in the early part of his administration, Herbert Hoover tried to substitute his own nominees for those of several Republican Senators since he believed that their parties had awarded various government jobs, including federal judgeships, to local politicians with very poor qualifications. Like President Carter, Hoover announced that all judges should be appointed according to merit, not party service. However, in most instances he was forced to withdraw

28. Indeed, the failure of President Carter to secure a Missouri-type plan for district judges and federal prosecutors is due to the demand of most Senators to continue to control these nominations.

his objections to Senate choices since he was unable to obtain support for his own replacements. One of Hoover's interim appointees survived, but as part of a compromise requiring acceptance of a Senator's nominees for two other court vacancies.²⁹ Conflicting political obligations involved Harry Truman in similar conflicts. He, too, found that he had to support the Senators' own nominations in order to fill vacancies, or agree at other times to a series of appointments in which both the Senators' choices and his own candidate received judgeships. Lyndon Johnson managed to satisfy three-way competition for two district court vacancies by promoting a sitting district court judge to the court of appeals. When a President does not face competition from Senators in his own party, he is provided with more freedom to make district court appointments. Nevertheless, he may still consider it valuable to reach accommodations with the opposite party in order to prevent opposition to his own nominees, or to secure support for other programs or votes for national appointments which are not controlled by senatorial courtesy.³⁰ Appointments across party lines create an image of bipartisanship, and the representation of more varied political interests and views on the federal bench, but the image often is a thin charade. Few bipartisan appointments are made, usually well under ten percent. When they do occur, the President often is seeking to appoint judges who have political views similar to his own and the other federal judges appointed from his party.³¹

2. Publicity and Interest Groups in Judicial Appointments

By operation of senatorial courtesy, or through various political com-

29. See HARRIS, *supra* note 9, at 317-18.

30. Faced with a liberal Democratic Congress, for example, Richard Nixon appointed several Democratic judges, not simply to present an image of bipartisanship, but also to avoid Democratic opposition to his other programs. California, represented by two Democratic Senators, received a Democratic judge for every fourth judicial vacancy. See Jackson, *supra* note 25, at 263. Along similar lines, as a key Senate Democrat, Lyndon Johnson once persuaded the Judiciary Committee to withhold approval of 13 judicial appointments until the Eisenhower administration permitted Senator Johnson to name his own candidate for a district court vacancy in Texas. When this compromise was achieved, confirmation of all 13 judges was immediately forthcoming. See COURTS, JUDGES AND POLITICS 71-72 (W. Murphy & C. Pritchett eds. 1961). Recently, Vice President Mondale, who maintains influence in Minnesota politics, has recommended that one third of the forthcoming judicial vacancies in his home state be filled with Republicans.

31. Keeping to the law and order theme which was the hallmark of his election campaign, for example, Richard Nixon's few Democratic judges generally were perceived as conservative, particularly on the important issues of race relations and crime. Thus, while he provided several appointments in key Democratic states, such as California, he maintained a consistent conservative ideology in the Nixon courts.

promises, most appointments to the federal courts are routine, almost private events and receive only perfunctory news coverage. In contrast, public conflict over appointments creates winners and losers, an outcome which damages prestige and sours public perceptions of leadership and influence, and also reveals the partisan nature of judicial recruitment. With only a routine announcement of the appointment, the actors preserve a quasi-legal image that public officials are cooperating to select the very best candidates, without resorting to political considerations.

Quiet politics is an advantage for those who have political influence, for they may achieve their political goals without the risks and uncertainties of public conflict. But groups which traditionally have been excluded from effective participation, such as women, blacks and other minorities recently have stimulated and invited publicity over judicial appointments in order to attract support for their demands for a share of judicial positions. Their heightened involvement is linked directly to President Carter's campaign promises to institute merit selection and broaden the range of individuals who are considered for appointment. With 150 new judgeships and the need to fill other vacancies, it has been estimated that, in two terms, President Carter could appoint two-thirds of the federal judiciary.³² Therefore, new positions and new political demands, as well as existing senatorial power and state political influence, have all stimulated intense conflict over the federal courts.

Civil rights groups have held President Carter publicly accountable for his campaign promises.³³ A new organization, the Judicial Selection Project, has been formed especially to lobby for the appointment of more women and minority group members to the appellate courts. In certain respects, the organization is an umbrella interest group whose guiding members are affiliated with public interest organizations such as the American Civil Liberties Union, Common Cause, the National Women's Political Caucus, the NAACP Legal Defense Fund, the AFL-CIO, the United Auto Workers, and other national associations. Part of its goal is to provide information to members of the merit nominating commissions concerning the ideals of affirmative action for the appellate courts, and to urge members to take the task of recruiting women and minorities very seriously. The Judicial Selection Project and other groups have promoted President Carter's plan for recruiting

32. See Slotnick, *supra* note 3, at 4.

33. Early in his term, for example, it was announced by Mrs. Coretta King that the President had promised to appoint more blacks, and particularly to make more black appointments in the Southern Fifth Circuit. N.Y. Times, Sept. 4, 1977, at 16, col. 1.

new individuals for the courts. They have also criticized him for not making enough of these appointments, and for appointing judges and others who have been hostile to minority rights.³⁴ Most of President Carter's appointments have followed traditional patterns, but he has increased the percentage of blacks and women on the courts. Most of these appointments have aroused little opposition and have been incorporated into traditional ways of satisfying new constituency demands. Occasionally, however, the opposition to the appointments has involved issues similar to those found in earlier controversial appointments.³⁵

3. Judicial Selection for the Courts of Appeals

The selection of court of appeals judges has followed generally similar procedures as those used for the trial courts, but the outcomes have not been as clearcut or as predictable. The most important difference is that senatorial courtesy does not operate in its purest form since the

34. For example, although he was not being considered for another judgeship, the appointment of Griffin Bell as Attorney General was opposed by the NAACP, the National Organization of Women, the National Conference of Black Lawyers, and the ACLU, which maintained that as Judge Bell of the Fifth Circuit Court of Appeals, he had either actively hindered or, at least, not advanced the cause of civil rights. *See* N.Y. Times, Jan. 1, 1977, at 23, col. 1.

