



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 12
Number 4 *Ninth Circuit Symposium: The
Federal Judiciary*

Article 9

9-1-1979

Recruitment and Appointment of Federal Judges

Jack J. Coe Jr.

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Jack J. Coe Jr., *Recruitment and Appointment of Federal Judges*, 12 Loy. L.A. L. Rev. 1033 (1979).
Available at: <https://digitalcommons.lmu.edu/llr/vol12/iss4/9>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

RECRUITMENT AND APPOINTMENT OF FEDERAL JUDGES

I. INTRODUCTION

The Omnibus Judgeship Act (the Act), enacted in October 1978,¹ has expanded the active federal judiciary by one-third with its creation of 152 new federal judgeships. For the Ninth Circuit, this provides an increase of ten judgeships at the circuit court level and fifteen at the district court level.² The Act was a product of a House-Senate Conference Committee compromise; it represents the largest single increase in federal judgeships in United States history and is the first increase since 1970.³

The need to fill these new positions has renewed interest in a reform, initiated by the Carter Administration in 1977, which may prove to be of equal historical importance for the administration of justice. Specifically, President Carter became the first American President to utilize merit selection principles⁴ in appointing federal judges.⁵ This reform has important implications with respect to both the quality of the federal judiciary and the level of public confidence in the judicial process. The extent to which this reform has replaced the traditional, highly political selection process is demonstrated by the varying procedures by which judgeships are being awarded under the Act.⁶

1. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978) (amending 28 U.S.C. §§ 44, 133 (1979)).

2. *Id.* §§ 1-3.

3. *Congress Approves Legislation Creating 152 New Judgeships*, 62 JUDICATURE 310 (1979).

4. In the literature associated with judicial selection reform, "merit selection" refers to schemes that rely on independent commissions for recruiting and screening candidates. Such commissions recommend candidates to the Chief Executive, who makes judicial appointments based on the Commission's findings. Proponents of such plans suggest that commissions should be nonpartisan bodies, composed of lawyers and non-lawyers. Nelson, *Carter's Merit Plan: A Good First Step*, 61 JUDICATURE 105, 107 (1977) [hereinafter cited as Nelson].

5. Williams, *Federal Merit Selection Takes Root*, 61 JUDICATURE 104 (1977).

6. The Act contains a merit provision requiring the President to promulgate "standards and guidelines" for the selection of the new district court judges on the basis of merit. The original House version required that formal merit selection procedures be established and followed. The House version was intended to prompt the President to establish a formal mechanism to fill district court vacancies similar to that already instituted to fill circuit court vacancies. The compromise legislation omits any reference to establishing specific merit selection procedures. As a result, the district positions are being filled by merit commissions only where such bodies are voluntarily established by United States Senators. *See, On The*

This essay will consider the recruitment and selection methods by which the newly expanded federal bench is being staffed and will evaluate the progress being made by the merit reform movement. It will also examine some key issues in the selection of federal judges.

II. THE PATRONAGE MODEL—ITS FRIENDS AND CRITICS

Merit selection of federal judges in its present stage of development is best appreciated when compared to the system which it is gradually replacing. Controversy concerning the manner by which federal judges are selected is as old as our nation. At the Constitutional Convention of 1789, judicial selection was the only topic related to the federal judiciary that generated vigorous debate.⁷ The central issue was not whether appointment was the proper method of selection, but whether given the need for an independent judiciary,⁸ such appointive powers should reside with the executive.⁹

James Madison and Alexander Hamilton contended that the appointive powers should be vested solely in the president.¹⁰ To the contrary, Benjamin Franklin, among others, maintained that the power should reside only in the Senate.¹¹ The present system, under which the Senate as a body must approve a President's appointment,¹² reflects the resulting compromise and includes additional provisions that were ad-

Omnibus Judgeship Bill and Merit Selection, 62 JUDICATURE 4 (1978); Cohen, *Judge Bill to Test Merit Selection*, Nat'l L.J., Oct. 9, 1978, at 1, col. 1 [hereinafter cited as Cohen].

7. A. ASHMAN, J. ALFINI, J. LOBBERS & V. CONNELLY, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 8 (1974) [hereinafter cited as ASHMAN & ALFINI].

8. Though the early 18th century witnessed a significant decline in the English monarch's powers with respect to appointment and removal of judges, colonial judges were excluded from this increase in judicial independence. Prior to the American Revolution, they remained mere adjuncts to the executive, dependent upon the King for their tenure and compensation. *Id.*

9. *Id.*

10. H. CHASE, *FEDERAL JUDGES, THE APPOINTING PROCESS* 6 (1972) [hereinafter cited as CHASE].

11. *Id.*

12. Art. II, § 2 of the United States Constitution provides in pertinent part: "The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court and all other Officers of the United States whose appointment are not herein otherwise provided for . . ." The prevailing view that "other Officers" includes district and circuit court judges is codified in 28 U.S.C. §§ 44 and 133, which provide that all circuit and district court judges be appointed with the advice and consent of the Senate. CHASE, *supra* note 10, at 5.

It is not clear why the framers gave the Senate power to advise and consent to judicial appointments. The manner by which the Senate was intended to discharge its duties is also not settled. See Totenberg, *Will Judges Be Chosen Rationally?*, 60 JUDICATURE 92 (1976) [hereinafter cited as Totenberg]; CHASE, *supra* note 10, at 4-5.

ded to safeguard judicial independence.¹³

Today, debate about the selection of federal judges continues, and ironically, still involves the extent to which the political interplay between the Executive and Senate has impacted the appointive process. One proponent of reform has observed concerning the traditional process:

The present federal judicial selection mechanism can best be characterized as overly political. It is far from the anticipations of the Constitution. It is highly enmeshed in the politics of the executive and legislative branches. It is not conducive to impartiality or separation of governmental powers. More importantly, it does not assure the quality of justice each citizen has a right to expect. The majority of federal judges today are quite competent, but that does not suggest that we have the best bench or that future selections will be as good.¹⁴

The practices that inject politics into this process are the custom of "senatorial courtesy" and its corollary of de facto senatorial appointment. They have drawn the greatest criticism. Senatorial courtesy involves a custom whereby a Senator may prevent confirmation of a nominee from his state. If a Senator from a state in which the vacancy is to be filled indicates his disapproval prior to formal confirmation proceedings, the Senate Judiciary Committee will generally defer to his views and take no further action to confirm.¹⁵ The custom recognizes the fact that a Senator from whose state the appointment is to be made

13. Art. III, § 1 of the Constitution provides: "The judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

14. Winters, *Merit Selection of Federal Judges*, in JUDICIAL SELECTION AND TENURE 186-87 (G. Winters rev. ed. 1973).

15. An ex-Senator has summarized the process associated with senatorial courtesy as follows:

(1) The Senator or Senators from the state involved, if of the President's party, suggest one (or at times more) candidates for the bench to the Attorney General and the President. (If the state has no Senator of the President's party, the suggestions come from the congressional delegation or other political allies of the President).

(2) The Department of Justice does a limited amount of screening for competence and the FBI conducts a background check.

(3) A twelve-member ABA committee on the Federal Judiciary investigates and reports on the qualifications of the nominee in confidence to the attorney general.

