Judging Judges: The Politicization of Judicial Nomination From Nixon to Reagan

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On June 21, 1986, President Ronald Reagan took to the airwaves during his weekly national radio address to defend Daniel Manion, the forty-four year-old Indiana state senator he had nominated to the Seventh Circuit Court of Appeals. Reagan passionately defended his nominee's judicial expertise, character, and his own administration's overall commitment to nominate judges who have a "strict constructionist" jurisprudence and to defend them against slurs from Democratic senators. Reagan blamed Senate partisanship for blocking Manion's nomination: according to the President, Manion "doesn't conform to the liberal ideology of some Senators. In fact, one Senator blurted out as much in the confirmation hearing. 'I think you are a decent and honorable man, but I cannot vote for you because of your political views.'"[1] Reagan maintained that Manion was "the kind of judge the American people want—and I think they know it."[2]

Democrats opposed Manion because they believed that he was too ideologically extreme to sit on the second highest federal court in the nation. They cited, for example, his co-sponsorship of a bill in the Indiana Senate that would have permitted the display of the Ten Commandments in all Indiana public schools. Many Democrats considered the bill a cavalier attempt to disregard a recent Supreme Court ruling that found such religious displays unconstitutional.[3] In contrast, Republicans used the American Bar Association's (ABA) "qualified" rating to contend that Manion received a passing grade and should therefore be confirmed.[4] Pundits saw the Manion confirmation as a possible

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[1] Ronald Reagan, "Radio Address of President to the Nation," June 21, 1986.
[2] Ibid.
[3] *Stone v Grahm* 449 U.S. 39 (U.S. Supreme Court 1980). In a 5-4 decision the Supreme Court ruled that a Kentucky state law requiring all classrooms to have a copy of the Ten Commandments unconstitutional under the Constitution's Establishment Clause.
[4] Howard Kurtz, "Judicial Nominee Stirs Ideological Fight in Senate," *Washington Post*, May 7, 1986.

"turning point in the continuing battle over President Reagan's effort to reshape the judiciary," with Manion representing "a flat-out fight over ideology."[5] Amid the controversy, the Senate narrowly confirmed Manion by 48-46 vote on July 24, 1986. Manion later assumed his position on the Seventh Circuit Court of Appeals where he presides as of December 2010. The confirmation battle over Daniel Manion was just one instance of Democratic opposition to the Reagan administration's commitment to populate the entire federal judiciary, not just the Supreme Court, with nominees who espoused a "strict constructionist" jurisprudence.[6]

Reagan, of course, was not the first president to take an interest in the ideological composition of the entire federal judiciary. In the wake of Richard Nixon's victory in 1968, a young staffer named Tom Charles Huston wrote a seven-page memo concerning the importance of nominees selected for the lower federal district and appellate courts. It began: "Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench—not merely to the Supreme Court, but to the Circuit and District benches as well. Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office."[7] As a presidential candidate, Nixon criticized the judicial branch like none of his predecessors with the exception of Franklin Roosevelt in 1937. His politicization of the federal judiciary helped attract southerners and other voters angered

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[5] Ibid.

[6] Strict constructionist jurisprudence was a term Nixon used during the 1968 presidential campaign. John Dean in *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme* Court defined strict constructionism as "A judge who is a 'strict constructionist' in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs—the latter two groups having been the principal beneficiaries of the Supreme Court's 'broad constructionist' reading of the Constitution."

[7] Cited in Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan* (New Haven, Connecticut: Yale University Press, 1997), 205-206. Hereafter cited as Goldman.

by the Warren Court's "activist" opinions. Nixon's hope of mounting a conservative counterrevolution and restraining the federal judiciary's alleged "legislation from the bench," however, remained unfulfilled during his presidency because the Democrats controlled both houses of Congress. During his second term, the Watergate scandal reduced his administration's clout and forced the President's resignation.

The process of appointing judges who were expected to hold a certain jurisprudence took several administrations to evolve into the efficient machine seen in current presidential administrations. Scholars focused on either Richard Nixon's decision to run against the "liberal" Warren court and Jimmy Carter's decision to utilize merit selection to choose federal judges in a non-partisan manner, as the president who definitively altered the judicial selection process. Both of these presidents' changes, however, paled in comparison to the systemic transformations in the judicial selection process that occurred during the Reagan administration.

The Reagan administration's politicization of the judiciary became one of its most indelible legacies for the American political landscape. Reagan made all the courts, not just the Supreme Court, an important campaign issue. The 1980 Republican Party platform pledged the appointment of judges "who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens." The Republicans promised to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[8] Such bold statements set the stage for

[8] Republican Party Platform for 1980 election in Goldman, 297.

the Reagan administration's successful policy to appoint young and conservative judges to the federal judiciary throughout his presidency.

In this paper I will argue that Reagan did politicize the federal judiciary, but he did so in a way that departs from the general meaning of this term. Most pundits and politicians during the Reagan era felt that he politicized the judicial branch through appointing ideologically extreme candidates. While this argument does have credence, as ninety-eight percent of all Reagan's nominees were Republicans, the real root of politicization revolved around the administration's desire to centralize the nomination process in the White House. Reagan seized upon Carter's implementation of merit selection boards, which moved the nomination process out of the Senate into a political gray area, to place the executive at the forefront of the nomination process. Reagan, as well as Carter, institutionally politicized the judiciary. The resulting conservative appointees were a consequence of the centralized nomination process that could effectively vet each candidate's political and judicial background ensuring that he or she was a conservative candidate.

Additionally, I will focus on three major changes that occurred during the Reagan administration. First, the administration centralized the nomination process in the White House and lessened the influence of senatorial courtesy in the selection process. Second, the Administration used several different government agencies to create a definitive analysis of a nominee's jurisprudence. Third, the administration utilized burgeoning conservative legal organizations, such as the Federalist Society, to identify and select dependable "strict constructionists."

The paper is divided into three separate sections. The first focuses on the selection processes of both Nixon and Carter because each of their approaches influenced the Reagan administration's handling of its selection process. Nixon's politicization of the judicial branch excited supporters who believed that he would end the era of obtrusive federal court decisions. His "law and order" campaign slogan also helped to consolidate an enthusiastic coalition of union workers, southerners, and conservatives.

In contrast to Nixon's frank attempt to politicize the courts, Carter spoke of minimizing ideological considerations during his presidency. Carter made "merit selection" a large part of his 1976 campaign, and he encouraged senators to create "selection committees" in order to recommend qualified judges.[9] Moreover, Carter endorsed the use of affirmative action in the selection process in order to increase the courts' racial and gender balance. Carter, therefore, created an apolitical selection process intent on achieving political goals. I will not evaluate the Ford selection process because his short Presidency enabled him to appoint relatively few lower-court judges.[10] Nixon and Carter played a critical role in preparing the nation for a change in lower courts, though each fell short in the execution of his plans.

The second section concentrates on the 1980 presidential election and Reagan's first term. As Nixon had done, Reagan politicized the federal courts in order to consolidate a disparate base ranging from wealthy and fiscally conservative Republicans to evangelical Christians. In contrast to Nixon, however, Reagan installed a centralized

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[9] Goldman, 238

[10] The Ford administration's appointment process mirrored the Nixon administration in that Ford generally deferred to the Senate to select nominees. Ford selected the dean of the University of Chicago Law School—Edward Levi—to be his Attorney General, but Ford and Levi rarely discussed judicial vacancies. When Ford did select a nominee he would write a letter to the director of the Presidential Personnel Office alerting him that the vacancy was filled. See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan* (New Haven, Connecticut: Yale University Press, 1997), 198-234, for more information about the Ford nomination process.

Committee on Federal Judicial Selection in the White House that bureaucratized and institutionalized judicial selection.

The final section of the paper discusses Reagan's second term and how the nominees became increasingly younger and more conservative as the administration reached its apogee. After his landslide electoral victory in 1984, Reagan made several changes to his staff. Most importantly, he appointed the prominent conservative, Edwin Meese III, the Attorney General in 1985. Meese aided Reagan in raising the White House's power in the nomination process to a level unseen even during his first term and in successfully fighting several battles over the appointment of controversial nominees. The administration remained at its zenith until 1986 when Democrats assumed control of the Senate and vociferously opposed many of Reagan's nominees. This period is essential to evaluating how the administration sought to combat negative press about the nominee selection procedure, specifically the ideological "litmus tests" and age restrictions it allegedly imposed.[11]

The Nixon Administration

On the eve of the 1968 presidential election, America was in the midst of political and social upheaval, which consumed the United States. Internationally, the nation continued drafting young American males to fight in Vietnam even though public support

[11] Liberal opponents of Reagan's judicial selection process believed that ideological "litmus tests" were used to disqualify potential nominees. These opponents believed that the selection process required potential nominees to state how they would rule on certain key legal issues, such as busing or abortion, in order to populate the judicial branch with "pure" conservatives. While the administration never admitted to "litmus testing" nominees, the judicial branch's perceived ideological composition lent credence to the prevalence of this practice.

for the war had waned after the January 1968 Tet Offensive. Economically, inflation became a growing concern due to increasing government spending and the slowing of economic growth that had buoyed the United States since the end of World War II. In this atmosphere, many Americans saw controversial decisions from the Warren court, such as *Baker v Carr* and *Miranda v Arizona*, as evidence that the unelected federal judiciary was forcing unwanted change upon the nation.[12]

Richard Nixon, the Republican candidate, seized upon this popular discontent with the courts and claimed that he was the "law-and-order" candidate who would restore discipline to the nation. To many Americans upset with the federal judiciary, the Supreme Court itself was no longer the bastion of justice, but the "criminals' lobby." Nixon used the Court issue to attract conservative Democrats who already felt marginalized by the increasingly progressive Democratic Party's support for civil rights. Eventually, southerners and middle-class whites, once stalwart Democratic supporters, would become the new Republican base. Many white southerners hated the Supreme Court's de-segregation of public schools and voted for George Wallace, the third-party American Independent Party candidate who ran a pro-segregation campaign. Wallace carried the entire deep south in the 1968 election. Like white southerners, middle-class whites grew wary of the civil rights movement's expansion into northern cities and began supporting Nixon. The loss of these two critical groups doomed Hubert Humphrey's chances of win the 1968 election.

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[12] *Baker v Carr*, 369 U.S. 186 (U.S. 1962), the Supreme Court concluded that it did have jurisdiction over state and local apportionment issues, which allowed the Court to institute the "one man, one vote" policy in subsequent cases. In *Miranda v Arizona*, 384 U.S. 436 (U.S. 1966), the Supreme Court ruled that any statements a suspect utters would prove admissible only if the individual was informed of his or her rights before making the statement.

Nixon's law-and-order rhetoric papered over differences between his supporters, virtually all of whom apparently felt uncomfortable with the dramatic changes that had occurred in the 1960s and the civil rights movement, in particular. Nixon successfully equated 1960s liberalism with the Supreme Court, an undemocratic entity whose decisions, he suspected, triggered an increase in violence around the nation. In fact, the Supreme Court was such a good target that it became an integral aspect of Nixon's acceptance speech at the 1968 Republican National Convention. "Let us always respect, as I do, our courts and those who serve on them, but let us also recognize that some of our courts in their dissents have gone too far in weakening the police forces against the criminal forces of this country," he retorted.[13]

Just two months before the election, a Harris Poll revealed that 51% of the nation believed that the courts were the "major cause" of a breakdown in law and order, while 49% did not.[14] In the former group Nixon held a nineteen-point lead over Humphrey.[15] Nixon had effectively used opposition to the Warren court to establish himself as the law-and-order candidate. In fact, a few weeks before the election, Nixon once again attacked a surging Humphrey's silence in regard to the Warren court's decisions. Nixon stated, "Whenever I begin to discuss the Supreme Court, Mr. Humphrey acts like we're in church. Mr. Humphrey's respectful silence [on controversial decisions] may stem from the fact that he spent four years in [Lyndon Johnson's] obedience school."[16] Nixon's law-and-order rhetoric struck a chord with many fearful Americans who sought order.

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[13] Bruce Murphy, *Fortas* (New York: Morrow, 1988). Cited in Mark Silverstein, *Judicious Choices* (New York: W.W Norton & Company Inc., 1994. Hereafter cited as Silverstein

[14] Louis Harris, "Law-Order Issue Aids Nixon," *Los Angeles Times*, September 13, 1968.

[15] Ibid.

[16] Ambrose, *Nixon.* Cited in Silverstein, 105.

These supporters, whom Nixon later dubbed the "silent majority," propelled him to the White House with a resounding electoral victory in the 1968 presidential election.[17]

Nixon entered the White House in 1969 with the expectation that he would curb the "activist" judges by using his appointment power to nominate "law-and-order" judges. Yet his administration proved unable to identify potential nominees who were "strict constructionists." It turned out that Nixon was not as focused on reforming the federal court as his rhetoric conveyed. In fact, Nixon mainly used his power to appoint judges who satisfied a certain supporter's desires, such as putting a southerner on the Supreme Court.