35. For example, in a nomination which the two Democratic Senators from Louisiana believed would be automatic, Judge Robert F. Collins, the first black to become a federal district judge in the Fifth Circuit, found his appointment withheld for nearly six months. During that time, the Senate Judiciary Committee investigated charges of bribery and corruption brought against him by a former aide to the governor of Louisiana. The charges claimed that as a New Orleans magistrate, Collins, a 1960's civil rights leader, had accepted thousands of dollars as a pay-off for influencing black voters to support Governor Edwards in the Democratic primary election. Also charged was that the judge had accepted the services of prostitutes in return for setting low bond in criminal cases. Despite his categorical denial, a Senate Judiciary subcommittee investigating the charges initially divided on the Collins nomination, with Republicans and conservative Democrats voting to withhold approval. After Governor Edwards himself denied the charges and no other evidence could be obtained to support them, the committee voted to recommend appointment. It was approved by voice vote on the Senate floor. N.Y. Times, Apr. 19, 1978, at 21, col. 2; *id.*, May 18, 1978, § 2, at 15, col. 6.

Political controversy has also characterized the nomination of Patricia Wald to the Court of Appeals. As Assistant Attorney General in the Carter administration, Wald's legal career involved her in numerous controversial issues including mental health law, juvenile rights, drug abuse, and other contemporary conflicts. She earned a radical leftist label from conservative Senators and right-wing political groups who vigorously opposed her appointment to the bench. Few questioned her legal credentials and skills, but her political values alienated much political support. Understanding the important role of ideology in judicial selection, Wald complained how much easier confirmation could be if she had devoted her career to the Uniform Commercial Code rather than to unsettled and politically dangerous legal issues involving the mentally ill, children, the handicapped, and drug abusers. Washington Post, June 19, 1979, § 3, at 3, col. 1; *id.*, June 25, 1979, § 3 at 1, col. 1.

appointments affect several states and no single Senator or state political organization is automatically involved. Nevertheless, appointment to the court of appeals generally is rotated among the states in the circuit in order to maintain state representation. There is, then, a certain amount of predictability to appointments since the affected Senators anticipate a special role in selection. This senatorial role is not senatorial courtesy, but it is greater than that of other Senators in the circuit. Instead of courtesy, which implies considerable senatorial initiative, observers refer to the need to obtain "senatorial clearance" or approval before making an appointment. Senators may still suggest names and eliminate some suggestions made by the Justice Department, but they have less control than in district court appointments.

A Senator's influence depends on his seniority in the Senate, his position on key committees, particularly the Senate Judiciary Committee, and his ability to affect other appointments or administration programs and legislation. A Senator who could aid or hinder a President's success in the passage of later important bills sometimes achieves considerable influence in court of appeals selection as a trade-off for his future political support. More often, however, the Presidential party has had more leeway and power in determining the nomination. Rather than awaiting the choice of individual Senators, for example, the Justice Department usually actively seeks the names of qualified individuals from numerous political and legal sources, such as state party chairmen, Congressmen, law school deans, state bar association leaders and other interest groups. While a Senator cannot simply dictate the outcome, it is to his advantage to reach an accord with the Justice Department, since he then can announce the appointment as his own decision. Opposition from the Justice Department and competition from other Senators can graphically illustrate a Senator's lack of influence on important appointments expected in his own state.

Typically, compromise may involve Senators and even Congressmen from several states within the circuit. Sometimes, in order to maintain their influence and avoid a public squabble, all of the participants agree on long term arrangements in which each of them is guaranteed an opportunity to name a candidate to a judicial vacancy over the next several years, or as soon as positions become available. Other federal patronage may be included in the arrangement if an insufficient number of judicial vacancies are expected during the life of a current administration.

C. *The ABA and Appointments to the Lower Courts*

The American Bar Association has been an especially important group in federal judicial selection, outdistancing any other single interest, other than official agencies and political parties. Although other organizations attempt to influence the selection of judges, the ABA deserves special attention due to its unusual historical role.³⁶

Stemming largely from the Senate rejection of Judge John Parker in 1930, the ABA attempted to mobilize a committee of the bar to influence official choices for staffing the federal courts. Their goal was to eliminate partisan influence and narrow pressure from civil rights groups, labor, and others important in defeating Parker, whom the ABA considered well qualified for the Supreme Court. But, early efforts by the bar were not encouraged by the New Deal Democrats and not until after 1946, when the Republicans had achieved a majority in Congress, did the ABA begin to obtain significant access to the Senate Judiciary Committee. The ABA's Special Committee on the Judiciary was invited to react to executive nominations before the Senate. This role brought the bar into the nominating process very late, after political commitments had already been made and could not be undone without breaking promises and political arrangements. The ABA sought more active participation in recruitment: the power to review *all* of the individuals under active consideration by the Justice Department before any firm political commitments were made to nominees, Senators, and others.

Gradually, the ABA obtained access to the Justice Department.³⁷ Faced with a terrific increase in workload, due to its direct access to the administration, the ABA attempted to standardize its evaluations by creating the now familiar four-point rating of candidates as not qualified, qualified, well qualified, or exceptionally well qualified. These recommendations were submitted privately and *prior* to official nomination or Senate hearings on a particular candidate. "For the first time

36. Numerous discussions of the political role of the ABA are available. See generally GROSSMAN, *supra* note 9. A more recent and broader discussion of the role of the organized bar and lawyers in American politics can be found in J. AUERBACH, *UNEQUAL JUSTICE* (1976).

37. During the Eisenhower administration, a Deputy Attorney General, charged with conducting the investigation and screening of judicial candidates, reported to the ABA assembly that "your Chairman [of the Committee on the Federal Judiciary] . . . has become, next to the Attorney General himself . . . my most intimate associate in Washington. I work with him and spend more time with him and talk longer with him than anybody else in the Department." GROSSMAN, *supra* note 9, at 94. Although highly influential toward the end of the Eisenhower years, the ABA did not achieve similar access until another Republican, Richard Nixon, controlled the executive branch.

in its twelve-year existence, the [ABA] Committee was able to begin to fulfill one of the major objectives of the ABA: to *promote* the nomination of the persons it considered best qualified."³⁸

Just as the ABA has often favored conservatives for the Supreme Court, most observers agree that it has leaned toward the right in approving judges for the lower courts. Certain analysts believe, however, that in recent years, the ABA has taken a more balanced or middle-of-the-road perspective in judicial selection.³⁹ In any event, it is difficult to verify systematically the political content of all bar endorsements since the procedures are not recorded. Rather, they are based on informal verbal exchanges among certain ABA-connected lawyers, and the entire process usually is kept secret by the committee. Few judges have been appointed to the federal courts who have not been given at least a rating of "qualified" by the bar committee. A somewhat larger number of "ABA unqualified" individuals have been appointed during Democratic years, when the ABA and the administration are not politically synchronized, but the actual percentage has not been great in any administration. The ABA has claimed that without the committee a larger number of poorly qualified judges would be chosen, but that is impossible to determine. The bar sometimes seems inconsistent in judicial selection, making evaluation of its overall impact very difficult. For example, although the bar decried Justice Abe Fortas' conflict of interest behavior on the Court, it had earlier supported his nomination.