(4) In most instances, the Attorney General then submits the "senatorial nominee" to the Senate for confirmation.

(5) The Senate Judiciary Committee holds a hearing if the Senators from the nominee's state have returned their "blue slips" indicating approval. . . . [T]he custom of the Judiciary Committee is not to hold hearings until the slip is returned.

Tydings, *Merit Selection for District Judges*, 61 JUDICATURE 113 (1977) [hereinafter cited as Tydings].

has a greater political interest in that appointment.¹⁶

Senatorial courtesy contemplates, therefore, that Senators, through mutual deference, may protect their individual interests in judicial appointments. Given the legal requirement of Senate confirmation, the practice assures that the President will only make appointments that are acceptable to the Senators whose interests in that appointment are most vital. Such deference has been taken for granted when one or both Senators are of the President's party.¹⁷ Few instances exist in which a Senator of the President's party has been unsuccessful in blocking a nomination to a federal district judgeship in his own state.¹⁸

With regard to circuit judgeships, however, senatorial courtesy has been relevant only when the nominee has been from the objecting Senator's state. Circuit judgeships need not be apportioned among the states in the circuit.¹⁹ Therefore, candidates from all states in the circuit may be considered, and a prerogative of disapproval exists only in favor of the Senator whose state produces the nominee.²⁰

Senatorial courtesy has as its corollary a tradition, dating back to the Washington administration, by which a Senator, if of the President's party, can bring formidable power to bear on behalf of a particular nomination.²¹ It has become common practice for the Attorney General, fully aware of senatorial courtesy, to consider primarily the wishes of Senators of a given state in filling federal judicial vacancies. As a result, a candidate's likelihood of appointment depends substantially upon the degree to which he was supported by a Senator or the party

16. The ability to reward supporters with federal government posts can be of great political value to Senators, who must cultivate support within their home states to ensure additional terms in office. Conversely, it damages a Senator if a President of his party ignores him when making an appointment affecting the Senator's own state. The damage is greater if the appointee is known to be a political opponent of the Senator. CHASE, *supra* note 10, at 7.

17. *Id.*

18. *Id.* at 9.

19. *Id.* at 43. Unlike districts, each circuit covers at least three states.

20. *Id.* at 44. There is, however, the phenomenon of "state representation." It refers to the fact that frequently circuit court appointments are made in the states from which the vacancy comes. This practice has apparently been institutionalized under President Carter's commission system. See Goldman, *Judicial Appointments to the United States Courts of Appeal*, 1967 WIS. L. REV. 186; Slotnick, *What Panelists Are Saying About The Circuit Judge Nominating Commission*, 62 JUDICATURE 320, 322 (1979) [hereinafter cited as Slotnick].

21. CHASE, *supra* note 10, at 10. As Fletcher Rush, President of the American Judicature Society explains with respect to district judgeships: "Although technically the President appoints district court judges with the advice and consent of the Senate, in fact, he relies on the recommendations of Senators from the state in which the judicial vacancy exists. In effect his designation is a confirmation of their choice." Rush, *Ending Patronage In The Judiciary*, 62 JUDICATURE 264 (1978).

leaders of his state.²²

While no single Senator necessarily controls each appellate judgeship, the selection of district judgeships has been an important source of political patronage. Many Senators consider the selection of district judges to be one of the duties they were elected to perform.²³ Unfortunately, as ex-Senator Joseph W. Tydings noted, “[o]pportunity and objectivity are too often rare commodities under the system of senatorial courtesy.”²⁴

The traditional system, then, has been characterized by an undue reliance on candidates who emerge from political sources. It has been criticized not for an inability to produce judges of outstanding ability and character,²⁵ but rather for the lack of uniformity in judicial quality inherent in a recruitment and selection process so dependent upon political pressures.²⁶ Further, according to proponents of reform, public confidence suffers to the degree that federal judgeships are perceived to be a form of political reward. “Citizens are entitled to know how these judges [are] chosen. They should be confident that careful study and investigations preceded a nomination, that objective criteria (not political trade offs) were the basis for selecting our federal judges.”²⁷

Given that the federal judiciary plays a crucial role in our system of governance,²⁸ it seems logical that any recruitment and selection

22. In a concluding chapter to his thorough treatment of federal judicial appointment, Professor Harold Chase observes that judicial selection has been made from a relatively small pool of legal talent and that many attorneys have excluded themselves early in their legal careers because they neither had the time nor the inclination to invest much of themselves in political activity. CHASE, *supra* note 10, at 197.

23. Tydings, *supra* note 15, at 113.

24. *Id.*

25. To so argue would be to ignore history. Griffin Bell is an obvious example. Bell, who distinguished himself during his fifteen years on the Fifth Circuit Court of Appeals, candidly admits that political connections were a major factor in his being appointed to the federal bench. He had managed John F. Kennedy’s presidential campaign in Georgia, had been close friends with the two Senators from Georgia and had managed the governor’s election campaign. L.A. Times, Oct. 9, 1978, § I, at 1, col. 2-3. See also Totenberg, *supra* note 12, at 93.

26. As ex-Attorney General Herbert Brownell notes, “Senators are rarely free agents. They have to respond to the suggestions of their own state or local leaderships. They have fences to mend, constituencies to acknowledge as well as friends to reward.” Brownell, *Moving the Judicial Selection Process Into the Twentieth Century*, 16 JUDGES’ J. 23 (Summer 1977) [hereinafter cited as Brownell].

27. Tydings, *supra* note 15, at 118.

28. To a large extent, the federal judiciary determines the posture of American society. Federal judges decide where children go to school, what movies people may see, where people may live, where housing projects will be built; judges often rule on how public hospitals are to be administered, how police and fire departments are to be run, how private companies should hire people and myriad other major matters of public policy.

method must have as its primary objective a federal bench occupied by the finest possible judges. The importance of inspiring public confidence is equally clear. It is not surprising, therefore, that during the 1976 presidential campaign, both candidates pledged to implement the long-needed reform.²⁹ Candidate Jimmy Carter asserted that "[a]ll federal judges . . . should be appointed strictly on the basis of merit without any consideration of political aspect or influence. We can no longer afford to treat the administration of justice as political patronage."³⁰

The sections that follow consider the extent to which this goal has been achieved within the federal judiciary, as demonstrated by the selection procedures now required under the newly enacted Omnibus Judgeship Act.

III. NOMINATING COMMISSIONS—THE KEYSTONE OF MERIT REFORM

Of the methods being used to fill the newly created judgeships, those relying on independent merit commissions,³¹ which recruit and screen candidates for the bench, represent, in theory, the greatest departure from the traditional patronage model. The benchmark of merit reform,³² such commissions presently operate as a continuation of both the mandatory circuit plans and the voluntary district plans³³ which

Totenberg, *supra* note 12, at 93.

29. Nelson, *supra* note 4, at 105; Carbon, *The U.S. Circuit Judge Nominating Commission* 62 JUDICATURE 233 (1978).

30. 124 CONG. REC. H720 (daily ed. Feb. 7, 1978) (Rep. Seiberling quoting President Carter's campaign speech). The literature addressing President Carter's merit plan contains frequent reference to this statement. Various interpretations have been given. Reform proponents have consistently deemed it to be promissory. By contrast, former Attorney General Griffin Bell has termed the statement "aspirational." Mann, *Politics Still Best Route to U.S. Bench*, L.A. Times, Feb. 18, 1979, § I, at 16, col. 1; Nelson, *supra* note 4, at 105-06.