The administration's difficulties can best be seen through the type of judges nominated for Supreme Court vacancies, which is when the White House generally becomes most active in the selection process. Earl Warren wanted to retire from the bench in 1968, but Lyndon Johnson's decision to elevate Associate Justice and friend, Abe Fortas, to this position became mired in controversy due to their close relationship and Fortas's acceptance of funds for nine speaking engagements at the American University Law School. The Fortas nomination became a partisan battle in the midst of the 1968 presidential election, which fueled a great deal of the Democratic anger that Nixon would face throughout his term. Ultimately, the Fortas nomination failed and Warren decided to continue serving as Chief Justice until Nixon could find a suitable replacement. Nixon selected Warren Burger in 1969 to become the Chief Justice because

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[17] While Nixon only defeated Humphrey by one percent in the popular vote, one must remember that George Wallace's third party candidacy attracted a great deal of support in the deep south. The statistics, however, were deceiving because Nixon and Wallace, the two conservative demagogues, split the Republican vote. Between Nixon and Wallace they received almost 60% of the popular vote.

he was a prominent "law-and-order" judge. According to Mark Silverstein, Burger was an attractive option to the Nixon administration because he was a "well-known critic of many Warren Court criminal process decisions . . . Conservatives and southern Democrats in the Senate welcomed Burger with open arms."[18] To the dismay of many Democratic senators angry over the Fortas debacle, Burger gained the Senate's confirmation. Burger became the ideal Nixon nominee because of his prominent position on the District of Columbia Court of Appeals and his outspoken conservatism.

The Burger nomination would prove the only smooth Supreme Court nomination for the Nixon administration. The most embarrassing example occurred after Abe Fortas resigned from the Supreme Court in 1969, leaving the Nixon administration scrambling to find a suitable replacement. First, the administration selected Judge Clement Haynsworth, who's southern and "strict constructionist" background satisfied Nixon's judicial criteria. Yet in its rush, it did not carefully evaluate Haynsworth's background, and Democrats pointed to several issues about his impartiality. This mistake only became magnified when members of the administration stated that the Haynsworth nomination marked the first time that the president "put the efforts of the White House staff so earnestly behind a nominee for the Court."[19] The Democratically controlled Senate rejected Haynsworth 55-35, which Nixon aide John Dean attributed to "residual hostility of Democrats over Nixon's manipulation of the Court's seats."[20]

After the Haynsworth debacle, Nixon nominated another southerner to fill the vacancy—G. Harrold Carswell. Attorney General John Mitchell touted as "too good to

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[18] Silverstein, 107

[19] John Anthony Maltese, *The Selling of Supreme Court Judges* (Baltimore, Maryland: Johns Hopkins University Press, 1995), 84.

[20] John W. Dean, *The Rehnquist Choice* (New York: The Free Press, 2001), 18. Hereafter cited as Dean.

be true" due to Carswell's verifiably "strict constructionist" jurisprudence.[21] Once again, the Department of Justice and Federal Bureau of Investigation, which worked in tandem to investigate every nominee's legal and criminal records, failed to investigate the background of the nominee thoroughly. When the media uncovered evidence suggesting that Carswell was a racist, the nomination was doomed.[22] The Senate rejected Carswell's nomination 51 to 45 on April 8, 1970.[23] Once again, despite centralizing control over Supreme Court nominations in the White House, Nixon's staff failed to vet a nominee properly demonstrating the growing pains associated with this nascent executive power—judicial nomination.

The administration eventually selected Burger's childhood friend, Harry Blackmun, for the vacancy. The Senate confirmed Blackmun 94-0 on April 13, 1970, almost six months after its rejection of Haynsworth.[24] The confirmation demonstrated the Nixon administration's disorganization and carelessness and forestalled the appointment of a true "strict constructionist." In fact, in a 1971 dissent, a crotchety Hugo Black questioned the jurisprudence of the two Nixon nominations in regard to their ruling on a Connecticut divorce case from the previous year, *Boddie v Connecticut*. Black asked from the bench, "Is this strict construction? If ever there has been a looser construction of the Constitution in this Court's history, I fail to think what it is."[25] In many ways, the Burger Court continued to behave like the Warren Court, as it articulated

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[21] "Carswell Obituary," *Atlanta Journal and Constitution*, August 1, 1992. Cited in Dean, 19.
[22] Carswell was accused of helping to transfer a public golf course into a private golf course in order to avoid integrating the club. Additionally, he made several controversial remarks in regard to the civil rights movement. The worst of his comments came during the 1950s when he stated that the "so-called civil rights program [would] better be called the civil wrongs program." These two examples made Carswell seem like a racist who was ill-suited for the Supreme Court.
[23] Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork, and the Intriguing History of the Supreme Court's Nomination Battles*. Cited in Dean, 21.
[24] *Facts on File*. Cited in Dean, 23.
[25] Scott Armstrong and Bob Woodward, *The Brethren* (New York: Simon and Schuster, 1979), 124.

sweeping decisions that had broad national implications, such as *Roe v Wade* in 1973.[26] The Nixon administration appointed two more Supreme Court justices—Lewis Powell and William Rehnquist—but the nomination process continued to be mismanaged and chaotic.

The Nixon administration proved even more disorganized when it came to nominate judges for the lower federal judiciary. While Nixon wanted judges who shared his law-and-order philosophy, according to Sheldon Goldman, "Richard M. Nixon did not seem to have much interest in lower-court judgeships or the politics surrounding them . . . there are only a few instances where Nixon's hand can be seen in the selection process."[27] Nixon deferred to Republican senators to unearth and nominate conservative legal minds. The process continued the traditional nomination process where senators from the president's political party used their constitutional power of "advise and consent" to become the primary actors in the selection process. Senators would select candidates from their state who they felt deserved a federal court judgeship and forwarded those names to the president for official nomination. Nixon did not seek to challenge this longstanding practice.

The primary example of Nixon's opposition to a senator's prospective choice occurred when the Nixon administration refused to nominate one of the names Hawaii Senator Hiram Fong submitted for a vacancy on the 9th Circuit Court of Appeals. The

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[26] Republicans in the 1970s were still split into moderate and more extreme conservatives. Nixon tended to fall into the moderate branch of the Republican Party, which tended to be liberal on social issues and more focused on lower taxes, anti-communism, and the nation's safety. The more extreme conservatives incorporated religiously driven social values into their ideology. Not until the Reagan's election would the need to end abortions and reinstitute school prayer become the Republican Party's key tenant.

[27] Goldman, 200

president decided to fight the Fong nominee because each circuit court's domain extends over several states reducing the power of each individual senator, but even in this type of nomination Nixon proved weak. Senator Fong put a hold on all nominations for the entire circuit, thereby preventing the Senate from voting on any judge nominated to fill a vacancy on this appellate court in response to the perceived slight. The Administration quickly struck a deal with Fong so that he would lift the hold, and Nixon appointed a Hawaiian to fill the next vacancy on the 9th Circuit Court of Appeals.[28] Nixon demonstrated political deftness in solving this potential crisis, but such instances only illuminated the Senate's primary role in the nomination process. The Senate could place a hold on nominees or refuse to grant the nominee's hearing for the Senate Judiciary Committee merely if the president refused to play by the traditional nomination rules.

During Nixon's term he appointed 179 district court judges and forty-five circuit court judges. The demographic composition of Nixon's appointees was similar to that of other presidents who largely deferred to the Senate for judicial nominations. Nixon's district court judges were 49.1 years old, which was about two years younger than Kennedy and Johnson's appointees, though no information suggested that age was a factor when deciding potential nominees.[29] Additionally, in regard to race and gender, Nixon tended to follow tradition by appointing white males to the federal bench. In fact, the Nixon White House appointed only one woman and six African Americans to the judiciary during the entire length of his term.[30] Lastly, religion remained an important nomination factor during the Nixon administration and Nixon not only continued to nominate a high proportion of Protestants—68.7%—but also appointed a significant

[28] Goldman, 208
[29] Goldman, 226
[30] Goldman, 233

minority of Catholics (16%) and Jews (7%).[31] Overall, Nixon's appointees reflected the white, male, Protestant demographic, which was traditionally the most privileged class in America. Nixon did not seek to further the rights of minority groups because it could have posed a threat to his voting coalition held together with tinges of implicit racism.

Nixon, thus, failed to live up to the hard-line "law-and-order" rhetoric of his 1968 campaign. After a series of blunders with respect to the Supreme Court, the Administration largely deferred to established selection methods for lower courts, rather than to make a concerted effort to appoint "strict constructionists" in regard to the entire judiciary. Ultimately, the courts that Nixon railed against during his campaign would prove to be his undoing because judges prodded forward the Watergate investigation. Nixon's eventual resignation created a new form of political turmoil and uncertainty, which would lead to the emergence of a relatively obscure former governor from Georgia—Jimmy Carter—who promised to make the selection process completely non-partisan.

The Carter Administration

After Nixon's resignation as a result of his involvement in the Watergate scandal, Americans yearned for an honest and conciliatory president. In many ways, the nation was ready to elect a "Washington outsider" in 1976. Jimmy Carter capitalized on this anti-establishment sentiment, which aided his meteoric rise in American politics from an unknown one-term Georgia governor into a serious contender for the American

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[31] Goldman 232

presidency. Carter's campaign sought to end the "typical" partisan Washington way of doing business.

Wanting to change the culture in Washington, Carter particularly focused on reforming the federal judicial selection process in order to ensure that the most qualified candidate would be selected for each judicial vacancy. Carter sought to reduce partisan appointments and cronyism by putting in place a "merit selection" process in which a panel of non-partisan citizens would select a candidate for nomination to a vacant position. The idea of "merit selection" was revolutionary because it attempted to reduce senators' coveted ability to "advise and consent" regarding vacancies requiring the Senate's approval. For almost two hundred years, the Senate basically controlled the federal judicial nomination process because senators vehemently fought to preserve this form of power. Arguments between senators and the White House were commonplace, such as the Senator Fong incident during the Nixon administration, over not selecting a judge from a certain state for a vacancy. "Merit selection" became Jimmy Carter's opening salvo to alter the culture in Washington by ending these partisan fights. Selecting by merit would particularly help the federal judiciary, according to Carter, because only the most qualified candidate, rather than the most politically connected, would prevail. In June 1976, candidate Carter pledged that he would select judges "strictly on the basis of merit, without any consideration of political aspects or influence."[32] To many Americans, who distrusted lawyers due to their involvement in

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[32] Ronald J. Ostrow, "Carter's 'Merit' Selection Pledge Faced Long Odds," *Los Angeles Times*, February 4, 1978.

the Watergate scandal, "merit selection" seemed the perfect antidote for the partisan plague infecting Washington.[33]

During the 1976 election, the Supreme Court became a campaign issue once again, as Carter and his vice presidential running-mate, Walter Mondale, differed with respect to Burger Court decisions that appeared to weaken the Fourth Amendment's prohibition of unreasonable searches.[34] Not wanting to fall into the trap that befell Humphrey in 1968, Carter proactively took the offensive and sought to cast himself as a stalwart law enforcement supporter who was tough on crime. At a campaign stop in early September, Carter stated, "I do favor a shifting back toward the removal of technicalities which obviously prevent the conviction and punishment of those who are guilty. I believe the Burger court is moving back in the proper direction."[35] Carter's verbal assault on the Warren Court was reminiscent of Nixon's law-and-order rhetoric some eight years earlier.

In contrast to Carter, Mondale spoke out against these same decisions because he saw them as retreats from already established Warren Court legal precedents. Mondale, the former attorney general of Minnesota, bluntly stated that he "had trouble accepting

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[33] Many of the key individuals implicated in the Watergate scandal were lawyers, such as White House Counsels John Dean and John Ehrlichman. Many disgruntled Americans asserted called for reform in the judicial profession after the scandal. Responding to calls for reform, the American Bar Association released a new set of ethical guidelines, the *Model Rules of Professional Conduct* in 1983, and made all students at ABA approved law schools take a class on legal ethics. The ABA hoped that these two changes would salvage the legal profession's tarnished reputation.

[34] *United States v Matlock*, 415 U.S. 164 (U.S. Supreme Court 1974). A famous Burger Court decision, which allowed voluntary searches of a location as long as a third party who possessed common authority over the premises grants permission. *South Dakota v Opperman*, 428 U.S. 364 (U.S. Supreme Court 1976). The Supreme Court held that searches conduced on an impounded vehicle were legal under the Fourth Amendment because the police must be allowed to complete "general caretaking procedures." Both cases expanded the Fourth Amendment's scope because law enforcement could obtain searches without the time consuming process of legally obtaining a search warrant. This marked a drastic change from the Warren Court where the onus was on law enforcement to legally obtain evidence.

[35] Warren Brown, "Mondale, Carter Split on Court," *The Washington Post*, September 14, 1976.

some of the recent decisions of the [Burger] court."[36] These comments came mere days after Carter embraced these same decisions. The two running mates played down the philosophical fissure, but the difference demonstrated a split in the Democratic Party in regard to the Warren Court's legacy. More conservative Democrats, like Carter, had an increasingly negative view of the Warren Court, while the more liberal Democrats, like Mondale, embraced the Warren Court's expansion of rights for all Americans. Nevertheless, the minor difference between Mondale and Carter did not affect the Democratic ticket's political fortunes. Carter barely garnered the support of the nation, narrowly defeating the incumbent President Gerald Ford by 297-240 Electoral College votes. Americans hoped that Carter would usher in a new era of government that would be free from partisanship and cronyism.