The ABA's political stance has been questioned largely as a result of its evaluation procedure and the types of lawyers who contribute to the candidate ratings. The Committee on the Federal Judiciary is composed of fourteen members, one for each of the federal judicial circuits (two for the recently divided Fifth and Ninth Circuits), and one national, at-large representative. All members are appointed by the president of the ABA after consultation with the chairman of the committee. Critics have argued that these few lawyers have unparalleled power to shape ABA recommendations. They have also argued that the committee members themselves constitute a highly select sample of elite American lawyers and are not representative of most practicing attorneys. In recent years, the members of the committee generally have been over the age of fifty. None have had legal careers in criminal or family law, but have been in general or other business-oriented law practice. Most of the members have been senior or managing partners of relatively large firms and many others have been partners in such firms. Half the

38. *Id.* at 77-78.

39. GOLDMAN & JAHNIGE, *supra* note 17, at 53-54.

members of the committee were state delegates, or held other positions in the ABA. Lawyers from large cities also have dominated the committee. As a composite, most committee members are, as some term it, "Wall Street" lawyers: highly paid attorneys in prestigious law firms serving business and corporate interests, and holding conservative political attitudes consistent with those interests.⁴⁰ This does not mean that members are biased or hostile to liberals, Democrats or other groups, but it does suggest that their adult and professional experiences and beliefs are heavily oriented toward business interests and conservative politics, and that their determination of which lawyers make good judges will be influenced by their personal experiences and outlook.

In addition to its highly selective membership, the methods used by the committee have created doubts about its political detachment and ability to be objective toward candidates with different backgrounds and views. First, the committee of fourteen is responsible for evaluating all individuals under active consideration for any lower federal court vacancy in the entire country. Clearly, this is a monumental job which prevents them from conducting extensive research or gathering evaluations from all interested parties or groups. They must, then, resort to numerous short-cuts to produce their preliminary assessment of the candidates. Circuit representatives usually conduct a few informal interviews with "leading lawyers" in the area of the vacancy. It is impossible to determine precisely who is contacted and the kinds of questions that are asked, since all investigations are private. It does not appear, however, that a standardized questionnaire is used or that random interviews are conducted with large numbers of lawyers in the circuit. Instead, members make various "regular contacts," calling on the same lawyers, judges, community leaders, and others each time a vacancy occurs.⁴¹

40. GROSSMAN, *supra* note 9, at 82-92.

41. A similar complaint has been made recently by Senator Howard Metzenbaum at hearings before the Senate Judiciary Committee. Reacting to testimony from the chairman of the ABA's Standing Committee on the Federal Judiciary, Metzenbaum explained his understanding and doubts about the ABA procedures:

One person from each circuit. That person really does all of this investigation That one individual talks to everybody and then writes up the report. If that person has a pre-conceived idea, isn't there an element of subjectivity in that person, in that kind of investigation? Don't we all hear what we want to hear and reject that which we don't want to hear? . . . How do you protect yourself against that? I must tell you that I practiced law all the time until I came to this body. . . . To this moment I haven't the slightest idea of who the individual was that represented the American Bar Association in the circuit in which I lived.

Selection and Confirmation of Federal Judges: Hearings Before the Senate Judiciary Comm., 96th Cong., 1st Sess. (1979) (statement of Senator Howard Metzenbaum), quoted in Slotnick,

Less than ten percent of the lawyers in a particular circuit have ever been contacted by an ABA representative. This alone does not indicate bias, since most random polls contact relatively few respondents in a large population, but the backgrounds of the lawyers included by the ABA clearly indicate that a special, slanted subset of attorneys has been selected to evaluate judicial candidates. Although only half of American lawyers are members of the ABA, about eighty-five percent of the lawyers contacted were members of the national organization. Moreover, eighty percent were partners of large firms (sixty percent were senior partners) and nearly three-fourths held some state or local bar association office, most often president. Thus, it appears that elite representatives of the ABA have interviewed a relatively small number of fellow elite lawyers. This self-selection of prestigious, primarily business oriented evaluators has undermined ABA claims that it is an appropriate, representative professional body for assessing potential judges.⁴²

With secrecy surrounding the proceedings, it is difficult to measure ABA political power and overall performance in federal judicial selection. Supporters may inflate the ABA's role in order to attribute the generally high quality of the federal bench to the work of the organization. Opponents may inflate its role to create a credible political target in efforts to reduce the ABA role. It is important to question whether the ABA can be considered so powerful as to take most of the credit for producing quality judicial appointments, or if the stakes involved for the President, the Justice Department, and individual Senators also produce respectable appointments. As mentioned earlier, patronage does not mean that poor appointments are made; it means simply that either Republicans or Democrats, usually with active party and other public experience, will receive most of the posts. With only two political parties in contention, there is always an abundance of qualified people. There is no reason, then, why the major visible political actors having influence in judicial selection should carelessly or routinely select poorly qualified individuals for the courts. Poor appointments may not always attract publicity and political opposition, but there is little reason to take risks which may damage the President's or a Senator's prestige by raising the specter of cronyism or pure party politics.

If both the ABA and government officials publicly support quality or

The Changing Role of the Senate Judiciary Committee in Judicial Selection, 62 JUDICATURE 502, 508 (1979) [hereinafter cited as *The Changing Role*].

42. GROSSMAN, *supra* note 9, at 109-11. See also SCHMIDHAUSER, *supra* note 9, at 28-33; *The Changing Role*, *supra* note 41, at 507-08; Slotnick, *supra* note 3, at 36-44.

merit appointments, it is very difficult to distinguish the ABA role from the policy of the politicians. This is doubly difficult since the standards for appointments are vague and idealistic, and can be interpreted in many ways to fit a wide variety of candidates. Therefore, even when there is rare public disagreement over appointments, it usually is not clear that the ABA is "right" and the government is "wrong" in supporting a particular nominee. The chances are that several candidates have above-average formal credentials, but there is disagreement on which candidate is "best" for the vacancy. When this occurs, a judge may be rated "not qualified" by the ABA but still have other public support as a qualified candidate. Instances of clear, uncompromising conflict over judicial appointments are extremely uncommon, since mutual interests usually are served by selecting at least fundamentally qualified and acceptable candidates.⁴³ Cases in which the nominee's credentials are almost universally perceived as woefully inadequate are so rare that they do not justify special bar influence in other, more routine judicial nominations.⁴⁴ The ABA function, then, in protecting fed-