31. Under the provisions of the Omnibus Judgeship Act, the sections creating the 117 new district positions did not take effect until President Carter promulgated "standards and guidelines for the selection of nominees on the basis of merit." Neither the Act nor the resulting executive order, however, mandate the use of merit commissions. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 7a, 92 Stat. 1629 (1978). See also notes 4, 6 & 30 *supra* and accompanying text.

32. "The judicial nominating commission is the cornerstone of the merit selection plan. Because the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office, the effectiveness of the merit plan is dependent upon the successful functioning of this body." ASHMAN & ALFINI, *supra* note 7, at 22.

33. In 1974, Florida Senators Chiles and Stone adopted a merit selection plan. As of late 1978, seventeen states had voluntarily implemented merit plans for the selection of federal judges. Rush, *Ending Patronage in the Judiciary*, 62 JUDICATURE 264 (1978). A similar trend began in the state systems with Missouri's innovative scheme in 1940. Alfini, *The*

predate the Omnibus Act.

At the circuit level, merit selection was implemented in February, 1977, when President Carter acted on his campaign commitment by establishing the Circuit Judge Nominating Commission through an executive order.³⁴ However, the order limited its scope to circuit nominations. In deference to the entrenched political system,³⁵ it left many district appointments to traditional sources³⁶ and was thus a partial disappointment to merit proponents.³⁷

Despite its limited scope, the February Order did represent a significant departure from the status quo.³⁸ The recruitment and selection process it sets forth compares favorably with models proposed by at least one leading proponent of reform,³⁹ and is the prototype⁴⁰ for the process currently being used under the Omnibus Act to fill circuit positions.⁴¹

Trend Toward Judicial Merit Selection, 13 TRIAL 41, 42-43 (Nov. 1977) [hereinafter cited as Alfini].

34. Exec. Order No. 11,972, 3 C.F.R. 96 (1977) [hereinafter cited as February Order].

35. It is widely reported that in a pre-inaugural meeting with Senate Judiciary Committee Chairman James O. Eastland, Carter made a major concession when he agreed not to require the use of nominating panels by Senators recommending district court judges. *See, e.g.*, Cohen, *supra* note 6, at 30, col. 1; 124 CONG. REC. H720 (daily ed. Feb. 7, 1978) (Remarks of Rep. Seiberling concerning merit language and President Carter's confrontation with hard political facts).

Judicial selection historian James Alfini explains:

[I]f President Carter had extended his merit plan to include United States district court judges, he would have gone against a long standing practice. Not only would such a move have been politically unwise in removing an important source of patronage from individual senators, but it would have superseded the efforts of certain senators who had established their own merit plans.

Alfini, *supra* note 33, at 43.

36. Officially, all of the approximately 400 district judgeships existing at the time of the Carter-Eastland compromise remained subject to the traditional method. Voluntarily adopted merit plans reduced this number. *See* note 36 *infra* and accompanying text; *Judicial Reform: Still No Verdict*, L.A. Times, Feb. 19, 1979, § 1, at 18, col. 2.

37. *See* Williams, *supra* note 5, at 104.

38. It should be noted, however, that at the time of the President's Order, Senators from thirteen states had promised to implement or had already established some form of merit plan. Tydings, *supra* note 15, at 113. *See also* note 33 *supra* and accompanying text.

39. The American Judicature Society (AJS) has developed and promoted various measures for improving the administration of justice. In 1977, the Society, a long-time proponent of merit selection, proposed that federal judicial nominees be recruited, screened and ranked by an independent body similar to those then operating in 28 states. *See* Nelson, *supra* note 4, at 106 n.4; *AJS Update*, 60 JUDICATURE 306 (1977).

40. The commission concept, however, was not new to Carter. In 1971, as Governor of Georgia, Carter adopted a nominating commission composed of lawyers and lay citizens, which was responsible for recruiting and recommending for appointment those most qualified for a judgeship. Alfini, *supra* note 33, at 42.

41. The May Order, which by its terms was to expire on December 31, 1978, has been extended for a two year period. Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (1978).

As modified in May of 1978, the President's Order establishes a commission composed of thirteen panels "each of which shall, upon the request of the President, recommend for nomination as circuit judges persons whose character, experience, ability and commitment to equal justice under law, fully qualify them to serve in the Federal judiciary."⁴²

The panels are assigned one to each of the eleven circuits, with two panels assigned to the geographically large Fifth and Ninth Circuits.⁴³ The membership of each panel consists of a "[c]hairman and such other members as the President may appoint."⁴⁴ The order further mandates that each panel shall include "members of both sexes . . . members of minority groups and . . . at least one lawyer from each State within a panel's area of responsibility."⁴⁵

Circuit panels begin functioning when notified by the President that the panel's assistance is desired to aid the President in discharging "his constitutional responsibility and discretion to select a nominee to fill a vacancy or vacancies on a United States Court of Appeals."⁴⁶

President Carter's circuit plan contemplates a commission active in pre-selection recruitment activity as well as the ultimate screening.⁴⁷ Thus, when notified by the President,

The panel shall: give public notice⁴⁸ . . . of the vacancies within the relevant geographic area, inviting suggestions as to potential nominees; . . .

42. *Id.* § 1.

43. *Id.*

44. *Id.* § 2.

45. *Id.*

46. *Id.* § 3.

47. The recruitment function contemplated by the order underscores a distinction between the role of the commission and that of the American Bar Association Standing Committee on the Federal Judiciary. The latter body, which merely "reacts" to the names submitted to it by the Justice Department, plays no role in recommending names for judicial positions. See Rosenbaum, *Implementing Federal Merit Selection*, 61 JUDICATURE 125, 126 (1977) [hereinafter cited as Rosenbaum]; Nelson, *supra* note 4, at 106. The ABA Committee's influence and stature in the judge-screening process has varied with each administration. Its evaluation of senatorial recommendations has often resulted in negotiations with the Justice Department. Totenberg, *supra* note 12, at 96; CHASE, *supra* note 10, at 20-21; S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 47-57 (1976). The future role of the ABA Committee with respect to the judicial confirmations occasioned by the Omnibus Act is somewhat uncertain. Nat'l L.J., Oct. 16, 1978, at 3, col. 1.