While the first major attempt to institute merit selection on the federal level occurred during the Jacksonian Era (1829-1837), Carter's campaign reinvigorated this idea on the federal level for the first time in the twentieth century. Supporters of merit selection during the early twentieth century created the "Missouri Plan" to help professionalize the judiciary. The plan set up judicial panels composed of nonpartisan citizens, which selected candidates for federal positions who would be approved by an elected official.[37] Many states implemented versions of the "Missouri Plan," but Carter was the first president to propose implementing merit selection for the federal judiciary.

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[36] Ibid.

[37] W. Gary Folwer, "A Comparison of Initial Recommendation Procedures: Judicial Selection under Reagan and Carter," *Yale Law and Policy Review*, Vol. 1, No. 2 (Spring, 1983): 304. Hereafter cited as Folwer.

Before his inauguration, President-elect Jimmy Carter and Attorney General designate Griffin Bell sat down with the powerful Chairman of the Senate Judiciary Committee, James Eastland of Mississippi, to discuss how the Administration could implement merit selection while preserving senatorial authority in the nomination process. Eastland consented to merit selection for the circuit courts, but insisted that senators retain the right to appoint district court nominees.[38] Eastland supported merit panels for circuit courts rather than the district courts because circuit courts extended beyond the boundaries of a single state. Thus each senator had less power to influence the president about a particular vacancy and would not face voter retribution for supporting a judge who could eventually write a controversial circuit court opinion. Senator Eastland's support became crucial for the Carter administration. Without his cooperation, merit selection would have failed. Members of Carter's inner-circle, such as Attorney General Griffin Bell and White House Counsel Robert Lipschutz, began the process of creating the legal and institutional foundation for the merit panels shortly after taking office.

On February 14, 1977, a mere four weeks after taking office, President Carter issued Executive Order 11972, which created the thirteen Circuit Court Nominating Commissions and laid out the nominating procedures each commission would have to follow. Carter created thirteen, rather than ten commissions, the number of appellate courts in the federal system, because of the sheer size of the Fifth and Ninth circuits. The Fifth circuit panel was split east and west, while the Ninth circuit was split into northern and southern sections. The executive order also set out guidelines on the composition of

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[38] A. Neff, THE UNITED STATES DISTRICT NOMINATING COMMISSIONS: THEIR MEMBERS PROCEDURES AND CANDIDATES (1981). Cited in Fowler, 308.

the panels, as they were to have exactly eleven members including "members of both sexes, members of minority groups and approximately an equal number of lawyers and nonlawyers."[39] The panels were to give the president the five "best qualified" nominees within sixty days of a vacancy.[40] Senators were not forced to create nominating commissions because doing so would have violated the differentiated powers set forth in the Constitution, but Carter strongly encouraged senators to form them. The commissions especially appealed to Republican senators because they would gain a say in the selection of judicial nominees, whereas in the traditional nomination procedure, when a Democrat was president, they would had none.[41]

While the executive order showed Carter's commitment to implementing merit selection, it failed to address the Administration's other main goal—diversifying the entire federal judiciary. The executive order failed to specify that the panels should emphasize selecting qualified racial minorities or females. The effects of not explicitly directing the commissions to select diverse candidates was evident during the next year, when five of the panels in 1977-78 failed to nominate even one person of color.[42] Equally as distressing to the Carter administration, six failed to select one female candidate during this period.[43] The commissions' inability to diversify the courts frustrated many attorneys in the Carter administration who were losing hope that the goal of having a judiciary "resembling its national demographic constituents" was

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[39] Executive Order 11972, American Presidency Project, http://www.presidency.ucsb.edu (accessed January 1, 2011).
[40] Ibid.
[41] The traditional nomination procedure occurred through President Ford's administration. Generally, the president would allow senators from his own party to nominate judges for appointment to vacancies. When senators and the president were from differing parties, the senators' power in regard to judicial selection was greatly diminished. They would have some say in the process, but very little in comparison with their politically aligned peers. The process changed under Carter with the implementation of "merit selection."
[42] Goldman, 239
[43] Ibid.

achievable.[44] These attorneys, including White House counsel Robert J. Lipshutz, pushed Carter to push more aggressively for the implementation of affirmative action.[45]

Carter listened to the concerns of his advisors and issued Executive Order 12059 on May 11, 1978, which revoked Executive Order 11972 a year after its implementation. The overall structure of the previous executive order remained intact, as thirteen commissions composed of eleven panelists each still existed, but Carter added a portion specifically instructing the commissions to use affirmative action when selecting potential nominees. The commissions were "encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."[46] The last portion of the order explicitly revoked Executive Order 11972 leaving no possible confusion for the commissions: they were ordered to diversify the courts.[47] Carter had begun the process of using the newly created apolitical merit selection panels to achieve his highly political goal.

For several years before Carter's election, several Warren Court decisions strained the judicial system because the cases forced all courts to spend more time adjudicating each case.[48] Congress and Carter sought to remedy this problem through dramatically increasing the number of Article III federal judges.[49] After almost a year of political infighting, Congress enacted the Omnibus Judgeship Act of 1978 on October 20,

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[44] A. Neff cited in Fowler, 332
[45] Ibid.
[46] Executive Order 12059, American Presidency Project, http://www.presidency.ucsb.edu (accessed January 1, 2011).
[47] Ibid.
[48] *Gideon v Wainwright* 372 U.S. 335 (U.S. Supreme Court 1963) is an example of such a Warren Court case. *Gideon* ensured that all criminals would have the right to counsel. This case, along with a slew of others, increased the amount of time that the judiciary had to spend with an individual case because all suspected criminals were given the ability to defend themselves properly.
[49] Article III Judges are judges who have lifetime tenure once they gain the Senate's approval.

1978, which added an additional one hundred seventeen new federal district court judgeships and thirty-five new appeals court judgeships.[50] The act was a victory for the nation because the judiciary would have enough judges to do its job more efficiently. It was, moreover, a victory for Carter because the wording of the Act supported its case for merit selection. The language of the act was striking. It explicitly condoned merit selection when it said that the president should "give due consideration to qualified individuals regardless of race, color, sex, religion, or national origin."[51] Congress's support of merit selection boards effectively endorsed affirmative action because Carter's latest order had required the merit commissions to pay attention to race and gender in the nomination procedure. While the goals of the commissions seemed contradictory to critics, since the commissions were ordered to select on merit and diversify the courts concurrently, to the Carter administration these two ideas—merit and affirmative action—positively reinforced each other. Selecting the most qualified candidate who was a minority or a female became the Carter administration's understanding of merit selection's implementation.

Many members of the House of Representatives, however, were unhappy with the Carter's handling of the 1978 act because he opposed the Seiberling Amendment, which would have mandated the creation of detailed selection guidelines for each vacancy before the position could be filled. John E. Seiberling, and his bipartisan supporters in the House, hoped that clear selection criteria would make the nominating commissions' job easy and apolitical because the panels would be looking for certain traits or qualifications rather than weighing partisan ramifications. The amendment ultimately

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[50] Goldman, 242
[51] Omnibus Judgeship Act of 1978, cited in Fowler, 332

failed to gain traction in the Senate.

David S. Broder of the *Washington Post* investigated whether key members of Carter's staff supported this amendment and found that while Carter himself was initially in favor of any "action that would guarantee merit selection of every person appointed to a position of responsibility in the judiciary," the support of his administration for the amendment soon faded after the legislation gained momentum. Before the bill was enacted, associate Attorney General Michael Egan voiced the administration's new position: it would not support any obligatory senatorial commissions for district court appointments. The commissions could deal only with circuit courts because of the deal struck between President Carter and Senator James Eastland allowing the administration to create selection panels as long as they concerned only circuit court nominations. Because Carter needed to maintain Senator Eastland's support for the commissions, he sacrificed his key political goal in order to preserve the principle of merit selection on a smaller scale. Many Democrats were upset with the Carter administration's sudden desertion of an amendment that would have furthered his political desires.[52]

While Carter did not directly support the Seiberling Amendment, he did use his executive powers to implement the key idea in the amendment—more precise guidelines for the nominating commissions. In Executive Order 12097, issued shortly after the Omnibus Judgeship Act's passage, Carter said that District Court Nominating Commissions should select candidates who have "demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with

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[52] David S. Broder, "When 'Merit Selection' Got Mugged," *The Washington Post*, April 19, 1978. All of the facts from these two paragraphs discussing the amendment derived from this article in the *Washington Post*, which evaluated why the Seiberling amendment failed when it received such enthusiastic bi-partisan support in the House of Representatives.

complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes."[53] The selection protocol was specifically tailored for lower federal judges who would be handling more procedural issues required of judges at the trial court level. Carter did in fact encourage senators to create selection commissions for the district courts even though he could not support the Seiberling Amendment due to his inability to create district court nominating commissions. The Carter administration, however, did not push senators to create the commissions to the same extent as for the circuit court commissions because it saw the circuit courts as the location to lay a sound foundation for merit selection. The several senators who did create commissions for both the district and circuit courts wanted to implement merit selection throughout all levels of the judiciary.

The Omnibus Judiciary Act of 1978 gave Carter a unique power "to mold the shape and character of the law in our justice system," according to Leonard Janofsky, the American Bar Association's president-elect.[54] The law specifically allowed him to change the language of judicial selection, as people began to associate the nomination process with merit selection rather than the traditional partisan Senate-led process. Senators from both parties began to create the nominating commissions and by the end of 1978, thirty states, including six with two Republican senators, established [the commissions. Obviously, the Act showed that merit selection was an attractive option at the federal level.[55] In fact, optimism abounded in Washington DC, and pundits believed that the number of nominating commissions would increase as people became more

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[53] Executive Order 12097, issued November 8, 1978, American Presidency Project, http://www.presidency.ucsb.edu (accessed January 3, 2011).
[54] "Law: Here Come the Judges," *Time Magazine*, December 11, 1978, http://www.time.com (accessed January 6, 2011). Hereafter cited as "Law: Here Come the Judges."
[55] Folwer, 309

comfortable with the merit selection's benefits. A *Washington Post* article predicted that "if President Carter and Attorney General Bell can make this plan work, other senators will be under strong pressure to join in the plan, and the president will have made good on an important campaign promise."[56]

Political commentators may have been optimistic about the proliferation of nominating commissions, but not all senators shared the sentiment. Carter encountered heavy resistance from Democratic senators who believed that the nominating commissions would adversely affect the type of judges joining the federal bench. For instance, Senator Adlai Stevenson, a Democrat from Illinois, believed that senators must actively participate in the nomination process because the judges must be convinced to take the position due to the substantial pay cut they would have to take. Stevenson stated, "great judges don't answer newspaper advertisements. They have to be sought out, and commissions can't do that."[57] Stevenson's worries came to fruition when several of Senator Ted Kennedy's selections withdrew their names from consideration because they did not want to expose themselves to public scrutiny and potential rejection.[58]

Additionally, Senator Stevenson believed that the merit selection commissions were a charade and that politics could never be truly purged from the nomination process. Stevenson cited several distinguished politically active judges who lacked substantial judicial experience and therefore would not have been appointed under the new process.[59] Stevenson was not alone, however, because two other prominent Democratic senators, including Lloyd Bentsen of Texas, rebuffed Carter's request and refused to create the

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[56] "The New Federal Judges," *The Washington Post*, November, 15, 1978.
[57] "Law: Here Comes the Judges."
[58] Ibid.
[59] Ibid.

nominating commissions.[60] These senators' concerns were understandable because they wanted to preserve their right to "advise" the president and to maintain a certain level of autonomy when selecting judicial nominees. The administration successfully fought to create and implement merit selection, but not all senators had the opportunity to adopt it because of Carter's loss in the 1980 presidential election.

With the legal and institutional steps toward establishing the merit commissions complete, the Carter administration began the process of ensuring that the panels followed the selection guidelines, especially those aimed at constructing a "pluralistic judiciary." Carter's officials believed that a racially and gender diverse legal system could increase the "confidence of the diverse groupings in a pluralistic society . . . [over] a judiciary overwhelmingly composed of one race, one social class, and one political orientation."[61] Affirmative action became the tool to achieve this goal.

In general, the nomination procedure that emerged under Carter followed the same screening process that previous administrations employed. When a nomination arrived from the circuit court selection commissions, the Justice Department, the American Bar Association, and the Federal Bureau of Investigation would evaluate a potential candidate's suitability for nomination and report their findings to the Senate Judiciary Committee.[62] The American Bar Association played a particularly key role in the selection process because it rated candidates on a scale ranging from "not qualified" to "exceptionally well qualified."[63] These ratings influenced how senators voted because

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[60] Ibid. The other senator mentioned was Democratic Senator Paul Sarbanes of Maryland.
[61] Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 *Judicature* 246, 253 (1978). Cited in Fowler, 339
[62] Fowler, 306
[63] During the Eisenhower administration, the ABA became entrenched in the nomination process because Eisenhower refused to nominate a candidate deemed unqualified. The ABA weights several factors, such as past work experience and legal education, which helps to determine the rating given to each nominee.

it provided insight into a nominee's qualifications and helped ensure the president did not appoint scores of unqualified judges.