43. The most vivid and recent example of an "obviously poor" nomination, in which the ABA not only rated the nominee "unqualified" but steadfastly lobbied against the appointment, is the Francis X. Morrissey nomination in 1965. A personal friend and ally of the Kennedy family, Morrissey was proposed by Senator Edward Kennedy for a Boston federal district court vacancy. President Johnson duly supported the nomination, and Morrissey was under consideration by the Senate Judiciary Committee. ABA officials testified that Morrissey did not have a *bona fide* law degree, but had obtained his certificate in a "quickie" law degree mill in Georgia (where he nevertheless failed four courses). Morrissey also had limited judicial experience, having served only as a minor judge in Boston. He also was a candidate for the Massachusetts legislature during the time he claimed to be a Georgia resident struggling to establish a law practice in that state. The ABA, the chief judge of the Massachusetts federal district court, and numerous newspaper editorial writers unequivocally called for Morrissey's rejection, for he was a clear case of personal and party patronage, without *minimal* judicial qualifications. The Morrissey nomination was withdrawn at the request of Senator Kennedy, but there is some disagreement concerning whether Morrissey would have been affirmed if the Senator had insisted on customary senatorial courtesy. President Johnson apparently was willing to support the nomination, and the Senate Judiciary Committee had approved it despite vigorous bar opposition in the public hearings. According to one view, the nomination was doomed because the bar and other outside "elites" steadfastly opposed the appointment. A more persuasive explanation is that since the Judiciary Committee had reported the nomination favorably, the Senate likely would have voted for it, keeping with traditional senatorial prerogatives. Senator Kennedy, however, reacting to adverse public opinion, withdrew the nomination to salvage and protect his personal and family prestige. See GOLDMAN & JAHNIGE, *supra* note 17, at 54-55; RICHARDSON & VINES, *supra* note 5, at 63-64.

44. For example, the failure of the ABA to block a candidate which it *alone* considers unqualified is clearly demonstrated in the recent appointment of Donald E. O'Brien to the federal district court in Iowa. Based upon his behavior as a prosecuting attorney in a 1955 criminal case, the ABA maintained that O'Brien lacked "legal scholarship" and "professional behavior" and rated him "unqualified." The Iowa state bar and others, however,

eral judgeships from incompetents is extremely minor; in most appointments, the ABA and various public officials disagree only regarding who are the "best" of at least generally "good" sets of candidates.

IV. PRESIDENT CARTER AND MERIT SELECTION

The ABA's influence in federal judicial selection has been fundamentally affected by the new appellate court nominating procedures created by President Carter and similar procedures followed by a large number of Senators. The ABA still has an opportunity to review the credentials of candidates proposed by the appellate nominating commissions, but its former, practically unchallenged role in approving candidates has been blunted. Besides its impact on the ABA, the work of the commissions has created new controversy and generally a new politics of judicial selection.

A. Organization and Goals of the Nominating Commissions

The appellate nominating commissions include eleven members ap-

supported O'Brien, and he was also securely tied to the national leadership of the Democratic Party. He had served as President Carter's 1976 Michigan state campaign chief and had been active in the presidential campaigns of Robert Kennedy, Hubert Humphrey, and George McGovern. Moreover, Attorney General Griffin Bell acknowledged that the administration was aware of O'Brien's 1955 court experience, but did not consider it sufficiently significant 20 years later. O'Brien's appointment passed by voice vote in the Senate. *See* N.Y. Times, Oct. 4, 1978, at 67; *id.*, Oct. 5, 1978, at 25.

There are several important differences between the Morrissey and O'Brien appointments which illustrate the limited political role of the ABA. First, and most important, the ABA alone considered O'Brien unqualified whereas many legal groups and influential laymen publicly argued against Morrissey's nomination. The ABA thus may be able to draw attention to the outside limits of legal credentials and, with allies, prevent the appointment of clearly substandard nominees at the lowest end of the legal qualification scale. But it cannot prevent nominations on its own, nor is it likely that many Morrissey-type candidates ever emerge. Except for the ABA, few doubted O'Brien's fundamental legal training, while Morrissey was known to lack even the basics necessary for a legal career.

Second, in the Morrissey nomination, the FBI failed to warn the administration fully of the candidate's background, allowing a private organization and the news media to uncover and present crucial information about the candidate. Since the Morrissey, Carswell, and Haynesworth nominations, the FBI assignment in conducting preliminary investigations reportedly has been strengthened, possibly preventing other poor choices from getting to the official nomination stage. In the O'Brien appointment, no new crucial information was provided from outside sources.

Finally, O'Brien had firm political connections to the Democratic Party, having served as a loyal soldier in many competitive elections. Morrissey, on the other hand, was tied as a personal friend and employee to only an individual Senator. (However, the Democratic Party also loyally supported Morrissey, suggesting that the first two factors are more important in distinguishing the nominations.)

pointed by the President as representatives of political interests and constituencies important to the President and the Democratic Party. Unlike bar associations which are dominated by older white men, the merit nominating commissions include men and women, whites and blacks, lawyers and laymen. Businessmen, labor union officials, university professors, and others have been appointed and are involved as never before in the selection of federal judges. The task of each commission is to select up to five highly qualified individuals for each vacancy which occurs on the appellate court. A commission is activated by President Carter, and is to complete its work within a designated period.⁴⁵

In selecting qualified nominees, the commissions are to use several broad criteria promulgated by the Justice Department. The guidelines are designed to satisfy a number of competing political forces and, consequently, are often seen as inconsistent by various groups. For example, the ABA has long maintained that federal judicial candidates ought to have a minimum of fifteen years of legal experience to be considered minimally eligible, while lawyers over age sixty are considered too old. No other President had formally acknowledged these principles, but President Carter included them as part of other general guidelines in his initial instructions to the commissions. (He later reduced the experience requirement to twelve years.) Traditional senatorial interests also have been included by requiring that appellate seats be rotated among the members' states. Rotation, in the past, was informal but customary, accounting for about sixty percent of all appellate appointments.⁴⁶ President Carter has now made this a formal requirement for nomination, seeming to invite Senators from the affected states to try to influence the choices of the commission or the final selection of the Justice Department. Using these broad guidelines as outer limits for selection, the commissioners have also been instructed to examine the credentials of sitting federal judges as models for selection of the most capable, experienced, and well-suited individuals. Commissioners also are to consult with prominent state and local community and political leaders, lawyers, judges, and others who might be able to guide the panel in selecting the best judges.