48. Notices in major daily newspapers and legal periodicals are typical methods. See, e.g., Carbon, *The U.S. Circuit Judge Nominating Commission*, 62 JUDICATURE 233, 238 (1978) [hereinafter cited as Carbon]. Candidates for a vacancy will, however, only be considered from a specified state even though circuit courts are putatively regional. The confinement of a panel's search to a single state has been criticized by at least one noted commentator. See Slotnick, *supra* note 20, at 322.

conduct inquiries to identify⁴⁹ those persons among the potential nominees who are well qualified to serve as a United States Circuit Judge [and to] [r]eport⁵⁰ to the President, within the time specified . . . its recommendations as to the persons whom the panel considers best qualified to fill the vacancy or vacancies.⁵¹

The order also makes explicit the goal of a more diverse federal bench by encouraging each panel "to seek out and identify well qualified women and members of minority groups as potential nominees."⁵²

By contrast, the district judgeship positions created by the Omnibus Act are being awarded pursuant to an executive order⁵³ that provides that the Attorney General, in assisting the President "shall receive recommendations . . . from any person, commission or organization. The use of commissions to notify the public of vacancies and to make recommendations for district judge is encouraged."⁵⁴

While the failure to mandate the use of merit commissions is conspicuous, this November Order does evidence a continued commitment to a judiciary of uniformly high quality and of a more diverse composition. For example, the November order further provides that the Attorney General, before making recommendations, shall consider whether "[p]ublic notice of the vacancy has been given and an affirmative effort has been made, in the case of each vacancy, to identify quali-

49. The particular screening process employed by each circuit panel varies. Typically, questionnaires, writing samples, personal references and personal interviews are a major part of the evaluation process. See Carbon, *supra* note 48, at 238; Fish, *Questioning Judicial Candidates*, 62 JUDICATURE 8, 16 (1978) [hereinafter cited as Fish].

50. The President's February Order required that the names of those recommended be kept confidential. Critics quickly noted that public confidence could only suffer as a result. The superseding May Order omits that requirement. The current procedure is to inform the public of those recommended when the President is informed. The extent to which the Commission's actual proceedings should be confidential remains an open question. Carbon, *supra* note 48, at 235.

51. Exec. Order No. 12,059, 43 Fed. Reg. 20,949, § 3 (1978).

52. *Id.* § 4. Certain experience requirements may undermine the order's affirmative action component. A guideline issued by the Attorney General's office suggests that "a person who has less than fifteen years of legal experience . . . should be considered only in unusual circumstances and if exceptionally meritorious." Slotnick, *supra* note 20, at 323 (citing Memorandum from Assoc. Attorney Gen., April 22, 1977, at 7). As Professor Elliott E. Slotnick has suggested, a rigid application of this guideline is inconsistent with the attainment of a more representative federal bench. *Id.* Professor Slotnick is joined by critics who emphasize that such an experience requirement discriminates against black and women lawyers, many of whom have just recently entered the legal profession due to past discrimination. Proponents of such a requirement contend that the requirement ensures thorough trial experience. "New Politics" Helps Pick Judges, L.A. Times, Feb. 20, 1979, § I, at 5, col. 4.

53. Exec. Order No. 12,097, 43 Fed. Reg. 52,455 (1978).

54. *Id.* §§ 1-102, 1-103 (1978).

fied candidates including women and members of minority groups."⁵⁵ Further, the Attorney General is to determine that the selection process was "fair and reasonable" and that persons recommended meet "standards for evaluation" similar to those required of circuit nominees.⁵⁶

Notwithstanding the fact that it establishes a basic format by which untraditional candidates will be more likely to receive consideration, the November Executive Order leaves open to debate the extent to which patronage will continue to play a role in the selection process. The Omnibus Act's requirement that the President promulgate "standards and guidelines" for the selection of district judges presumably gave him or her the authority to mandate merit commissions in districts where they had not already been voluntarily adopted.⁵⁷ Yet, in apparent deference to Congress, President Carter displayed a continuing reluctance to require commissions for other than circuit vacancies.⁵⁸

Other factors also suggest the continued vitality of the patronage model. In addition to the November Order's failure to require merit commissions, the process continues to allow senators to submit only one name to the President.⁵⁹ While senatorial courtesy is regarded by some as an anachronism,⁶⁰ and its future placed in question by recent developments,⁶¹ its demise is by no means certain.

55. *Id.* § 1-104(a). This apparent mandate of affirmative action may be of diminished force. Certain legal experience requirements set forth by the Attorney General's office could substantially narrow the pool of eligible women and minorities. With respect to the selection of district judges, twelve to fifteen years of legal experience is a prerequisite subject to only rare exception. As a result of past discrimination, women and minority groups have only, in recent years, entered the legal profession. Consistency would seem to require that any experience requirement not assume talismanic importance. See Cohen, *Playing Political Games with Judgeships*, L.A. Times, Nov. 15, 1978, § II, at 7, col. 3 [hereinafter cited as *Playing Political Games*]. See note 52 *supra* and authority cited therein.

56. Exec. Order No. 12,097, 43 Fed. Reg. 52,455, §§ 1-104(b), 1-104(c) (1978).

57. The Act's language was flexibly worded so as not to limit the avenues available to the President. See notes 6 & 31 *supra* and authority cited therein. Indeed, given Carter's commitment to merit selection, it was speculated that the President would rely on the Act's merit selection language to extend his merit system to district court appointments. See, e.g., Cohen, *supra* note 36, at 30, col. 1.

58. See note 36 *supra* and accompanying text.

59. See Exec. Order No. 12,097, 43 Fed. Reg. 52,455 (1978). See *Playing Political Games*, *supra* note 55, at 7, col. 4.

60. Encouraging an end to the custom, political scientist Sheldon Goldman likens the 'blue slip' practice to the political enemies lists that were discredited during the Watergate scandal. Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 247, 254 (1978). [hereinafter cited as Goldman].

61. Senator Edward Kennedy, the Chairman of the Senate Judiciary Committee, has indicated that he will alter the system of senatorial courtesy. Under the new procedure, a Senator's refusal to return his blue slip would result in a committee vote as to further proceedings and not a unilateral tabling of a nomination as under the traditional practice. The

As of November 1978, 55 of the 117 new district court positions stood to be filled without the aid of a voluntary merit commission system.⁶² This fact, while a source of discomfort to proponents of selection reform, is made somewhat less threatening by several factors. First, President Carter and former Attorney General Griffin Bell have continued to wage their "quiet campaign," encouraging Senators to adopt merit panels, or at least to produce more representative lists of candidates.⁶³ Second, the administrative burden⁶⁴ created by the Act, when combined with a greater public recognition of the commission mechanism, should prompt a continued adoption of merit commissions. Third, the House Judiciary Committee, a strong supporter of merit selection, can be expected to monitor closely the implementation of the Act's merit provision and to advocate changes where needed.⁶⁵

Finally, Edward Kennedy, Chairman of the Senate Judiciary Committee, has pledged that candidate qualifications will be thoroughly scrutinized during the confirmation process.⁶⁶ He has also pledged to end the time-honored practice of allowing a home state Senator the power of absolute veto over prospective federal judge nominees.⁶⁷ Rather than effecting automatic nonconfirmation, a Senator's blue slip protest will now prompt a Committee vote as to further action to be taken.⁶⁸ While senatorial courtesy is not completely discarded, the measure will undoubtedly lend further prestige to President Carter's informal reform tactics.⁶⁹

There remains strong opposition to the merit commission concept evidenced by both the Omnibus Act's weakened merit provision and the President's compromising executive orders. Congressmen and politicians, of course, wish to retain their capabilities of rewarding political

announcement of this controversial change was met with mixed reaction. L.A. Daily J., Jan. 26, 1979, at 1, col. 5. See notes 15-16 *supra* and accompanying text.