The administration took a more hard-line approach to affirmative action mid-way through Carter's presidency. White House Counsel Robert Lipschutz became increasingly distrustful of the Justice Department's willingness to force the commissions to comply with the Executive Order 12059, which ordered the panels to pay attention to race and gender when evaluating potential nominees. Lipschutz gained Carter's support for implementing affirmative action because they both saw it as one of the "political aspects of this process [diversifying the courts]."[64] To Carter, the ends justified the mean: He would continue supporting a highly politically charged procedure to make certain that the demographics of the judiciary approached the nation's. Attorney General Griffin Bell also voiced the administration's position on affirmative action even though he was not a vehement supporter. Testifying in front of the Senate Judiciary Committee, Griffin stated that the administration would support the nomination of a "qualified" black woman over the nominations of three "extremely well qualified" white men.[65] The Carter administration, along with supporters of affirmative action, rationalized supporting a less qualified minority candidate because it believed that the minority individual failed to receive the same opportunities as a white male candidate. In essence, affirmative action helped to rectify past inequities.

While Carter, Bell, Lipschutz and their allies supported affirmative action, not all senators believed that this policy was necessary. Critics of affirmative action lamented

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Though the ABA has been criticized for favoring lawyers who worked in large firms, it has remained an important on all judicial appointments because of its ability to rate each candidate on a standard guideline.

[64] Goldman, 257

[65] *Selection and Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, Part 8, 96th Cong., 2d Session 4 (1980). Cited in Fowler, 334.

that "the administration could not maintain its affirmative action goals and still claim the system was based on merit."[66] The only way to truly implement merit selection, according to Democratic Senator Harry Byrd of Virginia, was to select only the "best qualified"[67] candidate. The Carter administration, however, disagreed with such critics, because it believed that affirmative action and merit selection were mutually supportive of each other rather than inherently contradictory goals. Merit commissions merely nominated already qualified minority and female individuals who were simply ignored during the traditional nomination procedure. The Carter White House found support in an American Judicature Society study, which reported that 43% of all judicial candidates felt that they would not have even been considered for their position if not for the panels because they lacked the requisite political connections.[68]

The Carter administration vigorously fought with senators who refused to follow the guidelines requiring merit commissions to select minority and female candidates. One such fight involved Senator Harry Byrd, who battled the Carter administration after his nominating commission recommended ten white males for a vacancy. Objecting to the actions of Byrd's commission, the Carter White House ordered Byrd to select new nominees. Byrd was frustrated by the administration's use of affirmative action and refused to select another nominee that the commission did not approve because he believed that he was "defending merit selection" and was being criticized for following "precisely what the President, in a hand-written letter, asked me to do."[69] Eventually, Carter relented and nominated two men from the list, but he also included a third name—

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[66] Fowler, 334.
[67] Ibid.
[68] A. Neff. Cited in Fowler, 333.
[69] Samuels & Goodman, "Byrd's Ploy, Adlai's Pals," *Nation*, Jan. 20, 1979, at 46-49. Cited in Fowler, 319.

James Sheffield, a black state judge from Virginia—to increase diversity on the judiciary. The Senate approved the two men selected by the commission, but Sheffield ultimately withdrew his name from consideration because of questions regarding his tax returns.[70] Nevertheless, Sheffield's nomination to a federal judgeship demonstrated that the Carter administration would still diversify the judiciary even if senators resisted the new policy.

Though Carter failed to gain reelection in 1980, his merit selection panels did increase the number of female and minority judges in the judiciary. Between 1979-1980, the percentage of white male judges nominated to fill district court vacancies differed as a result of whether a merit commission panel was or was not evaluating candidates.[71] When such panels were used, 74.1% of candidates selected were white males. When merit commissions were not utilized and senators directly selected nominees, white males accounted for 80.4% of all candidates selected.[72] Similar statistics exist demonstrating that the merit selection commissions were more likely to nominate female candidates than candidates selected without the panels.[73] The statistics, albeit it small and over a relatively short period of time, demonstrated that the commissions successfully fulfilled their purpose of diversifying the courts through putting forward qualified minority candidates who lacked the political connections.

Additionally, the merit commissions did help professionalize the judiciary, as 75% of all judges nominated to the circuit court between 1979-1980 received the two

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[70] All facts from this paragraph from Fowler, 319.

[71] While Carter did not encourage senators to create nominating commissions to the same extent as the circuit court nominating commissions, by 1979 district court nominating commissions selected about sixty-six percent of all district court nominees. The number of states using the district court nominating commissions was roughly the same as the number of circuit court nominating commissions in 1979.

[72] Fowler, 333.

[73] Ibid. When merit selection was used 16.1 percent of all candidates chosen were females between 1979-1980. In contrast, female nominees fell to 8.9 percent when a senator selected candidates without consulting a merit selection panel.

highest scores from the ABA, "well qualified" or "extremely well qualified."[74] The ABA became so crucial in the nomination process that Carter rarely went forward with a nominee who received a "not qualified" rating. The Carter administration dutifully followed the ABA ratings a staggering 98% of the time for all judicial candidates and only nominated someone deemed unqualified a mere five times.[75] The prominent role the ABA played in the judicial selection process illustrated Carter's personal goal of increasing the level of transparency in the nomination process by having an apolitical external organization to check potential candidates to ensure they were qualified to work on the federal bench. The ABA effectively emerged as an additional check on the president's appointment power, which satisfied many Americans who were still wary of potential executive branch excesses after Watergate.

One peculiarity, which Carter received heavy criticism from conservatives about, was the disproportionate number of Democratic judges nominated to the federal bench. Almost 90% of all district court appointees during Carter's one-year term were Democrats, which seems like an alarmingly high number when politics was not supposed to play a role in the nomination process. Similar statistics exist for the second half of the Carter administration, 1979-1980, with 80% of all appellate court nominees identifying as Democrats.[76] The high proportion of Democratic judges appointed, however, can be attributed to the individuals selected to serve on the commissions. In fact, a study of the nominating commissions' ideological constitution found that 86% of all panelists self-

[74] Fowler, 352.
[75] Goldman, 268.
[76] Goldman, 281

identified as Democrats.[77] In an attempt to remove all traces of politics from the nomination process, Attorney General Bell stopped including party affiliation on resumes of persons shown to President Carter in April 1978.[78] The cause for the disproportionate amount of Democrats selected can be attributed to the panels and senators rather than to the Carter administration.

The evidence refutes claims that the Carter administration intentionally ideologically politicized the judicial branch through directly meddling in the nomination process. The administration attempted to make the selection process as apolitical as possible in the White House, but the commissions were vulnerable to influence from senators. For instance, a study found that a sizeable minority of senators—31%—claimed to have played some role in selecting panelists.[79] The Carter administration encouraged senators to create the commissions, but afforded the senators a great deal of autonomy in regard to actually forming the panels. This freedom allowed senators to achieve certain partisan goals through meddling in the commissions' ideological composition. Even though senators did sustain a partisan element in the merit selection process, the Carter White House still responded to criticism of ideologically politicizing the judicial branch by tempering merit selection's goals. The administration asserted that merit selection's ultimate purpose was not to exclude political factors entirely, but to

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[77] L. Berkson & S. Carbon, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980). Fowler, 335.
[78] Goldman, 264
[79] Elliott Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?* (pt. 1), 64 *Judicature* 60, 63 (1980). Cited in Fowler, 321.

"prevent their crass application."[80] Merit selection still had partisan elements, but Carter did accomplish a great feat by challenging the traditional nomination process.

The Carter administration's use of merit selection had a profound effect on the selection process, judiciary, and nation in three distinctive ways. First, by reforming the traditional selection process, the Carter administration transferred the nomination power from senators to external, supposedly nonpartisan, commissions. The movement of power away from the Senate placed nominations in a liminal space where neither the Senate nor the executive had complete control over the process. Future presidents, and especially Ronald Reagan, moved the nomination procedure inside the Executive Branch where it continues to reside. While merit selection's support may have faded over the years, the Carter administration should be recognized for initiating the transference of power away from the Senate.

Second, the Carter administration drastically altered the gender and racial composition of the judiciary. To critics of the Carter White House, merit selection and affirmative action may have seemed contradictory, but in actuality, the Carter administration wanted to ensure that all qualified candidates received a proper evaluation. White House Counsel Robert Lipschutz summed up this idea best when he stated, "there are well qualified minority and female lawyers in most jurisdictions today. If the process is open enough to permit identification of these people, some can and should be appointed."[81] Many of Carter's minority appointments, however, such as Patricia Wald and Ruth Bader Ginsburg, were quite liberal, which fomented tension between the

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[80] Lipshutz & Huron, *Achieving a More Representative Federal Judiciary*, 62 *Judicature* 483 (1979). Cited in Fowler, 335.

[81] L. Berkson & S. Carbon, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980). Fowler, 335

minority Republican senators who asserted that Carter used merit selection boards to further his own political goals. Nonetheless, a 1979 *Los Angeles Times* article supported the case for broad searches, which would undoubtedly lead to more diversity on the federal bench. The article stated, "an open and broad selection process is the vital element in the effort to increase the quality of the federal bench."[82] The judiciary did ultimately come to reflect the nation's demographics more accurately due to the administration's willingness to forgo short-term political gains in order to make the judiciary more responsive to the needs of a changing nation.

Third, Carter revolutionized the judicial nomination process by selecting qualified candidates who had past experience as judges. Generally, presidents looked to lawyers who had prosecutorial experience, but Carter wanted judges who would be able to deal with their caseloads in an expedient and efficient manner. Selecting former judges also became a hallmark of the Carter presidency; he wanted to truly professionalize the judiciary. Subsequent presidents were forced to follow Carter's legacy and nominate judges who had experience at the trial court level. In fact, all members of the Supreme Court as recently as the 2009-2010 term were all once circuit court judges. Modern presidents now must consider previous judicial experience when selecting a nominee because it makes candidates appear more qualified and ready to begin working effectively in their new position.

The one area where Carter's legacy remains in doubt is in regard to whether he intended to influence the course of the law by selecting certain nominees. According to Sheldon Goldman, "there is little evidence in the presidential papers of any deliberate attempt to use judicial appointments to affect the law in affirmative action or any other

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[82] "Judges: The Urgency of Merit," *Los Angeles Times*, January 2, 1979.

policy domain important for the president."[83] In contrast, Gary Fowler viewed Carter's nominees more cynically. He believed that regardless of rhetoric, Carter wanted to appoint a certain kind of judge, a conclusion he draws based on the disproportionate number of Democrats selected. Fowler stated, "Carter wished to appoint judges who agreed with him not only politically and philosophically, but also who sought to reform the system itself."[84] The evidence seems to support Sheldon Goldman's claim that the Carter administration really attempted to rid the system of partisanship because the administration only fought with senators when the commissions refused to select candidates who were minorities, and often liberal. Otherwise, the Carter administration had no vested interest in any potential nominee individually because its focus was on altering the judiciary's racial and gender composition.

Carter's changes to the judiciary were revolutionary in nature, but several other factors prevented Carter from further changing the judiciary during a second term. Because inflation and unemployment rates remained persistently high, the American economy bogged down into "stagflation." The nation yearned for a new political leader who provided tangible solutions to end the nation's financial misery. Ronald Reagan challenged and defeated Jimmy Carter in the 1980 election by promising to reduce both spending and taxes to revitalize not only the nation's economy, but also the nation's prestige. Reagan also wanted to change the federal judiciary, as he, along with other key conservative supporters, planned to end the era of liberal legal dominance by appointing truly conservative judges.

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[83] Goldman, 259.
[84] Fowler, 331.

The Reagan Administration: 1981-1985

Ronald Reagan's rise to prominence represented the emergence of a more conservative Republican ideology, which fused anti-communism, small government, and pro-family Christian morality into a coherent ideology. This form of conservatism greatly differed from the fiscal conservatism that Northeastern Republicans, like Nelson Rockefeller, practiced, which mainly focused on lower taxes rather than social issues. The "new right" derided Northeastern conservatism as interested only in reacting to the Democrats instead of creating a broad based platform with wide appeal. Reagan's campaign focused mainly on economic issues and the need to shrink the size of government. But nestled within the 1980 Republican Platform lay a few seemingly mundane sentences regarding the federal judiciary that gave an early glimpse into the Reagan administration's strategy of using the courts to institute conservative social ideas. The platform bluntly stated that the Reagan administration would "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[85] This sentence demonstrated that the Reagan administration would select judges who would not be as likely to enact social policy from the bench, which in itself endorsed a pro-life agenda. Additionally, it criticized the Supreme Court for legalizing abortion, which conservatives vehemently disagreed with because the Reaganites objected to a constitutional "right to privacy."