45. Discussions of the procedures and politics of the new merit selection are voluminous. See generally 62 JUDICATURE (1979); Cohen, *supra* note 4; Report Card, *supra* note 1; Slotnick, *supra* note 3.

46. Slotnick, *supra* note 3, at 11.

B. Merit Selection and Affirmative Action

As indicated, President Carter has required the appointment of more women and blacks to the courts. The combination of merit selection and affirmative action has produced much political conflict. Opponents who favor absolute standards of merit evaluation, for example, argue that affirmative action is inappropriate for the federal courts, and that only the very best nominees should be chosen, regardless of race, sex, and other inborn characteristics. They urge that only legal accomplishment, professional stature, and other attributes necessary for making a good judge should be considered. Spokesmen for the administration have replied, however, that a "pluralistic" federal bench strengthens the courts through increased public respect for the judiciary and representation of many diverse groups. They add that the courts have always been dominated by white males, and that if our national policy is committed to end institutional discrimination, then the courts should be included. If we also recognize that American courts have always been involved in the major social, economic, and political conflicts of our nation, which fundamentally affect the distribution of power and opportunities, then women and blacks, two groups who have not had many opportunities to participate in decision-making, can add a new dimension and sense of equality to the federal courts. Moreover, affirmative action does not mean that mediocre appointments will be made, since highly qualified women and blacks can be found for the courts. In reviewing the backgrounds of the new federal judges, Sheldon Goldman, who has systematically gathered and evaluated the characteristics of federal judges selected since the Eisenhower administration, has concluded that:

[I]t is my distinct impression based on over 16 years of research on the backgrounds of federal judges that the credentials of the women and minorities chosen by the Carter Administration on the whole may even be *more distinguished* than the overall credentials of the white males chosen by Carter and previous administrations.⁴⁷

If blacks and women have superior credentials and experience, it probably is due partly to a conscious effort to overcome anticipated criticisms that affirmative action appointments fall below the mark of merit selection.

Women and blacks certainly do not dominate the federal courts, for they constitute a small percentage of the total number of federal judges appointed by President Carter and previous Presidents. Now, however,

47. Goldman, *Should There be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 493 (1979) (emphasis added).

they will be consciously included as part of the pool of eligibles, whereas in the past they were excluded from consideration. Proponents of the new policy conclude that merit selection and equality in judicial selection can co-exist and will produce numerous benefits for the courts and the nation.

In order to ensure affirmative action, President Carter has promised not to submit nominees for the district courts unless Senators actively consider eligible women and blacks. Moreover, Senator Edward Kennedy, the chairman of the Senate Judiciary Committee, has obtained broad committee support to reform traditional senatorial courtesy. Key to this reform is the broadening of the committee's role in independently screening district court nominees in order to guarantee the inclusion of women and blacks.⁴⁸ The committee has formulated a new questionnaire to be submitted to each candidate in order to uncover more information. The questionnaire requests facts regarding personal finances, business connections, and potential conflicts of interest, as well as attitudes and personal experiences regarding commitment to equality under the law, voluntary legal service to the poor, and affiliation with private organizations which discriminate on the basis of sex, race, or religion. The committee also will inquire about the relationship a candidate has had with his state or circuit merit nominating commission in order to maintain proper ethical procedures in the selection process.

Despite administration and Senate commitments to affirmative action in federal judicial selection, political conflict continues over the implementation of the new goals. Various organizations, such as the NAACP, Common Cause, and others doubt the aggressiveness or willingness of the President or the Attorney General to insist upon equal treatment. They fear full compliance with the President's guidelines may be bargained away in return for senatorial support on other issues or may be only a facade of equal opportunity to satisfy electoral groups important to the presidential party. In addition, women's organizations have complained that requiring extensive legal experience and other high professional accomplishment contradict affirmative action, since few women or black attorneys have had opportunities for such extensive or prestigious law practices or judicial careers. Many otherwise

48. Senator Kennedy has promised, for example, that Senators should no longer be able to veto a nomination simply by refusing to return the "blue slip" on which they are to provide their approval for a district court appointee in their state. Although a "home state" Senator may be opposed to an appointment, the full committee would decide how to report the nomination.

qualified individuals might even have minor police records from arrests made during protest demonstrations which were parts of their early political initiation and involvement in causes now championed by President Carter. These characteristics will exclude a large number of talented individuals, leaving recruitment opportunities available only to a small pool of elite female and black attorneys.

In part, the raising of objections is a strategy to maintain pressure for women and minority appointments. However, the actions of various Senators and reports from some of the circuit commissions suggest that judicial recruitment has instead been limited in several ways. For example, in certain states where Senators have voluntarily created their own merit panels to advise them on selection, the lists of nominees include few or no women or blacks compared with other states in which politically sensitive Senators still personally pick judges. In other cases, while blacks are included, certain types of black attorneys are excluded due to their distinctive law practice and political activities.⁴⁹ The black "legal servant," for example, who represents the black community in routine neighborhood or poverty law cases may be eliminated since his experience is too narrow to qualify him for the federal courts. The black "legal militant" also is suspect. He has gone beyond simple civil disputes on behalf of local blacks to argue class action civil rights cases. Since such a lawyer is a legal/civil rights activist, panelists frequently doubt his objectivity, judicial detachment, and "temperament." These attorneys also are more likely to have minor criminal records and contempt citations on their legal records due to their conflict with white lawyers and judges in controversial cases.⁵⁰ Their records as political activists may indeed be marked with abrasive personal behavior, conflict, and opposition to the traditional legal system, but probably as a necessity in seeking political change. Altering the status quo in civil rights, consumer protection, environmental regulation, nuclear energy, and other controversial public policies requires the use of publicity, mass meetings, demonstrations, and group litigation in order to mobilize political opposition. This kind of experience does not automatically mean that a judge chosen from these ranks will be an intemperate, unfair, or poor decision-maker. As his role changes from activist to jurist, his behavior can be expected to change according to his new tasks. Perhaps only as political change occurs, and innovative or radical ideas become part of accepted policy, can the early advocates of change become eligible as members of the governing elite.

49. Fish, *Evaluating the Black Judicial Applicant*, 62 JUDICATURE 495 (1979).

50. *Id.* at 497-98.

The black lawyers who most often are viewed as acceptable are those who have developed legal careers within the "mainstream" of the profession.⁵¹ This really means that they have participated and worked within white-dominated legal and political institutions, serving as state judges, prosecuting attorneys, members of government legal staffs, or even as academics. Although they are black, their lifestyle and legal credentials have moved them beyond and perhaps separated them from black politics.⁵² These kinds of lawyers are acceptable to the nominating commissions since they have the credentials judged important by prevailing, established legal and governmental thought, and since they have established a "safe" track record in our major institutions.