62. See *Playing Political Games*, *supra* note 55, at col. 5.

63. See Tydings, *supra* note 15, at 118; *Losing to Patronage*, Nat'l L.J., Jan. 29, 1979, at 20, col. 1.

64. See Tydings, *supra* note 15, at 114, 118; Nat'l L.J., Jan. 29, 1979, at 20, col. 1.

65. See *Playing Political Games*, *supra* note 55, at col. 5.

66. Cohen, *supra* note 6, at 30, col. 1.

67. *Id.*

68. *Id.*

69. *Id.* The scope of the reform measures being proposed by Senator Kennedy reach well beyond senatorial courtesy. A preliminary version of legislation currently being drafted by Senator Kennedy suggests that he is planning a major reform of the federal judiciary system. The proposal's most novel concepts include a time limit on Congressional action on requests for new federal judges, the creation of a high level council to study the needs of the federal justice system, and provisions regarding judicial discipline and tenure. Nat'l L.J., Jan. 8, 1979, at 3, col. 1.

allies. A more defensible criticism of the merit commission addresses public accountability. Opponents have argued that such a system replaces identifiable decision makers, who are directly responsible to their constituents, with political appointees having no formal political responsibilities. These critics, then, do not view nominating commissions as ensurers of a more capable judiciary.⁷⁰ Studies to date have declined to render a final verdict concerning President Carter's Circuit Judge Nominating Commission or the senatorial commissions currently in use. Those of Professor Sheldon Goldman,⁷¹ Professor Elliot E. Slotnick,⁷² and others⁷³ do highlight certain areas, however, that will continue to be scrutinized in measuring the reform's progress. In recognition of the "undeniable" trend toward acceptance of the merit commission concept,⁷⁴ these areas are surveyed in the sections that follow.

IV. MERIT PLAN COMPONENTS—MEASURING REFORM

As has been seen, the interrelated themes of public confidence, access to the bench, and judicial quality pervade the continuing debate about judicial selection reform. With reference to these themes, scrutiny of the commission's concept has necessarily addressed the facets of panel composition, selection criteria, and confidentiality. The imperatives that have directed argument have been identified by Ashman and Alfini in their comprehensive empirical analysis of various state nominating commissions. They observe:

In carrying out its sensitive recruiting, screening, and nominating tasks, a commission must operate in a manner that ensures the best potential judicial talent available is nominated, without compromising the public's respect and trust. Toward this end, a commission's composition and its operating and evaluating procedures are of critical importance in assessing the effectiveness of a merit selection plan.⁷⁵

A. Panel Composition

Given that diversity and public confidence are closely linked to the success of merit reform, two aspects of panel composition are noteworthy. The first involves the partisanship of panel members, the second the role of the non-lawyer.

70. See Cohen, *supra* note 6, at 30, col. 2.

71. See Goldman, *supra* note 60, at 250-54 (1978).

72. Slotnick, *supra* note 20.

73. See, e.g., Carbon, *supra* note 48; Rosenbaum, *supra* note 47.

74. Alfini, *supra* note 33, at 41.

75. ASHMAN & ALFINI, *supra* note 7, at 227.

As the chief proponents of merit reform, the American Bar Association (ABA) and the American Judicature Society (AJS) have consistently stressed that a decision by a bipartisan commission will enjoy greater legitimacy than one produced by a partisan body. Indeed, they suggest that, ideally, such panels should be nonpartisan.⁷⁶ Yet, as to the partisanship of circuit commission members, the relevant executive order⁷⁷ is noticeably silent.

The overwhelming majority of individuals who have served on the Circuit Judge Nominating Commission have been of the President's party.⁷⁸ A recent comparison of panel composition in the Sixth and Eighth Circuits revealed that the former comprised two Republicans and nine Democrats while the latter was composed entirely of Democrats and attracted substantial criticism for its single party membership.⁷⁹ Further, a study by Elliot E. Slotnick of the Ohio State University's political science department found that of the panel members responding, 44% indicated they participated in President Carter's election campaign and 65.4% said they supported Carter *before* the Democratic National Convention.⁸⁰

With respect to results achieved by a given panel, however, it bears emphasis that the key issue is the extent to which political acceptability was a factor in the recommendation of a candidate. Notwithstanding the absence of an executive mandate, panels have given little or no weight to an applicant's political background.⁸¹ Similarly, in the seminal study of state nominating commissions, authors Ashman and Alfini conclude that "political influences are less prevalent and are of less consequence to a commission which is bi-partisan in nature."⁸²

Whether final recommendations are significantly affected by the partisan asymmetry of panel membership is difficult to determine.⁸³ The more immediate issue speaks to public acceptance of the commission concept. Certainly, a selection plan that is successful in minimizing the

76. See CHASE, *supra* note 10, at 73; Nelson, *supra* note 4, at 107.

77. Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (1978); See Nelson, *supra* note 4, at 107.

78. Carbon, *supra* note 48, at 244.

79. *Id.*

80. Slotnick, *supra* note 20, at 322; Cohen, *supra* note 6, at 30, col. 1. A Justice Department survey rendered similar results. *Id.*

81. Cohen, *supra* note 6, at 30. Rather, a recent survey suggests that panels were most concerned with a candidate's character, moral courage, integrity and open-mindedness. Slotnick, *supra* note 20, at 322. See also Carbon, *supra* note 48, at 241; Haskin, *Serving on the Circuit Judge Nominating Commission's Third Circuit Panel*, A.B.A.J. 575, 576 (April 1978).

82. ASHMAN & ALFINI, *supra* note 7, at 78.

83. Carbon, *supra* note 48, at 244.

importance of a candidate's political background, may discourage public confidence if the panels themselves become politicized. In this regard, Professor Goldman's suggestion that at least one or two members of the opposition party be routinely included⁸⁴ in panel memberships constitutes a minimum step toward ensuring public confidence.

Quotas on party affiliation are equally advisable with respect to the various voluntary plans now operating at the district level. Senator Joseph W. Tydings' study of the voluntary plans that existed as of late 1977 revealed that only Ohio and Pennsylvania formally provided for bipartisan membership.⁸⁵

In light of traditional merit reform theory, the second noteworthy aspect of commission composition relates to the role of the non-lawyer. As early as 1931, proponents of merit reform suggested that candidates be nominated by commissions composed not only of judges and lawyers but also of non-lawyers.⁸⁶ Missouri became the first state to adopt a merit plan in 1940 and included equal numbers of lawyers and non-lawyers plus one member of the judiciary in its panel.⁸⁷

Lay participation is considered important for at least two reasons. First, judicial panels composed of lay members will be more closely identified with the citizenry.⁸⁸ One commissioner has observed that "[t]he basic role of nonlawyers is to ensure that the public's expectations are influential. The lay person has an extra responsibility for such things as affirmative action and breaking traditions that go unquestioned."⁸⁹

Second, though lawyers are best qualified to determine whether a candidate has demonstrated an ability to deal with complex legal issues, lay persons can be "as perceptive as lawyers about people and equally adept in evaluating available information."⁹⁰ For example, lay persons are as qualified as lawyers to ascertain such important judicial qualities as the willingness to consider fully both sides of a debatable proposition, the ability to be even-tempered, fair and impartial, and the