While the judiciary may not have been an integral portion of the campaign, Mark Silverstein asserts that, much as Richard Nixon had done some twenty years before, Reagan used unpopular "liberal" Supreme Court rulings to unite a disparate collection of

[85] Republican Party Platform for 1980 election in Goldman, 297.

conservatives into a solid electoral base.[86] Reagan's base ranged from wealthy individuals who wanted lower taxes to hardcore social conservatives who wanted to reinstitute school prayer and make abortion illegal. These two groups were strange bedfellows because the wealthy individuals were more liberal on social issues and supported Reagan for economic reasons. The judiciary, however, became a brilliant way of unifying both groups. Social conservatives realized that no president, no matter how conservative, could implement their desires because the judiciary was the final arbiter of so many matters. Court decisions bound both the legislative and executive branches and state and local governments as well. Therefore, in order for social conservatives to achieve their goals, the composition of the judiciary itself would have to change so the courts were more amenable to the arguments of social conservatism. The Republican Party's stated intention to appoint a new breed of conservative judges satisfied the vocal social conservatives' desires. With the generally vociferous cries of the religious right quieted, wealthy voters, according to Silverstein, "could easily support a Reagan presidency, secure in the knowledge that Supreme Court rulings on a host of privacy and First Amendment issues precluded enactment of the New Right's agenda. Winking at the language of the devout was a tiny price to pay for a reduction of marginal taxes."[87]

Reagan's ability to unify several different groups into a cohesive base allowed him to defeat Carter easily in the election of 1980. The electoral results demonstrated just how unpopular Carter had become, as Reagan handily routed Carter 489-49 in the Electoral College and by almost nine points in the popular vote. The Democratic base that Franklin Roosevelt erected during the election of 1932 had finally been thoroughly

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[86] Silverstein, 117
[87] Ibid.

wrecked. The era of conservatism was beginning in American politics with the overt goal of repudiating liberal policies, which were seen as too intrusive into the lives of most Americans. All aspects of the nation, ranging from the economy to the judiciary, were in store for a great change.[88]

While the Carter administration transformed the judicial nomination process, the Reagan administration quickly terminated many of Carter's practices and objectives and implemented its own selection process managed directly from the White House. The guiding principle of the Reagan administration was to appoint the brightest conservative legal minds to the Supreme Court and the appellate and district courts so that, once there, they would further advance the conservative agenda from the bench. Reaganites planned to diversify the courts through appointing a group of ideologically homogeneous judges to the federal bench. The achievement of this end goal drove the Administration's future decisions to alter the judicial selection process. Through transforming the courts' ideological composition, the Reagan administration believed that it could constrain future presidential administrations in two distinct ways. First, all court opinions are final and cannot be changed except by the judiciary itself or through a constitutional amendment, which has only occurred sixteen times in the nation's history. Binding decisions could create potentially invulnerable barriers to future Democratic presidents and Congresses. Second, the appointment of young lawyers to federal judgeships for life terms would allow the Reagan administration's effects to be felt into the twenty-first century and even beyond that if Republicans continued to win presidential and legislative elections with

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[88] Other scholars, such as Laura Kalman in *Right Star Rising: A New Politics, 1974-1980*, view the 1980 election as a repudiation of Carter's policy rather than an endorsement of conservatism.

any regularity and stuck to Reagan's policies and procedures in this sensitive and vital arena.

The Reagan administration broke with the Carter administration shortly after officially assuming office. On May 5, 1981, Reagan issued Executive Order 12305, which explicitly and officially revoked President Carter's "Executive Order 12509 of May 11, 1978, as amended, establishing the United States Circuit Court Nominating Commissions."[89] The Reagan White House believed that it needed a more hands-on approach to ensure that conservatives were selected. Leaving the decision to panels, even composed of conservatives, was too much of a gamble. Fred Fielding, Reagan's Chief White House Counsel, asserted that the nominating commissions, "didn't really depoliticize the nominating process, they sometimes resulted in delays, and they did not produce judges of higher quality."[90] In fact, Fielding cited the disproportionate number of Democrats chosen during the Carter administration to prove that merit selection was merely a sneaky way to appoint "activist" liberal judges. Liberal "activism," in other words, was about to be replaced by a powerful dose of conservative "activism."

Additionally, the Reagan administration stopped focusing on diversifying the judiciary. Justice Department spokesman Thomas DeCair reiterated previous administration statements it would appoint "well qualified women and blacks to judicial positions but that race and sex would not be factors in the process."[91] Reagan would appoint minorities to judicial vacancies as long as they were staunch conservatives. Rather than attempting to diversify the courts' gender and ethnic composition, the

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[89] Executive Order 12305, May 5, 1981, www.americanpresidencyproject.com (accessed January 17, 2011).
[90] Stuart Taylor Jr., "Reagan Judicial Plan is Defended," *The New York Times*, May 8, 1981.
[91] Ibid.

Reagan administration openly preached and erected a nominating process aimed at ensuring ideological homogeneity. All other desires with respect to the judiciary were secondary to the desire to repopulate it with conservatives.

The executive order, however, failed to abolish the district court nominating commissions because many senators were pleased with their ability to select candidates generally ignored by the traditional nomination process. For instance, Senator John Heinz of Pennsylvania, a Republican, stated, "indeed, I am very proud of the results of our judicial nominating commissions."[92] Reaganites pragmatically allowed senators to decide where they wanted to keep the commissions that had been set up during the Carter administration. Paying deference to the Senate on an insignificant issue allowed Reagan to show that he respected the authority of the Senate and was willing to make concessions to get a deal, which strengthened the president's hand early in his first term. The district court nominating commissions were such a staple in politics that during the first two years of the Administration, 55.6% of all district court nominees were selected by the aforementioned method.[93]

Allowing the nominating commissions to remain for district court selections meant that nominating procedures for circuit court judges and district court judges would be different. On May 7, 1981, the President's Committee on Judicial Selection met and discussed the district-court level process. The committee decided that the procedure would begin as follows: "Republican Senator[s], Republican Congressmen, or other Republican sponsor, submit by letter a list of 3-5 nominees for judgeship to the OLP [Office of Legal Policy]." The OLP then reviewed the nominees' resumes and forwarded

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[92] *Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary*, Part 3, 97th Cong., 2nd Sess. 126 (1982). Cited in Fowler, 317

[93] Fowler, 316.

the names to the FBI for security clearance as well as to the ABA for qualitative evaluation. The "AG [Attorney General], DAG [deputy Attorney General], or OLP" interviewed each remaining candidate and then reported his recommendation to "[Chief of Staff James] Baker, [advisor to President Reagan Edwin] Meese, or [chief White House counsel Fred] Fielding." Once the final determination had been made, Attorney General William French Smith would draft a formal letter of nomination and present it to President Reagan. The rest of the nomination process involved prepping the nominee for questions he or she would likely face during the confirmation hearing. This process illustrated the administration's desire to have a thorough and well organized system that involved the White House at a particularly critical point in the nomination process. It must be stressed, however, that the Reagan administration's thinking focused heavily on the appellate court judges because they had the most profound impact on the law. Even so, its involvement in both circuit and trial court appointments was still much greater than that of almost all previous administrations.[94]

The selection procedure for circuit court judges during the Reagan administration, however, differed from the district court selection process and from all predecessors because of the way Reagan centralized it in the White House. According to Sheldon Goldman, under "Reagan, the center of judicial selection activity had been in the Deputy Attorney General's office, with an assistant to the deputy responsible for the details, and at times negotiations associated with the selection process."[95] The nomination procedure under Reagan for prospective nominees to the ten circuit courts of appeals began in the Justice Department's Office of Legal Policy, which would vet each candidate to ensure

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[94] The entire district court selection process cited from President's Judicial Selection Committee Meeting, May 7, 1981, Fred Fielding Box 2 of 3, CFOA 425, Reagan Library.
[95] Goldman, 291

that he or she was in fact a conservative. After the Office of Legal Policy reviewed a candidate, the rest of the top brass in the Justice Department, including the Attorney General and the deputy Attorney General, would meet and make specific recommendations to the President's Federal Judicial Selection Committee (FJSC), the key Reagan innovation. This committee created the active White House presence seen in all subsequent administrations. Many top White House officials, such as the chief of staff, the White House counsel, and the assistant for legislative affairs, attended this meeting and discussed pending judicial nominees in addition to crafting a long-term judicial selection strategy. This ensured that the highest levels of the White House would actively participate in the selection of judges. All aspects of the Executive Office of the President, ranging from legislative affairs to press relations, had a vital interest in creating a unified message so each candidate would face the least political problems when gaining the Senate's confirmation. A singular message ensured that all of the administration worked together to verify that all nominees would receive the entire administration's support.

The initial vetting brief that the Office of Legal Policy used for all nominees was about a page in length and briefly outlined who nominated the prospective judge, the law school the person attended, major previous legal work, and any potential problems. This form was succinct and provided an objective evaluation of the nominee's background that could shed light on any questions that might hinder Senate confirmation. The length of the form also showed that some people in the administration were at least familiar with the nominee because the fraternity of conservative lawyers was relatively small. Important Reagan advisors, such as Edwin Meese, Steve Markman, and Kenneth Cribb,

belonged to nascent conservative legal groups, such as the Federalist Society. The conservative legal network was small enough that administration officials personally knew many of the possible nominees and could personally vouch for their jurisprudence.

While the Reagan administration ambitiously articulated its goal to retake the judiciary, actually finding conservative lawyers proved far more difficult because no conservative legal professional organizations existed. For instance, very few law schools even taught non-liberal jurisprudence because the most distinguished legal minds of the era were almost exclusively liberal. Jack Balkin asserted that a lack of well-known conservative law professors was especially problematic in law because "the more powerful and influential the people who are willing to make a legal argument, the more it moves from loony to the positively thinkable."[96] The dearth of distinguished conservative law professors outside of the University of Chicago and a few other universities during the mid-twentieth century was just one of the many institutional barriers that stunted the conservative legal movement's growth because young law school students did not have the professors to teach them about conservative jurisprudence. Consequently, the conservative legal movement was only just developing an alternative jurisprudence to the established liberal orthodoxy at the time of Reagan's election. Yet the conservative movement did have one distinct advantage that allowed it to grow relatively quickly, a concise ideology advocating judicial restraint. The main problem became how to articulate this ideology to a public unaccustomed to learning about jurisprudential schools of thought.

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[96] Jack Balkin, "*Bush v. Gore* and the Boundary Between Law and Politics," *Yale Law Journal* 110, no. 8 (2001): 1444-45. Cited in Stephen Teles, *The Rise of the Conservative Legal Movement*, (Princeton, New Jersey: Princeton University Press, 2008), 13. Hereafter cited as Teles.

Creating the language to characterize conservative lawyers was an essential but often overlooked factor, which helped alter the type of judges appointed to the federal bench. Nixon had preached about the need to appoint "law and order" judges who would make the courts friendlier to honest citizens than to criminals. Law and order, however, became a loaded term synonymous with racism, which made it woefully inadequate to describe the type of judges that Reagan hoped to appoint. During Reagan's first term judges were still referred to as "strict constructionists," and the administration began searching for a term that described the judges in more politically appealing ways.[97] The Reagan White House was not especially aggressive about judicial appointments during the first term because it had both a relatively moderate Attorney General in William French Smith and Reaganites lacked the language to sell conservative lawyers convincingly to the public if a confirmation battle was to occur. Not until the beginning of Reagan's second term did the conservatives find a brand for themselves—originalists—that helped crystallize the difference with liberal jurisprudence. Once the language was established Reaganites vigorously fought to appoint increasingly younger and more conservative judges.

The Reagan administration felt impelled to take a more active direct role in the nomination process as a result of the lack of well-known conservatives. With the exception of the few prominent ones, like Robert Bork, the Department of Justice had genuine difficulty finding lawyers who fit the desired mold. For most of Reagan's first term, the administration sought to create a systematic way of discovering and nominating conservative legal minds for judgeships. Therefore, while the basic skeleton of the

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[97] Stephen Teles, "Transformative Bureaucracy," *Studies in American Political Development*, April 23, 2009, 75. Hereafter cited as "Transformative Bureaucracy."

nomination procedure was already established in the form of the FJSC, the rest of the structure took the remainder of his first term to create. Major questions, such as the role of senators in the nomination process and the ideal template for a judge, still had to be answered.

The most prominent issue that the FJSC encountered early in the administration revolved around how much deference would accord senators in the nomination process. With Carter's merit selection panels disbanded for circuit court nominees, Reaganites had free rein to re-create the process in a manner that best fit its ultimate ends. The administration began setting the limits of senatorial influence in the nomination process during the June 11, 1981 meeting of the FJSC. After evaluating the potential nominees to fill judicial vacancies, the committee looked into "special problems" regarding judicial vacancies. The committee overruled Republican New York Senator Alfonse D'Amato's recommendation to appoint Judge Raymond Neaher of New York to the Second Circuit Court of Appeals. The FJSC voiced three major concerns with D'Amato's appointment, which spelled out the administration's desired traits for potential judicial nominees.

The first major concern was Justice Neaher's age; he was "69 years old and would be forced to take senior status in one year."[98] Eisenhower had been the first president to impose age restrictions, since he refused to select any individual over the age of sixty. Under Reagan, youth became an important characteristic for judges because of the desire to maximize each appointee's effect on the judiciary. The FJSC wanted judges who would serve on the court for several decades rather than several years. The committee bluntly stated this sentiment in its second concern: Judge Neaher's age "runs

[98] President's Federal Judicial Selection Committee Meeting, June 11, 1981, Fred Fielding Box 1 of 2, CFOA 425, Reagan Library.

counter to [the] President's desire to appoint younger judges who will have a lasting impact on the judiciary."[99] The third issue involved the role that senators should play in the nomination process. The JFSC opposed going along with D'Amato's choice because to do so "would give senators more influence in Circuit Court Judge selection process than the President wishes."[100] All the concerns voiced in regard to Neaher's recommendation became clues to the way that the administration would institutionalize the nomination process. The Reaganites wanted young, conservative judges who were discovered by the administration itself with the help of senators, rather than solely via senators. Maintaining autonomy from the Senate was pivotal to the Reagan administration because it had a policy objective that indicated what kind of judges needed to be selected in the present in order to extend the "Reagan revolution" in the future. Senators simply could not be trusted because they too often treated judicial appointments as partisan tools to further their own ends.