C. *Characteristics of the Nominating Commissions*

The conflict between the abstract goals of merit selection and the realities of judicial politics is clearly demonstrated by recent research on the selection of merit nominating commissioners and their values and behavior. First, it is clear that while the commissions represent a wide range of participants (forty-three percent female, thirteen percent black, thirty-seven percent non-lawyers), Democrats comprise the vast majority (eighty-seven percent). Moreover, forty-four percent of the respondents in a recent national survey indicated that they had actively participated in President Carter's campaign, and nearly two-thirds of these were supporters at the Democratic Convention.⁵³ It also appears that all or many members of certain commissions were personally approved by Hamilton Jordan, President Carter's chief White House political advisor.

Although service on the nominating commissions probably involves few tangible rewards or immediate promotion of a political career, the appointments are prestigious and personally valuable to local partisans who need to maintain connections to other political activists and the national administration. Moreover, if partisan loyalty is an important criterion for selection, then the President has an excellent opportunity to choose judges sympathetic to administration policy.

The party affiliation of commission members alone is a major clue about judicial selection, but also revealing is the contrast between their

51. *Id.* at 498.

52. This situation does not only occur with blacks, of course. For a discussion on the staunch opposition to the appointment of activist Patricia Wald, see note 35 *supra*.

53. See generally Nelson, *Carter's Merit Plan: A Good First Step*, 61 JUDICATURE 105, 107 & 109-11 (1977); Tolchin, *Testing the Merit of Carter's Merit Selection*, N.Y. Times, Dec. 31, 1978, § IV (Week in Review), at 4, col. 3; Slotnick, *supra* note 3.

stated selection standards and the ultimate appointment outcomes. When surveyed about selection criteria, commissioners ranked good mental and physical health, communicative skills, and character and personality as the most important elements of a quality federal judge. Ranked at the bottom of twelve general criteria were, in order, formal group recommendations, age of the candidate, and political activity. Other research reveals that none of the judicial contenders interviewed by various circuit commissions had been asked about their past political or partisan activities.⁵⁴ Yet, the backgrounds of the new federal judges reveal that over ninety percent are Democrats and over half have been political candidates, office holders, or have participated in other campaigns and party activity. The apparent contradiction between the stated criteria and the selection outcomes probably results from panel members knowing that the "correct answer" to a survey about merit selection is to emphasize merit qualities and to deemphasize partisan politics. But it is possible to have the best of both worlds: highly qualified individuals who also meet the requirements of party patronage. In filling a relatively small number of important political positions in which the commissioners review the credentials of dozens of individuals over a two month period, it does not seem unreasonable that they could produce a list of names which fulfill both merit and political requirements. After all, traditional patterns of senatorial courtesy and presidential politics have produced a generally reputable federal judiciary. Substituting nominating commissions publicly charged with producing qualified candidates probably can do no worse.

Although most of the visible political controversy has involved the issue of affirmative action, it is equally important to examine and evaluate how the commissions have fared in translating the ideals of merit recruitment into actual judicial selection. The merit issue has received somewhat less attention because there is general and widespread agreement that federal judges, although selected through party patronage, have always been highly qualified and respected. The new merit panels are not faced with replacing a federal bench currently filled with poorly qualified judges. Indeed, Attorney General Bell has pointed to the existing bench as a guide for the merit panels in selecting lawyers with suitable credentials. Discussion of the legal criteria for appointment has been avoided due to the difficulty of translating vague standards into meaningful evaluations of individual candidates. As long as there is little agreement on what actually constitute merit criteria, most peo-

54. Berkson, *The U.S. Circuit Judge Nominating Commission: The Candidates' Perspective*, 62 JUDICATURE 466, 471 (1979).

ple involved in the process will understandably concentrate on more tangible political evaluations.

The social and political composition of the new commissions and emphasis on affirmative action also has changed the role of lawyers in federal judicial selection. Nationwide, the commissions clearly are dominated by lawyers. They are the single largest occupational group on the commissions. Conceivably, they provide information and guidance regarding legal experience, training, expertise, and other similar criteria. But lawyers are a large and varied group, representing a wide range of social, economic, and political interests. These particular lawyers are Democrats who are linked, not to the ABA and its Committee on the Federal Judiciary, but to the Carter campaign and the White House staff. When they seek to apply general legal criteria to selection, they, too, like the lay members, translate them into partisan interests for the Democratic Party. Again, this does not mean that poor judges will be selected since the commissions have a wide choice of individuals.

By appointing a large number of lawyers to the nominating commissions, President Carter has responded to claims that lawyers have a special and important role in judicial selection, without relying on the ABA as the vehicle to screen federal judicial candidates. The lawyers appointed by President Carter appear independent of bar associations since they reportedly are even *less* interested than the laymen in outside group or organization recommendations for particular candidates, including those from local and state bar associations. Thus, while lawyers still are heavily involved in federal judicial selection, their political ties and role under the Carter merit plan provide an alternative source of legal influence in judicial selection.

Affirmative action and the emerging role of the Senate Judiciary Committee also have reduced the ABA role. Despite suggestions that the ABA has moderated its political evaluation of judicial nominees, the perceptions of certain key Senators underscore the traditional image of the ABA as exclusionary, conservative, elitist, and secretive.⁵⁵ Senator Kennedy has worried that the ABA methods of evaluation assure an "old boy network" of judicial selection, and others believe that the Committee on the Federal Judiciary relies much too heavily on one representative from each circuit.⁵⁶ In the past, political out-groups have attacked the ABA for its narrow interests in judicial selection, but the criticism often went unheeded. Now, the new judiciary committee

55. *The Changing Role*, *supra* note 41, at 508.

56. *Id.*

is re-examining the traditional ABA role and finding that it leaves much to be desired compared to a more open, broader merit selection plan.

V. THE BACKGROUND OF FEDERAL JUDGES

Much debate has centered on the credentials of federal judges, especially those in the more numerous district and appellate courts. It is thus important to examine the backgrounds of judges in order to evaluate concerns about the quality of judicial nominees. This kind of comparison also is valuable in order to describe the groups of individuals who actually are selected from the large pool of formally eligible attorneys and to assess political changes over time. In the case of the current administration, which has explicitly sought to standardize merit selection procedures and to promote equal opportunity, the comparisons are crucial in judging administration performance and determining possible political shifts which have developed.