84. Goldman, *supra* note 60, at 254.

85. Tydings, *supra* note 15, at 117. California's voluntary plan will remain bipartisan as long as Senators Cranston and Hayakawa continue to cooperate despite being from different political parties. *Id.*

86. Nelson, *supra* note 4, at 109.

87. *Id.*

88. Tydings, *supra* note 15, at 116-17.

89. Rosenbaum, *supra* note 47, at 127.

90. See Nelson, *supra* note 4, at 109-10 (quoting Robertson & Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973)).

capacity to conceptualize complex relationships.⁹¹

Thus, merit theorists have stressed that to keep the narrow-minded from the bench, the panel itself should reflect in its membership a diverse balance of perspectives.⁹² As Glen R. Winters states: "An all-lawyer commission would tend to exaggerate the purely technical skills of a good lawyer and the broader viewpoint of the layman or non-legal considerations of general intelligence, education, personal integrity and other human qualities is needed."⁹³

The degree to which lay participation will be stressed by the Carter Administration in staffing the circuit commission remains unclear. A comparison of the initial executive orders with the more recent ones suggests that the role of the lay citizen has been considerably reduced. Specifically, President Carter's initial order required that panels be composed of approximately equal numbers of lawyers and non-lawyers.⁹⁴ It further provided that each state within a panel's circuit be represented by at least one "resident."⁹⁵ His superseding order of May 1978, however, has no requirement concerning the ratio of lawyers to non-lawyers, and it specifies that at least one "lawyer" shall represent each state within the circuit.⁹⁶ Whether these modifications presage less lay participation remains to be seen.

Concerning the different district court voluntary plans, Senator Tydings' pre-Omnibus Act comparison of thirteen merit schemes found non-lawyer participation common.⁹⁷ Membership is often designed to correspond to the state's populace with respect to race, sex, hometown, occupation and party affiliation.⁹⁸ In addition, several plans seek to have a non-lawyer majority on the panels.⁹⁹

91. *Id.*

92. *Id.*

93. G. WINTERS, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development* in JUDICIAL SELECTION AND TENURE 29, 41 (G. Winters ed. 1973). *But see* Slotnick, *supra* note 20, at 321 ("To a statistically significant degree, we found that attorneys claimed to place less emphasis than layman on recruitment recommendations from various groups and individuals, including public officials, labor unions, civil rights groups, and non-legal and professional associations.")

94. Exec. Order No. 11,972, 3 C.F.R. 96 (1977).

95. *Id.* See Carbon, *supra* note 48, at 234.

96. Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (1978).

97. Tydings, *supra* note 15, at 116-17.

98. *Id.*

99. *Id.*

B. Selection Criteria

1. The Basic Standards

The basic standards by which judicial candidates are to be evaluated in filling positions under the Omnibus Act are set forth in the respective Executive Orders that have implemented the circuit and district procedures. Common to these orders are the requirements that the proposed nominees be members in good standing of at least one state bar, that they possess and have reputations for integrity and good character, and that they have demonstrated outstanding legal ability and commitment to equal justice under the law.¹⁰⁰

The more recent order that embodies the "standards and guidelines" promulgated for district evaluations is more particular in certain areas. For example, "substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing and familiarity with courts and their processes" are listed as evidence of "outstanding legal ability and competence."¹⁰¹ Further, with obvious reference to the trial function, criteria for district positions include "the ability and willingness to manage complicated pretrial and trial proceedings, including the ability to weigh conflicting testimony and make factual determinations, and to communicate skillfully with jurors and witnesses."¹⁰²

As noted above, for district positions, these characteristics may be determined without resort to an independent panel but in theory must be the basis for a recommendation in any event.¹⁰³ Understandably, these exemplary criteria have met with little criticism from proponents of selection reform. The degree to which these standards are enforced by the Attorney General at the district level will undoubtedly be subject to scrutiny by proponents and critics alike. As of the date of writing, President Carter has made four district appointments under the Omnibus Act, including a woman and a black. Recommended by Senator Edward Kennedy, all four have impressive credentials¹⁰⁴ that appear to comport well with the dictates of Carter's standards and guidelines order.

100. Exec. Order No. 12,059, 43 Fed. Reg. 20,949, § 4 (1978); Exec. Order No. 12,097, 43 Fed. Reg. 52,455, §§ 1-2 (1978).

101. Exec. Order No. 12,097, 43 Fed. Reg. 52,455, §§ 1-2 (1978).

102. *Id.*

103. See generally note 54 *supra* and accompanying text.

104. *Carter's First Appointment Under Omnibus Law Made*, L.A. Daily J., Jan. 29, 1979, at 1, col. 6.

2. Merit Commissions and the Screening Process

The purported desirability of merit commissions is premised, in part, on an ability to ascertain the required attributes of a potential judge in an environment free from inappropriate political influences.¹⁰⁵ However, the pre-Act evolution of Carter's merit selection at the circuit level has been attended by controversy concerning the extent to which inappropriate criteria have controlled panel recommendations. The issues raised highlight problems inherent in the reform's campaign for public acceptance.

In the absence of specific guidelines, each panel constituting the Circuit Judge Nominating Commission has adopted different procedures and criteria for selecting circuit court judges.¹⁰⁶ The abstract criteria listed in the executive orders, while easy to state and agree upon, are by no means self-evident in a given candidate. As Professor Maurice Rosenberg of Columbia Law School has observed, "as to the way to measure the amount of any given virtue a candidate possesses, there is only bafflement."¹⁰⁷

In determining the qualifications of a particular candidate, certain sources of information have been used. For instance, in the Sixth Circuit, applicant questionnaires and contacts with listed references provide much of the principal information.¹⁰⁸ Authored opinions and law review articles may also be helpful in appraising an applicant's writing ability.¹⁰⁹ A final source of data used in this circuit is the candidate interview.¹¹⁰ It is the aspect of selection procedure least cloaked in confidentiality.¹¹¹ As the most visible indication of the character of commission deliberation, the interview process has generated controversy in several instances.¹¹²

The Eighth Circuit panel, which convened in April of 1978 to fill a vacancy created by the appointment of William Webster to the Directorship of the Federal Bureau of Investigation, experienced difficulty with the interview process. Some panel members characterized their peers' questions as poorly worded, unnecessarily embarrassing, or sim-

105. See generally notes 32-39 *supra* and accompanying text.

106. *Id.* See Rosenbaum, *supra* note 47, at 126-27.