At the next week's meeting, the FJSC once again discussed potential nominees. When discussing the bevy of candidates that the nominating commission for the district of Minnesota submitted to the White House, the President's commission took particular interest in Charles Augustine Flinn of Minnesota because he was intelligent and well educated with an undergraduate degree from Yale and L.L.B. from University of Minnesota Law School. Better yet, he would be only forty-one at the time of his appointment and would therefore be on his bench for a long time. It should be noted that an individual involved in the vetting process definitively circled his age on the vetting

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[99] Ibid.
[100] Ibid.

form.[101] Additionally, a young individual, like Flinn, could gain the necessary judicial experience at the district level to eventually warrant promotion to a higher court later in Reagan's administration. While the FJSC decided to select another candidate, the focus on Flinn's age illustrated how the Reagan administration intently wanted to find as many young nominees for vacancies as it could.

Another important trait that the Reagan administration wanted in prospective judges involved active partisan experience in the Republican Party. For example, when Emmett Ripley Cox was evaluated for appointment to the district court for the southern district of Alabama, he appeared to meet all the necessary qualifications. He was young enough to warrant a nomination and he had strong work experience, but he had one additional characteristic that the administration favored—active participation in Republican Party politics. Cox's resume specifically stated that he was on the Mobile County Executive Committee for several years in the "late 60's and early 70's" with the latter part of the statement in bold type.[102] Cox wanted all who evaluated his resume to understand that he was an active Republican and therefore understood the tenets of Reagan's ideology focused on limited government. While not a requirement, the FJSC looked favorably upon a nominee's participation in the Republican Party because it showed sustained commitment to the party's ideals. The FJSC eventually selected Cox to fill the vacancy, and he won Senate confirmation on November 18, 1981. Party activism in the Republican Party became another desired trait for Reagan appointed judges.

Reagan, however, was not averse to appointing conservative Democrats to the

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[101] President's Federal Judicial Selection Committee Meeting, June 18, 1981, Fred Fielding Box 2 of 6, CFOA 425, Reagan Library.

[102] President's Federal Judicial Selection Committee Meeting, June 25, 1981, Fred Fielding Box 2 of 5, CFOA 426, Reagan Library

federal bench as long as a Republican senator or state party representative supported the nominee and he or she had a strong record of conservative jurisprudence. Identifying as a Republican helped demonstrate that an individual was more likely to support Reagan's policies, but it did not shed light on the individual's legal philosophy. Also, one must remember that conservative Southern Democrats still existed and would not join the Republican Party until the mid to late 1980s. The nomination of Neal Biggers from Mississippi became emblematic of the Reagan administration's stance on appointing Democrats to the federal judiciary. Republican Senator Thad Cochran of Mississippi selected Biggers as the only candidate he would forward to the White House for the District Court of Mississippi. Biggers's affiliation with the Democratic Party worried some on the Committee, but the vetting form sought to allay any residual concerns. The report stated, "although Biggers is a Democrat, he is the only candidate recommended by Senator Cochran for this position. Justice states that Biggers is regarded as a judicial conservative, especially on law enforcement issues."[103] Nominating Biggers served three important purposes for the administration. He was a Democrat, which allowed Reagan to parry any criticism that his administration only chose Republicans. His appointment also demonstrated that the administration sympathized with a Republican senator's desires. Lastly, Bigger's selection brought a young judicial conservative to the federal bench. Party affiliation was important to the Reaganites, but it could be overlooked under certain circumstances.

In addition to Republican Party affiliation, the Reagan administration wanted to appoint individuals who had connections to members of the Reagan administration at

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[103] President's Federal Judicial Selection Committee Meeting, June 1983, Fred Fielding, CFOA 428, Reagan Library

some point during their career. Pamela Ann Rymer, for example, was nominated to fill a vacancy on the district court for the central district of California. Rymer actively served in the Republican Party as President of the Wilshire Republican Club in Los Angeles, California, and as an officer at the 1972 Republican National Convention.[104] The FJSC underlined both of these activities on her nominee briefing form, which illustrated the importance of political participation. Republican Party activities were only one part of Rymer's resume. She was a two-time member of the California Postsecondary Education Commission appointed by both Republican Governor Ronald Reagan and Democratic Governor Jerry Brown. Her bipartisan support in California and her active involvement in the Republican Party aided her case for the nomination. The FJSC ultimately selected Rymer in January of 1983, and the Senate confirmed her a month later on February 23, 1983.

A focus on distinguished conservative legal faculty was the administration's last major nomination category. Robert Bork was the quintessential Reagan administration candidate. Bork was a Chicago University Law School graduate, which was known for its conservative legal scholars, the Solicitor General during the Nixon administration, and a prominent legal scholar and conservative professor at Yale Law School.[105] The Reagan administration patiently waited for a vacancy on the United States Court of Appeals for the District of Columbia to occur so Bork could be appointed. In fact, the FJSC never discussed Bork for any other positions because he was being held in reserve for a Supreme Court vacancy. When the circuit court position did become available in

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[104] President's Federal Judicial Selection Committee Meeting, September 1982, Fred Fielding Box 3 of 3, CFOA 428, Reagan Library

[105] President's Federal Judicial Selection Committee Meeting, December 3, 1981, Fred Fielding, CFOA 427, Reagan Library

December 1981, the FJSC jumped at the opportunity and placed the most prominent conservative one step away from the Supreme Court.[106] Reagan wanted to place one of the foremost conservatives on the Court of Appeals for the Federal Circuit so his administration could assert that the judge was well qualified when the time came for elevation to the Supreme Court. Placing an individual, like Bork or Antonin Scalia at any level below this appellate court was wasteful so the administration did not mind waiting patiently for vacancies to become available. The FJSC officially nominated Bork to the Court of Appeals for the Federal Circuit on December 7, 1981 and gained the Senate's confirmation on February 8, 1982.

The composite of a Reagan appointee became visible midway through Reagan's first term. The ideal judge was a young, staunch conservative who had participated in the Republican Party at some point during his career. Additional ancillary factors that played an important role in the nomination process involved previous connections to the Reagan administration or being a prominent conservative legal scholar. The Reagan administration hoped that judges with this background would restore legal precedent to pre-Warren Court rulings. With the Reganite's ideal composite judge fully assembled and with a selection process institutionalized in the White House, other conservative organizations, specifically the Federalist Society, began emerging during Reagan's first term. These groups found inspiration from the Reagan administration's willingness to champion conservative legal jurisprudence.

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[106] The Federal Circuit Court of Appeals in Washington, DC is seen as the most prominent circuit court position in the nation because of its proximity to Washington, DC, the complexity of cases dealt with, and the number of judges who are elevated to the Supreme Court from this particular location. Placing Robert Bork in this location signaled to the nation that the Reagan administration would appoint him sometime during his term if a position came available on the Supreme Court.

The Carter administration seemed to mark the limits of "New Deal" liberalism in American politics. Reagan's emergence demonstrated that conservatism emerged from the shadows and influenced all aspects of America from economics to academia. Conservatism's profound influence on the legal profession emerged because conservative lawyers created their own legal organizations to compete with the well-established liberal legal movement. The most important conservative legal group—the Federalist Society—officially started in 1982, early in Reagan's first term, and would alter the legal field forever because conservative lawyers ranging from small law schools to large corporate firms could join. This created a forum where conservative lawyers could make the necessary connections to further entrench their emerging ideology through the creation of a solid conservative legal network.

The first Federalist Society activity was a national conservative symposium held at Yale Law School in April 1982 with the idea that "law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology . . . no comprehensive conservative critique or agenda has been formulated in this field [law]. This Conference will furnish an occasion for such a response to begin to be articulated."[107] Like protestors on the left in the 1960s who rebelled against a nation they considered too conservative, these conservative law students challenged a system which they believed failed to give a fair and holistic legal education. Liberalism had become the entrenched philosophy taught at many law schools and the Federalist Society's founding mission sought to explore an alternative and conservative jurisprudence.[108]

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[107] "Proposal for a Symposium on the Legal Ramifications of the New Federalism," Federalist Society Archives, 1982, 1. Cited in Teles, 139.

[108] Chicago Law School was a well-known bastion of conservative legal thought throughout most of the twentieth century. Conservatives had also begun to carve out ideological footholds at other prestigious

The opening event, according to Yale Law student Gary Lawson, sprouted from the desire to have the most renowned conservative legal minds, such as Bork, Scalia, and Edmund Kitch, on a single panel to discuss federalism.[109] The meeting was a success, and the founders began to look for donors to increase the organization's size so it could expand to more campuses. The founders moved beyond symposia and conferences through creating a "job exchange section" in the Society's newsletter so law students could develop strong relationships with "judges, legislators, governmental counsels, and practitioners."[110] The Federalist Society developed such a strong organizational foundation because the founders understood that creating an alternative jurisprudence to liberalism would be the organization's most lasting legacies.

A mere eight months after the first meeting, the Federalist Society became a permanent organization with a director, Eugene Meyer, and a full-time staff.[111] Antonin Scalia, University of Chicago Law professor and eventual Supreme Court justice, became one of the organization's pivotal backers in academia. Scalia helped connect the Yale and Chicago Federalist Society branches with the one at Stanford, became an important fundraiser, hosted students at his house, and facilitated the Society's move into an office at the American Enterprise Institute in Washington D.C.[112] The group grew in prominence quickly after its inception because the original founders yearned for an intellectual outlet for their stifled ideas.

The Federalist Society played an important role in the Reagan administration

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universities, such as at Harvard Law School. Law schools were more accepting of conservatism, but the process was incredibly slow and the Federalists sought to increase the speed of these necessary reforms.

[109] Teles, 139.

[110] Teles, 140

[111] Teles, 141

[112] Ibid.

because Kenneth Cribb, who served as both an advisor to the attorney general and an assistant to the president for domestic policy, wrote that he "was always looking for people to come and work on the president's agenda without self-calculation, and that describes these Federalists. They're loyal to a philosophical principle that Reagan was trying to accomplish . . ."[113] Cribb recounted how the professional connections made in the Federalist Society allowed for systematic hiring from the organization. For instance, Robert Bork told friends at the Justice Department to hire Federalist member Steve Calabresi who was the son of Guido Calabresi, Robert Bork's liberal colleague and the eventual dean of Yale Law School. Once Calabresi became the assistant to the attorney general, he helped other Federalists, like David McIntosh and Lieberman Otis, gain employment in the Justice Department demonstrating the Federal Society's growing impact on the Reagan administration.[114] Membership in the Society became a valuable signal to the administration wanting to hire individuals who clearly understood their ideology and were willing to fight to defend it. Additionally, Federalist Society membership demonstrated a clear ideological positioning, which above all else, was the key Reagan administration desire. Thus, membership illustrated ideological purity.

The Reagan administration became a logical employment opportunity for many Federalist Society members who wanted to work for a conservative president. While some scholars asserted that a conservative legal group formed only after Reagan, a staunch conservative, became president, the aid that Reaganites gave this burgeoning group weakened this argument. The Reagan White House provided two distinct services for the Federalist Society. First, the administration, as seen earlier, provided prestigious

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[113] Cribb Interview. Teles, 141
[114] Ibid.

government jobs for Federalist Society members. Second, since Reagan appointed conservative judges to the federal judiciary, intelligent Federalist Society members could clerk for a Reagan judge who would hone their malleable jurisprudence rather than liberalize it. The conservative legal network formed during the Reagan administration helped to bind this small movement together while allowing it to expand to include law students who became attracted to the organization that sent so many law students to such high government positions. The Federalist Society and the Reagan administration created a symbiotic relationship where each worked together to improve and legitimate the conservative legal movement.

Creating an efficient nomination procedure and an ideal judicial template became the Reagan administration's main goal during its first term. The Reagan White House effectively achieved both goals, which allowed it to focus on spending more time vetting and selecting increasingly conservative judges during the second term. In essence, the Reaganites sought to create the nomination system during the first term and would work to further politicize the process during the second term. The administration, however, would have more vacancies during the second term because Congress enacted the Bankruptcy Court and Federal Judgeship Act in July of 1984, which reorganized the bankruptcy courts and created eighty-five new federal judgeships. In fact, in the signing statement for the act, President Reagan rejected a portion of the law that he viewed as unconstitutional because Congress prohibited the administration from appointing more than twenty-nine circuit court judges until January 21, 1985, a full year after the signing. Reagan viewed this time restriction as an infringement on his executive authority and an

impingement on the speed and efficiency of his confirmation procedure.[115]

In December 1984, after Reagan had won re-election, the FJSC met in the White House and sketched out the urgent steps that needed to take effect during the first two years of Reagan's second term. The committee's report applauded the entire administration for filling so many positions during Reagan's first term and asserted that when mixed with existing vacancies, "we [the administration] already exceed the total of appointments made by President Carter."[116] The report further said, "if historical trends continue, President Reagan will have appointed over half the judiciary by 1987."[117] The FJSC understood its potentially unique position in history because it was primed to appoint over half the judiciary. Reaganites salivated at the possibility of filling the judiciary with young conservatives who would serve for decades rather than years. Appreciating the ability to make a lasting impact, the committee reiterated the importance of their jobs with a single, prophetic sentence: "Thus, we [the President's Committee on Judicial Selection] are presented with a tremendous opportunity and responsibility."[118] The race to transform the judiciary had begun. The administration was ready to appoint the youngest and most conservative nominees available.