The focus here is on district and appellate courts since observers of the federal courts have voiced few concerns about the qualities of the Justices of the Supreme Court. These observers recognize that while ideology, party, and region are important, the High Court has been staffed with highly qualified and experienced people.⁵⁷ Careful analysis of the backgrounds of Supreme Court Justices also reveal that they have been recruited from groups with the highest social status in the United States⁵⁸ and only relatively recently have Justices included members of religious⁵⁹ and racial minorities,⁶⁰ symbolically broadening the eligibility and representation on the Court. However, despite the absence of constitutional requirements and formal merit selection plans, Presidents typically have selected individuals with extensive political and legal experience, almost automatically qualifying them as members of the elite of the American bar as well as of American society.⁶¹

Tables I and II in the accompanying Appendix describe the background characteristics of federal district and appeals court judges and nominees from the Eisenhower administration to the early Carter

57. For a detailed description of the social and political backgrounds of the Justices of the Supreme Court, see J. SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES AND PROCEDURES* 30-62 (1961) [hereinafter cited as *PERSONALITIES*], and SCHMIDHAUSER, *supra* note 9.

58. *See PERSONALITIES, supra* note 57.

59. *See id.* at 38-43.

60. *See generally id.* at 37-38.

61. *See id.* at 43-47.

years. Although judicial selection under President Carter reveals several important changes, there are many similarities with previous administrations. We may take it for granted now that a formal legal education is virtually required for recruitment to the courts, and a number of judges in all recent administrations have attended prestigious ivy league law schools. More important, many of the judges, especially on the appellate courts, have had judicial as well as active political experience. It is perhaps surprising that relatively few judges have been recruited from non-judicial government or political occupations. If not recruited from other courts, many of the judges were chosen from medium-sized or large law firms, which typically are viewed as the more prestigious types of law practice and experience. This kind of comparison among large groups of judges certainly does not demonstrate that they are highly qualified for the federal courts. However, it does provide at least general support for the idea that in all recent administrations some care has been taken to choose lawyers with substantial personal backgrounds and experience which are likely to make them good prospects for the judiciary. This kind of data removes many serious doubts about the fundamental qualifications of federal judges.

Demonstrating the formal credentials of the federal judges does not mean, of course, that there are no important political variations among administrations which also shape the judiciary. For example, while all administrations have included non-Protestants in their appointments, it is clear that Democratic Presidents have included more Catholic judges and more lawyers from solo practices or partnerships, thereby responding to the constituent groups which more heavily support the Democratic Party. Of course, the clearest distinction among administrations is the obvious emphasis on partisanship. With the exception of President Ford's Democratic appointments to the district courts, all recent Presidents have awarded over ninety percent of these important government positions to members of their own political party, many with highly activist political careers.

While having much in common with his predecessors, President Carter has produced several important changes in the selection of federal judges. In keeping with promises to apply affirmative action standards to judicial selection, the Carter Administration clearly has appointed a larger percentage of black and female judges. Although President Ford appointed more blacks than earlier administrations, President Carter has produced a clearer break with past political patterns. More women have been selected; however, the percentages remain small and far below the ratio in the general population. The

administration has not promised quotas or symmetrical representation on the basis of population. Nevertheless, it is understandable that the number of women appointed has led to the dissatisfaction of women's organizations with President Carter's judicial selection procedure, and with the administration's general orientation to the politics of sexual equality. If the federal courts are to become rough reflective images of certain politically relevant population characteristics, then the federal government still has a great distance to go in meeting feminist political demands. While there is some disappointment with President Carter's appointments, it is clear that his administration has done more than any other to provide access to large groups of people who formerly were systematically excluded from other than merely token appointments.

President Carter has satisfied a number of difficult requirements in filling the federal bench. Aside from appointing predominantly activist Democrats and more women and blacks, he has chosen individuals who clearly satisfy formal standards of merit by having substantial judicial experience and quality educations. There has been an increasing emphasis over the years on prior judicial experience, and President Carter has advanced the trend of supporting this legal value by recruiting a larger percentage of judges directly from various state courts or by appointing those who have held a prior judicial post. Fewer of his district court nominees and none of his early court of appeals selections came directly from other government or political positions. For example, experience as a prosecuting attorney is somewhat less important to the new administration than it has been in the past. A position as state or federal prosecutor traditionally has been an important initial step in a political career since it provides either state electoral and/or law enforcement visibility which is crucial in establishing a base in local politics. The Carter administration, however, has concentrated on previous experience as a judge. It also is interesting that the current administration has selected somewhat more judges with ivy league law degrees than in the past twenty-five years. It is dangerous to translate a prestigious law degree to mean highly qualified for office, but it seems safe to conclude that the recent district court nominees received quality, and often prestigious, legal educations.

While the current administration has been politically successful in balancing the district courts, Table II suggests that in selecting court of appeals judges, the President has not distinguished himself quite as sharply from previous administrations. However, it is important to note that the data available for complete comparison is based upon

relatively few early appointments. From these it seems that in addition to appointing several blacks to the appellate courts, President Carter has emphasized partisanship and activism as the main distinguishing criteria in his appointments. This is somewhat ironic since the merit nominating commissions were created especially for the appellate courts. However, since these figures were gathered, President Carter has appointed several women to various circuits, all with excellent formal credentials reflecting quality legal educations, prestigious law practices, and government service and experience on several state courts. There are few other important differences in the backgrounds of the appellate judges, but it is clear that the overall high quality of the federal bench has been maintained by the Carter Administration while recruitment has been opened to new groups.

VI. CONCLUSION

The history of federal judicial selection clearly reveals continuous involvement of the federal courts in national and state politics. From the early debates over the creation of the lower federal judiciary to President Carter's merit selection plan, the selection of judges has been a crucial issue in American politics. This does not mean, however, that there is much cause for concern about the quality of judges, since recruitment has emphasized qualifications as well as party rewards. Continued emphasis on legal education and judicial experience, as well as political activity and community involvement, all tend to emphasize the selection of individuals who are sensitive to major social and economic issues, and who are considered capable of contemporary decision-making.

At the same time, we should not delude ourselves about merit judicial selection. Party and interest group politics, ideology, and other factors always have been and will continue to be important in choosing judges. Moreover, while President Carter has instituted official merit selection procedures, and recent decisions by the Senate Judiciary Committee imply continued momentum and interest in recruiting judges according to legal qualifications and accomplishments, there is no evidence that a prestigious legal career in government or private law practice produces individuals who become "good" judges. Perhaps selecting federal judges from the state appellate courts provides an opportunity to assess judicial philosophy, attitudes, scholarship, and personality, but these, too, offer only general guides in judicial selection. There is little agreement on or practical application of which qualities are most critical in selecting judges.