107. Rosenberg, *The Qualities of Justices—Are They Strainable?* 44 TEX. L. REV. 1063, 1068 (1966).

108. Carbon, *supra* note 48, at 238.

109. *Id.*

110. *Id.*

111. See, e.g., Fish, *supra* note 49, at 8, 11 (dealing with experience of Fourth Circuit candidates).

112. See, e.g., Carbon, *supra* note 48, at 240-41.

ply improper.¹¹³ Further, the panel's impressions of the interview process and those of the applicants often differed.¹¹⁴

Several candidates were asked about contemporary issues such as the Equal Rights Amendment, abortion, and first amendment freedoms.¹¹⁵ Regarding such questions, panel members have since emphasized that their objective was to evaluate the applicant's demeanor and legal reasoning processes and not to ascertain his personal predisposition.¹¹⁶ One candidate left the interview process convinced that his position on the Equal Rights Amendment had been an important factor.¹¹⁷ That two candidates who opposed the amendment were recommended to the President suggests otherwise.¹¹⁸ However, a candidate who was not selected for recommendation made public his contempt. His letter to a St. Louis newspaper reported that he had been excluded for personal opinions rather than evaluated on the basis of judicial competence.¹¹⁹

A similar circumstance occurred in the Fourth Circuit nearly a year earlier. Campaigning against the panel and its then novel role, both Senators from North Carolina publicly complained that interviewed candidates were "questioned about their philosophical beliefs and not about their legal experience."¹²⁰ To the same effect, a scathing column in a Washington newspaper characterized as "baffling" the replacement of panel questions concerning judicial process or judicial temperament with inquiries on substantive areas such as abortion, women's rights, state sovereignty, and the *Bakke* case.¹²¹ In the wake of the Fourth Circuit controversy, Assistant Attorney General Daniel J. Meador warned that while "attitudes" or "ideological factors" or views on specific public issues may be germane to the selection process, it is inappropriate for panel members to interrogate a prospective nominee about them.¹²²

Speaking directly to the issue of the merit commission's proper function, the Justice Department's distinction between appropriate and inappropriate interview questions is not a clear one.¹²³ As implemented, however, it is certain that the interview process is supposed to display

113. *Id.* at 241.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Fish, *supra* note 49, at 11, 13.

121. *Id.* at 11.

122. *Id.* at 12-14.

123. *Id.*

some measure of restraint at the interview stage. In this regard, former Attorney General Griffin Bell disapproved of the practice of asking potential nominees "a lot of questions about philosophy—the kind of things they wouldn't answer if they were in the Senate."¹²⁴

Reasoning that limitations on the scope of permissible questions exacerbates the already difficult task of finding the abstract judicial qualities set forth in the executive order, Professor Fish of Duke University argues that the spectrum of questions should be "wide-ranging" and "not narrow and technical."¹²⁵ He notes that the appeals courts are in reality the "final decision making institutions for virtually all cases including those of significant political content."¹²⁶ They are involved in non-static and sometimes political law making which requires the creative use of discretion. Ascertaining the degree to which this aptitude exists in a given candidate, the argument continues, requires the best available evidence including wide-ranging and searching interview questions. Rather than prohibiting panel use of a broad range of questions that are admittedly germane to the task before them, Professor Fish recommends that the spectrum of acceptable questions remain wide, but subject to a monitoring function performed by the chairperson.¹²⁷

More recently, an Eighth Circuit panel member observed that, although he was initially offended when candidates were questioned about the Equal Rights Amendment, "the answers were so illuminating that I concluded that the question itself is not improper." He added, however, that "it would be improper for a panelist to make a decision on a candidate based upon the candidate's stand on ERA."¹²⁸

Central to the success of the commission's concept in the selection of federal judges is its operation "with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office and in a manner which will ensure that the selection process will deserve and receive public trust."¹²⁹ Thus, if legitimate screening and interview objectives escape the public awareness, skepticism will hinder acceptance of the commission concept.

This can be viewed as part of the larger problem, mentioned earlier, of differing screening standards used among the various panels.¹³⁰ A

124. L.A. Times, Oct. 7, 1978, § I, at 1, cc1. 2.

125. Fish, *supra* note 49, at 15.

126. *Id.* at 14.

127. *Id.* at 14-17.

128. Carbon, *supra* note 48, at 241.

129. ASHMAN & ALFINI, *supra* note 7, at 41.

130. See Carbon, *supra* note 48, at 244.

lack of uniformity will result in lowered expectations regarding panel integrity among the public. But with uniformity the public should be afforded "some insight into [objective] qualities deemed by the commission as a requisite to a judgeship."¹³¹ To this end, the results of a survey of the Nominating Commission representatives are enlightening.¹³² A comparison of two of those panels participating indicates the relative importance of several factors in their evaluation of candidates. Among these potential factors that could be considered in the Sixth Circuit were age, sex, race, physical and mental health, writing ability, religion, party affiliation, education, character and personality, professional experience, and community and public service. Health, character and personality were given the greatest emphasis while party affiliation and religion played virtually no role.¹³³ In addition, the Sixth Circuit panel placed primary emphasis on an applicant's writing ability, while the Eighth Circuit gave community and public service greater preference. Both panels believed that age would be an important factor "only if the candidate were near or over sixty."¹³⁴

As for affirmative action, both panels, aware of President Carter's commitment to a more diverse federal bench, gave "some additional preference" to women and members of minority groups when candidates were otherwise equally qualified.¹³⁵ Panel representatives indicated that education and professional experience were additional factors to be considered, but they were not decisive.¹³⁶ Those interviewed also noted, however, that the "weight awarded each criterion varied with the individual applicant and his or her professional position."¹³⁷ Generalizations, therefore, were difficult to make regarding such criteria.¹³⁸

C. Confidentiality

Described by one commentator as an area "fraught with controversy,"¹³⁹ confidentiality of panel proceedings involves several competing interests. "There is first the public's right to know as much as possible about the applicants, their background and credentials, and

131. *Id.*

132. *Id.* at 243-245.

133. *Id.* at 241.

134. *Id.*

135. *Id.* at 242.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 245.

the panel's rationale in making final selections."¹⁴⁰ Opposing the public's right is that of the applicant to be assured anonymity and spared the embarrassment of rejection. The panel also has an interest in conducting its business in an atmosphere free of external political and special interest pressures.¹⁴¹

The current practice is to make known the names of those finally recommended to the President.¹⁴² Those rejected presumably remain unpublicized, those selected are honored,¹⁴³ and public confidence is enhanced when the President appoints a judge from a list naming those candidates found to be superior.¹⁴⁴

As to "actual panel deliberations and all communications between commissioners, between commissioners and a candidate, and between a commissioner and any person or organization with respect to the candidate's qualifications," the need for confidentiality is clear according to one commentator.¹⁴⁵

The recent AJS study suggests that few panel members would argue for open meetings but that many see advantage in communicating with the public to some extent before releasing their recommendations to the President.¹⁴⁶ Orientation sessions to which the press and public are invited and which precede the actual panel deliberations are gaining acceptance.¹⁴⁷ However, in the absence of specific guidelines from the Department of Justice, the nature and amount of information that may be released after a panel completes its recommendations continues to pose a problem.¹⁴⁸

The goal of educating the public concerning panel practices is important in order to combat the negative inferences that attended the *fait accompli* atmosphere of the former selection process.¹⁴⁹ However, this goal may not be fully realized because panel members are reluctant to disclose identities and credentials of capable applicants; they fear that such disclosures will breach confidential relationships established between the panel and such candidates and thereby jeopardize the success of the selection process.¹⁵⁰

140. *Id.*; Nelson, *supra* note 4, at 111 (quoting ASHMAN & ALFINI, *supra* note 7, at 230).

141. Carbon, *supra* note 48, at 245; Nelson, *supra* note 4, at 111.

142. See Carbon, *supra* note 48, at 235.

143. Nelson, *supra* note 4, at 111.

144. See Rosenbaum, *supra* note 47, at 128.

145. Nelson, *supra* note 4, at 111.

146. Carbon, *supra* note 48, at 245.

147. *Id.* at 237-38.