The Reagan Administration: 1985-1989

Reagan entered the 1984 presidential election with a great deal of political

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[115] Statement on Signing the Bankruptcy Amendments and Federal Judgeship Act of 1984, July 10, 1984, http://reagan.utexas.edu/archives (accessed February 5, 2011).
[116] President's Federal Judicial Selection Committee Meeting, December 1984, Fred Fielding Box 2 of 5, CF 514, Reagan Library
[117] Ibid.
[118] Ibid.

momentum. The economy showed signs of recovering from the stagflation that debilitated the nation throughout the 1970s, and American-Soviet relations were just beginning to thaw. Reagan's campaign slogan—"morning in America"—seized upon this renewed optimism, which helped to secure his position as the conservative leader who would once again make America the respected world power. Reagan appeared unstoppable in the 1984 election because he enjoyed a great deal of popular support and the Democratic candidate—Walter Mondale—was so closely linked to President Carter. All of these factors helped Reagan easily gain re-election in one of the most lopsided electoral victories in American political history. Reagan received 525 electoral votes, and almost fifty-nine percent of the popular vote, to Mondale's meager thirteen electoral votes. Reagan's rhetoric and policies unified the nation from the 1984 election victory until the Iran Contra scandal in 1987.[119] At the administration's political zenith it successfully instituted even more conservative policies, especially with regard to the judiciary.

The 1984 Republican Party platform discussed the judicial selection goals and lauded the accomplishments of the Reagan administration: "Judicial power must be exercised with deference towards state and local officials . . . It is not a judicial function to reorder the economic, political, and social priorities of our nation . . . In his second term. President Reagan will continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint."[120] The administration wanted to

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[119] Iran Contra became a political scandal in November 1986 after Congress discovered that the Reagan administration was selling weapons in Iran in order to fund the anti-communist Sandinistas in Nicaragua. This action violated the Boland Amendment, which prevented any federal money from being spent in Nicaragua. After this scandal broke the administration became consumed with preventing an impeachment trial causing all other issues, including judicial appointment, to become secondary.

[120] *Congressional Quarter Weekly Report* 42 (August 25, 1984): 2110. Cited in Goldman, 300.

continue appointing conservative candidates who practiced judicial restraint to the federal bench, but the platform failed to mention social issues, such as abortion, which had been a part of the 1980 Republican Party platform. Wanting to attract the broadest electoral base, the Republican Party remained silent on hot button social issues that would push conservative Democratic voters away from the Democratic Party. While the Republican Party refused to overtly discuss social issues in the electoral platform, the Reagan administration still would look into the background of each judicial candidate to ensure he or she would rule in a manner consistent with the administration's preferences. For example, during Reagan's first term, in 1983, the administration kowtowed to right-wing opposition and refused to nominate Hilda Gage to the District Court of Eastern Michigan because "she is adamantly opposed by President Reagan's supporters and the right to life forces in Michigan."[121] The failed Whittaker nomination demonstrated that the administration still listened to its conservative base especially regarding a potential nominee's jurisprudence on issues, such as abortion. After the appointment of the moderate Sandra Day O'Connor, which angered many conservatives, the administration began paying particular attention to the concerns of its base.

The pivotal personnel in the administration, such as Chief of Staff James Baker, advisor Edwin Meese, and Attorney General William French Smith, began to either leave the administration or take on new positions. James Baker eventually became the Treasury Secretary during the second term and Edwin Meese was nominated to become the Attorney General in February 1984. A political scandal, however, slowed the Meese nomination, but he did eventually gain Senate confirmation almost a year after being

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[121] President's Federal Judicial Selection Committee Meeting, August 1983, Fred Fielding Box 2 of 2, CFOA 428, Reagan Library.

nominated in March 1985. Meese became pivotal in the administration because of his particularly close relationship to Reagan (Meese served as the chief of staff to California Governor Ronald Reagan) and his conservative legal mind. With Meese in charge of the Justice Department, the Reagan administration moved forward with increasingly younger and conservative candidates who conflicted with the increasingly boisterous Democratic senators. Additionally, Meese would fearlessly fight against the American Bar Association and other "liberal" legal organizations believed to oppose alteration of the judiciary.

The most important change to the Justice Department occurred when Meese hired Grover Rees III as a special assistant with the sole responsibility of examining the judicial philosophy of each perspective candidate.[122] Hiring Rees marked an evolution in the nomination procedure because Meese wanted the most ideologically pure candidates possible in order to complete the vision of making the judiciary increasingly more conservative. The vetting forms, which were short in length during Reagan's first term and evaluated only the nominee's name, law school, and sponsor, changed when Meese became the Attorney General. The forms remained about a page in length, but discussed the candidate's jurisprudence in greater detail. The form became a standard document, which consisted of three components: Background, Department, and State. The Background portion answered the relatively standard issues, such as the nominee's biography, law school, and legal experience. The Department section displayed Rees's research because it exclusively discussed the candidate's jurisprudence and whether it was similar to Reagan's. The State segment discussed the nominee's overall reputation in his or her legal community and relied upon other lawyers' statements to gain insight

[122] Goldman, 301

into the individual's character. This form became an invaluable source of information that provided the President's Committee on Judicial Selection with the necessary information to decide whether a candidate was worthy of receiving a lifetime nomination to the federal bench.

Additionally, Meese helped to pioneer the term "originalism," along with Robert Bork, which allowed the Reagan administration to sell these increasingly conservative candidates to the American public.[123] Developing the proper language for conservative jurisprudence that was free from the Nixonian tinges of racism befuddled conservatives for several years. Meese first tried out the term originalism with the Federalist Society in the early 1980s, and Steve Markman recalled that "Ed Meese at this time had originated not the idea, but the nomenclature of original intent jurisprudence. This was later refined, refined I believe in a very useful way to original meaning jurisprudence . . ."[124] Once Meese became Attorney General, he set out on a speaking campaign to sell this newfangled term, which became a "transformative" moment because "it [originalism] was designed to provide a unifying language for conservative elites and to legitimate conservative ideas within the profession and the legal academy."[125]

Meese aided the "new right" because his ideological innovations helped the Reagan administration emerge from the Democratic Party's shadows. The Republican Party had created its own set of ideals in order to directly challenge the Democratic Party. For instance, the more moderate Attorney General William French Smith, according to Reagan Justice Department Official Terry Eastland, "had given speeches arguing against

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[123] Robert Bork's article "Neutral Principles and the First Amendment" became a foundational text for originalism.
[124] Teles, 145
[125] "Transformative Bureaucracy," 75.

judicial activism. I thought that those speeches [were fine] as far as they went, but I thought that the time had arrived to state in a more positive way what judicial interpretation was about."[126] Conservatives yearned for an independent and intellectually stimulating term that addressed the current need to rein in big government rather than squabble over such settled issues as race relations and New Deal projects. Originalism became a useful phrase to encourage all people, but specifically law professors and lawyers, to re-evaluate the constitution not as a living document, but a static one rooted in the ideals of the founders who wrote it.

Additionally, pioneering the term had a profound effect on Reagan's judicial selection process because it allowed the formulation of more precise and profound questions about each nominee's jurisprudence. Another Justice Department official, Kenneth Cribb, described the critical effects that this single term had on the selection process, as the administration "improved the actual predictability of judicial selection . . . Before this intellectual analysis [originalism] was available, all our judge-pickers had were slogans—'judicial restraint,' 'would you legislate from the bench?'—those kinds of things, which of course everyone knows the answers to if you want a judgeship."[127] This phrase allowed the Justice Department to create the extensive jurisprudence background checks that were utilized during Reagan's second term. Attorney General Meese conceded the importance of finding the correct terminology because the selection process "was a matter of [defining] what judges should do, in order to determine what sort of people should be judges."[128] With Meese's work to legitimate a term to describe the entire conservative legal movement complete, the administration found increasingly more

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[126] Interview with Terry Eastland. Ibid.
[127] Interview with Cribb, August 2007. Cited in "Transformative Bureaucracy," 77.
[128] Footnote 104, interview with Meese, July 2007. Ibid.

conservative candidates.

After the administration had settled on a singular term to describe each nominee's ideology, it continued appointing candidates to judicial vacancies. The main difference from Reagan's first term was the type of candidate selected—extremely young and very conservative. This significant change helped guarantee Reagan's ultimate goal of transforming the judiciary. Reagan's focus on youth increased friction with liberals, which accused the administration of valuing youth over experience. The first six months of Reagan's second term were relatively uneventful, as the FJSC only met a handful of times and evaluated very few nominee-vetting forms. The administration was in a state of flux with all of the personnel moves, and appointing judges was not its highest priority. Conflict with the ABA, disagreement with Democratic senators, and criticism from the press would consume the administration's attention for the remainder of Reagan's presidency.

Tension emerged between the American Bar Association rating system and sitting federal judges who believed that the ABA deliberately delayed the evaluation process so the Democrats could devise a strategy to defeat each nominee. In fact, the Reaganites first fought with the ABA in December of 1983 when it could not nominate J. Harvie Wilkinson III to the Fourth Circuit Court of Appeals because the ABA took so long to release its rating. The FJSC became so frustrated that it considered moving ahead with the appointment without an ABA rating, which most administrations avoid.[129] During Reagan's second term, however, the conflict occurred between the Chief Justice of the

[129] President's Federal Judicial Selection Committee Meeting, October 1983, Fred Fielding Box 1 of 2, CFOA 428, Reagan Library.

Eighth Circuit Court of Appeals, Donald P. Lay, and Robert P. Fiske, chairman of the ABA. Judge Lay asserted that the ABA took too long to evaluate each nominee. Fiske addressed Lay's concerns in a letter, which both President Reagan and Attorney General Meese also received, refuting the claim that the Chairperson of the Ratings Committee took extended vacations while she worked in this important position. Additionally, Fiske blamed a perspective nominee, rather than the committee, for delaying the ratings process because he failed to make himself available for a personal interview.[130] Fiske sought to calm Lay's fears and assured him that the committee was working as hard as possible to rate each candidate quickly in order to prevent any extended vacancies. Both Lay and the administration seemed receptive to Fiske's explanation of the delay.

While tensions between the ABA and federal judges ran high, the press began to criticize the Reagan administration for appointing judges who would fundamentally alter the federal judiciary for an extended period. A *Wall Street Journal* article that Robert Friedman wrote on September 6, 1985 rejected the administration's claims that its vetting process was similar to those used by its predecessors. Friedman stated that

> once the names are submitted to the Justice Department, they are subjected to a more intensive and systematic review than in the past. Several department officials, who probe their views about the role of the federal courts, the death penalty and the soundness of the Supreme Court's abortion ruling, interview most candidates. They are also asked to name their favorite Supreme Court justice.[131]

Additionally, Friedman discussed the formation of liberal opposition groups, such as People for the American Way, which started "an advertising campaign warning about

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[130] President's Federal Judicial Selection Committee Meeting, November 1985, Fred Fielding Box 1 of 3, CF 515, Reagan Library.

[131] Robert Friedman and Stephen Wermiel, "Stacked Bench? Reagan Appointments To the Federal Bench Worry U.S. Liberals—They Fear That 'Ideologues' Will Reshape the Laws; A Litmus Test Is Denied—High Marks From the ABA," *The Wall Street Journal*, September 6, 1985. Hereafter cited as Friedman.

what it calls the "blatant manipulation" of the nomination process."[132] Once people realized that Reagan would be able to appoint over half the judiciary, many became increasingly uncomfortable with the FJSC's systematic appointment process leading to the selection of such young and conservative candidates. As awareness of what was going on increased, the increasingly boisterous Democratic minority stepped up its campaign against what the Reaganites were doing in order to transform the federal bench.

Other news organizations, such as National Public Radio, also began to criticize Reagan for appointing unusually young judges to the circuit court. On an April 11, 1985 broadcast of "All Things Considered," Nina Totenberg brought the issue of Reagan's propensity for appointing youthful judges into the homes of the Americans people. The broadcaster introduced the program by briefly describing Reagan's nomination process and goals:

> Ronald Reagan, the oldest President in the country's history, is trying to appoint younger people to be judges on the nation's federal courts. To date he's been only marginally successful, but with the Administration preparing to fill 100 vacant judgeships, most of them newly created judgeships, the hunt is on for young conservatives who could dominate the federal judiciary for the next thirty or forty years. Sometime in the next month or so, President Reagan, is expected to nominate a record breaker. If thirty-four year old Alex Kozinksi is nominated to the Ninth Circuit Court of Appeals, he will become the youngest person to be nominated to be a federal appeals court judge in this century.