At best, it seems that merit recruitment illustrates official sensitivity and good intentions toward selecting people whose experience and personalities are appropriate for judicial decision-making. But, as some critics have argued, merit selection can become a charade in which actual selection excludes classes of individuals who do not possess tangible political credentials making them minimally eligible for selection. This clearly is possible in future federal merit selection since President Carter's creation retains many important political requirements from the past while the merit criteria remain vague and poorly defined.

Since we have such difficulty translating general standards of merit selection into operational or practical vehicles to screen judicial candidates, it is likely that creating or fine-tuning the machinery of merit judicial recruitment is not the critical issue in federal judicial politics. As we have seen, the important changes which have occurred in selection are found in the political characteristics of the new appointees, not in their legal credentials or preparation as federal judges. Few of the recent women or black appointees probably seriously envisioned themselves as federal judges before President Carter began to campaign for merit selection and affirmative action. Their careers had developed in other directions and they certainly were not specially prepared or trained for positions on the federal courts. Clearly, all of the new appointees have excellent formal credentials *comparable to those of other past appointees*. Thus, while the new judges are meritorious, others selected by earlier Presidents also have been well qualified despite the absence of a formal merit selection procedure. Therefore, it appears that President Carter has accomplished political goals in meeting campaign promises and creating a good public image through merit selection, but he has not fundamentally altered the professional credentials of federal judges. While merit selection has tremendous and growing political appeal, we should anticipate continued emphasis on party, ideology, geographic representation, and other similar political factors which have accounted for judicial selection in the past.

APPENDIX

TABLE I
CHARACTERISTICS OF FEDERAL DISTRICT COURT JUDGES^a

Characteristic	Carter (D)	Ford (R)	Nixon (R)	Johnson (D)	Kennedy (D)	Eisenhower (R)
Occupation						
Politics/Gov't	4.4%	21.2%	10.7%	21.3%	16.5%	21.6%
Judiciary	42.2	34.6	28.5	31.1	29.1	18.4
Law Firm	42.2	40.4	51.4	26.2	32.0	42.4
Solo or partnership	8.9	3.9	6.7	18.0	21.4	12.8
Other	2.2	0.0	2.8	3.3	1.0	4.8
Law School Education^b						
Public supported	37.8	44.2	41.9	40.2	36.9	37.6
Private (Not Ivy)	33.3	38.5	36.9	36.9	41.8	38.4
Ivy League	28.9	17.3	21.3	21.3	18.4	21.5
Experience^c						
Judicial	47.6	42.3	35.1	34.3	33.3	26.4
Prosecutorial	33.3	50.0	41.9	45.8	—	—
Neither	33.3	30.8	36.3	33.6	—	—
Party						
Democrat	95.6	21.2	7.8	94.8	90.3	7.2
Republican	4.4	78.8	92.2	5.2	9.7	92.8
Party Activism^d	53.3	50.0	48.6	48.4	—	—
Religion						
Protestant	57.8	73.1	72.1	57.4	60.2	77.6
Catholic	31.1	17.3	18.9	31.9	28.1	16.8
Jewish	11.1	9.6	8.9	10.7	11.7	5.6
Race						
White	91.1	90.4	97.2	96.7	96.1	100.0
Black	8.9	5.8	2.8	3.3	3.9	0.0
Asian-American	0.0	3.9	0.0	0.0	0.0	0.0
Sex^e						
Male	86.7	98.1	99.4	98.4	—	—
Female	13.3	1.9	0.6	1.6	—	—
Total No. of Appointees	45	52	179	122	103	125

a. Adapted from Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 248 (1978) (all of these Carter nominees were subsequently appointed); Goldman, *Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts*, 18 WEST. POL. Q. 755, 757-61 (1965). The figures presented in this table are percentages based on the total number of appointments made during each administration.

b. The law school education of several Eisenhower and Kennedy appointees is unknown and not included.

c. Prosecutorial experience for Eisenhower and Kennedy appointees was not reported.

d. Includes any party experience from active campaign worker to elected official. Activism of Kennedy and Eisenhower appointees was not reported.

e. The sex of Eisenhower and Kennedy appointees was not reported.

TABLE II
CHARACTERISTICS OF FEDERAL COURTS OF APPEALS JUDGES^a

Characteristic	Carter (D)	Ford (R)	Nixon (R)	Johnson (D)	Kennedy (D)	Eisenhower (R)
Occupation						
Politics/Gov't	0.0	83.0%	4.4%	10.0%	14.3%	15.5%
Judiciary	41.7	75.0	53.3	57.5	47.6	55.6
Law firm	41.7	16.7	31.1	22.5	22.2	19.0
Solo or partnership	0.0	0.0	2.2	77.5	4.8	4.4
Other	16.7	0.0	8.9	2.5	1.0	2.2
Law School Education ^b						
Public supported	41.7	50.0	37.8	40.0	33.3	31.1
Private (Not Ivy)	33.3	25.5	26.7	32.5	47.6	37.9
Ivy League	25.0	25.0	35.6	27.5	19.1	28.8
Experience ^c						
Judicial	58.3	75.0	57.8	65.0	52.4	62.2
Prosecutorial	41.7	25.0	46.7	47.5	—	—
Neither	25.0	25.0	17.8	20.0	—	—
Party						
Democrat	91.7	8.3	6.7	95.0	95.2	6.7
Republican	—	91.7	93.3	5.0	—	93.3
Party Activism ^d	75.0	58.3	60.0	57.5	81.0	66.7
Religion						
Protestant	83.3	58.3	75.6	60.0	66.6	80.0
Catholic	8.3	33.3	15.6	25.0	28.6	13.3
Jewish	8.3	8.3	8.9	15.0	4.8	6.7
Race						
White	66.7	100.0	97.8	95.0	95.2	100.0
Black	25.0	0.0	0.0	5.0	4.8	0.0
Asian-American	8.3	0.0	2.2	0.0	0.0	0.0
Sex ^e						
Male	100.0	100.0	100.0	97.5	—	—
Female	0.0	0.0	0.0	2.5	—	—
Total No. of Appointees	12	12	45	40	21	45

- a. Adapted from Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 251 (1978) (all of these Carter nominees were subsequently appointed); Goldman, *Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts*, 18 WEST. POL. Q. 755, 757-61 (1965). The figures presented in this table are percentages based on the total number of appointments made during each administration.
- b. The law school education of several Eisenhower and Kennedy appointees is unknown and not included.
- c. Prosecutorial experience for Eisenhower and Kennedy appointees was not reported.
- d. Includes any party experience from active campaign worker to elected official.
- e. The sex of Eisenhower and Kennedy appointees was not reported.