148. *Id.* at 245.

149. See Tydings, *supra* note 15, at 118.

150. See generally Carbon, *supra* note 48, at 245 n.33.

The balance between these potentially conflicting objectives should, however, be tipped in favor of public disclosure. The public's "right to know," which has recently experienced greater recognition in the courts, should play a significant part in determining disclosure guidelines that should be followed in the judicial merit selection process.¹⁵¹

V. CONCLUSION

A leading merit reform historian has observed, that "[i]f the merit plan is to continue to be touted as a major reform, it is important that we begin to document the successes and failures of presently existing plans."¹⁵² In this spirit, it is appropriate to acknowledge that, at least at the circuit level, the selection process is experiencing unprecedented openness. As distinguished from what was formerly a function of senatorial prerogative, the commission concept contemplates that anyone can apply or recommend others for consideration.¹⁵³ As public confidence increases, such access will prove to be the reform's salient feature.

At the district level, the continued adoption of voluntary merit plans combined with the administration's vigilance in demanding "representative lists of candidates"¹⁵⁴ should encourage a broader avenue to the expanded federal bench than that traditionally allowed. Already, a substantially larger proportion of blacks and women have been placed on the federal district bench by President Carter than were placed by other administrations.¹⁵⁵

Superficially inviting a less sanguine posture for proponents of selection reform, a study of Carter's pre-Omnibus Act appointments also suggests that party affiliation will continue to play a role in the selection of federal judges. Both those nominees produced by the circuit commission and those by the various methods at the district level tended to be prominent party activists.¹⁵⁶

With respect to President Carter's district appointments, Professor

151. See generally *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

152. Alfini, *supra* note 33, at 42.

153. Carbon, *supra* note 48, at 243.

154. President Carter has made public his dissatisfaction with the lists of candidates he has received from certain Senators in preparing to fill the positions created under the Omnibus Act. Senator Harry Byrd, for example, submitted a list of ten candidates which contained no women or minorities. *Nat'l L.J.*, Jan. 29, 1979, at 20.

155. Goldman, *supra* note 60, at 249.

156. *Id.* at 251.

Goldman observed that, "[a]lthough it is unlikely that previous political activity and political connections were [a] prime consideration, it is clear that well qualified candidates with prominent partisan activism or connections usually had an edge over those without it."¹⁵⁷ Further, with few exceptions, those selected from the merit commission recommendations to fill circuit positions had impressive records of service to the Democratic Party.¹⁵⁸ As with former administrations, at least ninety percent of those appointed have been of the President's party.¹⁵⁹

Arguing for reform in 1972, Glen R. Winters stated:

From the time of President Cleveland to the present administration, over 90 percent of those appointed have been from the party of the President It is a fundamental premise in our system of government that the judiciary functions best when it is nonpartisan and unattached to either the executive or legislative branch. Others contend that the President has the right to inject his particular judicial philosophy into the judiciary through his nominations. Unfortunately, a corollary of this view is that only those who agree with the President are qualified. Thus a potential judge clearly superior to another nominee might be excluded because his interpretations are not as "close" to the President's.¹⁶⁰

Professor Sheldon Goldman predicts that Democrats with a record of "party activity and/or political connections will continue even under 'merit selection' to have the inside track, all other things being approximately equal."¹⁶¹ Assuming there is a significant correlation between party affiliation and certain judicial decisional tendencies,¹⁶² the 152

157. *Id.* at 250. It should be noted that merit commissions merely aid the President by submitting lists of well qualified persons. Ultimately, however, appointments are an executive function. Even assuming a politically disinterested merit panel, therefore, partisanship can be a factor. The critical distinction, in theory, is that such considerations occur only after merit has been independently established. In this regard, there is disagreement as to whether panels should rank the nominees they send to the President. See Rosenbaum, *supra* note 47, at 125-26; Goldman, *supra* note 60, at 254.

158. Goldman, *supra* note 60, at 252.

159. *Id.* at 251.

160. G. WINTERS, *Merit Selection for Federal Judges*, in JUDICIAL SELECTION AND TENURE 183-84 (G. Winters ed. 1973). However, Professor Joel Grossman has suggested:

[T]he argument against eliminating partisanship from the recruitment equation need not rest entirely on a negative basis. It could be argued that considerations of partisanship (excluding only the more blatant uses of it) make a positive contribution to the nationality of the selection process. First they insure the selection process will be indirectly responsive to the popular sentiment. More important, they insure that the important question of the social and political philosophies of the judicial candidate will be considered.

. . . Although partisanship may be a pernicious influence in the actual rendering of judicial decisions, it *may* also be a desirable feature of the recruitment process GROSSMAN, *LAWYERS AND JUDGES* 219 (1965) (emphasis in original).

161. Goldman, *supra* note 60, at 252-53.

162. For example, judges who affiliate with the Democratic Party tend to be more liberal

new lifetime judgeships represent an opportunity for the Carter Administration to fundamentally reshape the federal judiciary.¹⁶³

Purist merit theory would suggest that partisanship should play no role in the selection of federal judges.¹⁶⁴ Yet, the literature is replete with more realistic analysis. As Dean Dorothy Nelson has written, "[p]erhaps no judicial selection plan will ever be entirely free from political influences, but any plan should be free of such unsavory by-products of partisan politics as the 'reward system' whereby individuals not otherwise qualified are rewarded for their service or contributions to the party."¹⁶⁵ Similarly, former Attorney General Herbert Brownell has asserted that "[p]olitics is an essential element of any democratic government. To deny its existence is to bury one's head in the sand."¹⁶⁶

Thus, in deference to the nature of our democratic society, the battle-lines of the merit reform movement have, for the time being, been drawn by the distinction between partisanship and patronage.¹⁶⁷ The Carter Administration has been successful in curbing the latter.¹⁶⁸ As for the continued imbalance stemming from the former, "[i]f merit selection works as it should, the surface 'imbalances' of the Carter judiciary may be insignificant in light of what will be recognized as the high quality of judges on the bench."¹⁶⁹

Jack J. Coe, Jr.

than Republican judges, particularly in matters involving economic policy. *Id.* at 253. See, e.g., Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Goldman, *Voting Behavior on the U.S. Courts of Appeal Revisited*, 69 AM. POL. SCI. REV. 491 (1975).

163. Goldman, *supra* note 60, at 247. See Schellhardt, *Reshaping the Federal Judiciary*, Wall St. J., Feb. 23, 1978 at 26.

164. See note 160 *supra* and accompanying text.

165. Nelson, *supra* note 4, at 107. See also Rosenbaum, *supra* note 47, at 127.

166. Brownell, *supra* note 26, at 23.

167. Carter's successor will have the same opportunities, at least in part, to correct what he perceives to be the 'imbalances' Carter left behind. This has been the political tradition of the United States and for much of our history the ebb and flow of national politics as it has concerned the judiciary has served us reasonably well.

Goldman, *supra* note 60, at 254.

168. See notes 59-61 *supra* and accompanying text.

169. Goldman, *supra* note 60, at 254.