Totenberg described Kozinski's qualifications and ascribed the reason for the month delay in nomination to the ABA review process, which would "have to waive its standard rule that a nominee is not qualified unless he's had ten years of practicing legal experience." During the last portion of the broadcast, Totenberg quoted one of Reagan's own youthful appointees, Kenneth Starr, saying, "the thing us younger folks lack is the

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[132] Ibid.

rich variety that other judges on this circuit have. And for that reason you shouldn't have a whole bunch of us." Totenberg's broadcast sought to show Americans that the appointment of younger judges could have an adverse effect on the judiciary in two distinct ways. First, young judges, as Starr stated, lack the life experience necessary to have a well-developed jurisprudence. Second, youthful judges would continue to further Reagan's ideals long after he left office, concluded, which worried many moderate and liberal Americans. These growing concerns about Reagan's power became apparent a year later when Senate Democrats poured sand into the gears of Reagan's single-minded and efficient nomination process.[133]

While Totenberg focused on the age of Reagan's nominees, other pundits, specifically Tom Wicker of the *New York Times*, consistently attacked Reagan for ideologically purifying the judiciary. Wicker became one of the foremost voices calling attention to the administration's ulterior motives, which American University Law Professor Herman Schwartz summed up as Reagan's desire "to do in the federal courts what he's [Reagan] failed to do in Congress and with the Supreme Court."[134] One of Wicker's most devastating articles was written in early April 1985, just days before Totenberg's broadcast, and accused Reagan of using a "litmus test" in order to prevent any rogue liberals from gaining appointment to the judiciary.[135] Wicker cited an instance where three Republican members of the Senate Judiciary Committee "sent a blatantly ideological questionnaire (concerning abortion, school prayer, the Equal Rights Amendment, affirmative action etc.) to Joseph E. Rodriguez, a former head of the New

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[133] Supreme Court Candidates Passed on by Richard Moore, RNC Counsel, Kenneth T. Cribb Jr.: Files, Box 17, Reagan Library.
[134] Friedman
[135] Tom Wicker, "Purifying the Courts," *New York Times*, April 19, 1985.

Jersey State Bar . . .[136] The administration consistently dismissed all accusations that it used a "litmus test" on nominees, but the fact that Reagan appointed so many Republicans to the federal judiciary made many in the general public begin to question the White House's truthfulness. The media's incessant criticism began to threaten the administration's long-term goal of appointing strict conservatives to the judiciary.

The increasingly vociferous opposition to Reagan's appointment strategy left the administration in a precarious situation because it could not directly refute the assertion that the selection process used a "litmus test" to weed out liberal nominees. The administration's main goal revolved around a single coherent message, which was a key reason for the creation of the President's Committee on Judicial Selection. A concerted media campaign to refute these claims would cause the administration's message to deviate from the main priority—the nominees to the selection process. Therefore, the administration remained silent on the issue until it lost control of the debate and public sympathy lay squarely with the Democrats. The constant criticism allowed the Democrats to take increasingly aggressive steps to slow down the efficient Reagan nomination machine.

In November 1985, the administration became ensnarled in its first major showdown with the Senate Democrats who had recently gained a seat in the 1984 elections, though the Republicans still controlled the Senate. This was particularly problematic because Reagan had a large number of vacancies due to the passage of the Omnibus Judgeship Act just a year earlier. The FJSC summed up the issue in a brief

[136] Ibid. The three senators mentioned were Orrin Hatch of Utah, Harry Dent of Alabama, and John Porter East of North Carolina.

internal memo, which sought to refute the "lies" told about Reagan's judicial nominees. This memo was a sheet of talking points to prepare administration officials in case they received questions about Reagan's nomination procedure in order to ensure they all presented a coherent and singular message. The Democratic senators, the memo began, do not merely "cite a few specific objections to particular candidates, but instead demand certain 'process concessions' which in effect would allow them to block all future judicial nominees indefinitely and without giving reason . . . They assert this is necessary to stop President Reagan from packing the court with ideological nominees."[137] The two main criticisms that the FJSC sought to silence regarded the claims that Reagan rushed nominees through the Senate for confirmation and that his appointees were exceptionally youthful. Additionally, the FJSC lamented that the confirmations of Reagan's second term circuit court nominees were taking far longer than during the Carter years, an average of 30.2 days for Carter to 46 days for Reagan.[138] Lastly, the administration refuted the claim that Carter also appointed young judges through comparing the mean ages of its nominees—49.76 years—to Carter's—50.44 years old.[139] Despite the administration's best efforts, it could not resolve this crisis without making a deal with the Senate Democrats.

Joseph Biden, a Democratic senator from Delaware, became the leader of the liberal senators intent on slowing down Reagan's nomination freight train. Biden gave the administration an ultimatum, via Senator Strom Thurmond, a Republican from South Carolina who was the Senate Judiciary Committee's ranking member—meet the group of

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[137] President's Federal Judicial Selection Committee Meeting, November 1985, Fred Fielding Box 3 of 3, CF 515, Reagan Library.
[138] Ibid.
[139] Ibid.

Democratic senators' four demands or no nominees would be confirmed. The first demand requested that a two-week delay be implemented between "notice to the Minority that the Committee has received a nominee's answer to the Committee questionnaire," and the nominee's hearing. The second demand requested adding another automatic week delay in the time between a nominee's hearing and the committee vote. This extra week delay came in addition to the committee members' ability to postpone a committee vote without a cause. The third demand changed the questionnaire given to all nominees before their Senate Judiciary Committee hearing. The fourth, and most important, demand gave the Democratic minority the right to designate any nominee as "controversial" without any cause. Nominees who received this label would not be subjected to the same regimented time schedule as normal nominees because Democratic senators could take "as much time as we [Democratic Senate Judiciary member] need" in order to properly investigate the individual's background. Each of Biden's demands represented an effort to slow the nomination process down so much that Reagan would limit the number of conservatives appointed to the federal judiciary until the midterm elections.[140] The Democrats believed that they were in a strong position to retake the Senate, which, consequently, would give Democrats control of all committees. Therefore, the Democrats could control the Senate Judiciary Committee and the nomination process.

The FJSC analyzed the demands and asserted that Senator Biden's demands were baseless because they were created with the sole purpose of slowing down the confirmation process. The report stated, "The effect of these proposals, even on "non-

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[140] All facts from this paragraph from document in President's Federal Judicial Selection Committee Meeting, November 1985, Fred Fielding Box 3 of 3, CF 515, Reagan Library.

controversial" nominees, would be that [Senate Judiciary] committee approval would begin by taking longer than it has at almost any time in the past." The FJSC estimated that it would take each nominee twenty-eight days to receive a vote from the Senate Judiciary Committee when senators employed only the traditional automatic delays. The time for a nominee to gain a hearing and vote would greatly increase if a Democratic senator labeled a particular nominee "controversial." The FJSC asserted that "the practical effect would be that no nominees presented to the committee this January would face floor action before mid-spring, when the election would already be well underway."[141]

While the FJSC felt that Biden's demands were without merit, it still met on November 26, 1985 to create a strategy so the stalemate could be brought to an end. Pat Buchanan spoke first and blamed low political morale among Republicans as the root cause of Biden's demands. When Attorney General Meese pressed Buchanan to explain why the Republicans were downtrodden, Buchanan explained, "Each month it's somebody different, but it culminates in a general tenor on our [Republican] side of the aisle." Buchanan's strategy involved solving the morale issue among the Senate Republicans and then fighting Biden's demands as a united front. One committee member noted an problem with Buchanan's idea because "if we [the Reagan administration] solve internal [issues] facing Senate Republicans. If Thurmond can schedule votes. If [Robert] Dole can schedule votes. Then we still have problems with controversial [hold issued in Biden's demands]." The FJSC decided that allowing the Senate to solve the problem internally would be the most effective course of action and Chief of Staff Donald Regan stated that he would schedule a meeting with Senate

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[141] Ibid.

Majority Leader Robert Dole from Kansas. In fact, the FJSC exclusively relied on Dole to solve the political crisis leading Meese to express his personal uncertainties about this course of action. "We [the FJSC] need Dole for short term to get our ninth out." The meeting ended on an ominous note, however, as Grover Rees told the committee that, "we are not frightened about the fact that there are legitimate problems. We are frightened about peremptory designations" such as labeling a candidate controversial.[142]

Majority leader Dole resolved the brokered a deal with Senator Biden, and the administration could once again commenced with its nominations. The administration had not heard the last of the pesky Senate Democrats, however, because their demands would grow as they gained political momentum entering the 1986 midterm election. Though the FJSC dealt with the Biden crisis, it still continued nominating individuals to the federal bench. For example, the vetting report on a prospective nominee for the District of the District of Columbia, forty-three year old James Knapp, gave deep insight into his jurisprudence. The report bluntly stated that Knapp "is unquestionably strong philosophically and has long been active in the Republican Party."[143] Since Knapp had three of the most critical traits that the FJSC desired—youth, a longtime relationship with the Republican Party and a proven conservative jurisprudence—the administration decided to move forward with the nomination. Knapp, however, never moved out of the Senate Judiciary Committee effectively ending his chances of gaining the full Senate's confirmation.

The FJSC moved forward with the nomination of David S. Doty to serve as the

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[142] All facts from this paragraph from document in President's Federal Judicial Selection Committee Meeting, November 26, 1985, Fred Fielding, CF 515, Reagan Library.

[143] President's Federal Judicial Selection Committee Meeting, December 1985, Fred Fielding CF 515, Reagan Library.

federal judge for the District of Minnesota even though the administration worried that he was too liberal. The vetting report stated that during the interview phase the only discernible constitutional position that Doty took was that "*Brown v Board of Education* was incorrectly decided."[144] Appointing a candidate with such a dubious position on this seminal Supreme Court case was beyond controversial because even avowed conservatives, such as Robert Bork, had embraced this decision. Such comments provided ample evidence for liberal activists to portray the Reagan administration as hostile to non-white Americans. Doty, however, almost failed to gain confirmation because while the Justice Department strongly supported him, some on the committee found him too liberal by association. Doty's wife was a supporter of John Anderson's presidential campaign and joined the anti-Reagan Gender Gap Coalition. The administration decided to move forward with Doty's nomination, despite these liberal "red flags," and he gained Senate confirmation on May 21, 1987.

The fight over the nomination of Daniel Manion to the Seventh Circuit Court of Appeals became the prime example of the entire administration's willingness to fight for a candidate facing increasingly vocal liberal opposition. Manion fit the ideal Reagan administration appointment template in two ways; he was only forty-four years old and a proven conservative on social issues, especially school prayer.[145] He was nominated on February 21, 1986, but liberals fought hard against his confirmation. They painted Manion as a typical Reagan candidate who was too ideologically extreme, too

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[144] Ibid.
[145] Refer to the opening paragraph of the essay for more biographical information on Manion.

inexperienced, and too young to warrant appointment to a federal appellate judgeship.[146] The FJSC, however, decided to support Manion and use all means, including the national airwaves, to help this conservative nominee gain Senate confirmation.

On May 5, 1986, a group of senate Democrats serving on the Senate Judiciary Committee—including Joe Biden, Edward Kennedy, and Patrick Leahy—wrote a letter to the White House explaining their reasons for opposing Manion. The group cited Manion's support of school prayer legislation that directly challenged *Stone v Graham*, which found school prayer unconstitutional. They pointed out that Manion had spoken out in favor of school prayer while serving in the Indiana State Senate as proof of his personal judicial activism. This incident allowed the Democratic senators to directly call into question Manion's personal understanding of the Constitution because he justified his actions using the ideas of "'legislative prerogative' and 'legislative protest'" to defend his blatant disagreement with a Supreme Court ruling.[147] The worried senators asserted that "the Constitution is a self-executing document and its viability as 'supreme law of the land' depends on the fidelity and faithfulness of those entrusted with governmental power. As our judicial system has evolved, the Supreme Court's interpretations are to be given weight equal to the original document itself."[148] Effectively casting Manion as outside the ideological mainstream, the reinvigorated Democratic senators attempted to use a hot button social issue to split Reagan's base into separate camp and end the Manion nomination.

The press quickly reported on the growing Democratic opposition to the Manion nomination, and on May 7, 1986, two days after the Senate Democrats wrote their letter,

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[146] Manion briefly served as a lawyer before serving as an Indiana state senator.
[147] Peter J. Wallinson, Daniel Manion (1), OA 14007, Reagan Library.
[148] Ibid.

The Washington Post reported on the Manion battle. Howard Kurtz began his article by evaluating a comment Manion made on his father's well-known conservative talk show regarding the Supreme Court. When his father, Clarence Manion, asked his son why he was "suspicious of the Supreme Court," his son responded with a series of complaints about the increasingly activist courts. "It seems that they have gone into regulating schools and their management," Manion stated: "they took prayer out of public school . . . And now it seems that they allow pornography on newsstands . . . Why is it supreme? Why are they allowed to do this?"[149] The article also look into Manion's close relationship with his father, a leader of the John Birch Society, his support of school prayer legislation, and his age to demonstrate that Manion was not fit to serve on the federal courts. Incessant media reporting, staunch liberal opposition, and a Democratic minority willing to fight the nominee seemed to turn the political momentum against Manion.

The Reaganites, however, fought to save Manion's confirmation by lobbying key Republican senators and launching their own media campaign. Majority Leader Bob Dole and Strom Thurmond, the Senate Judiciary Committee's chairman, received the same letter in support of Manion's nomination because without either one of those senators' support the nomination would fail to gain confirmation. The letter described Reagan's general goals to appoint a certain breed of judges and how Manion effectively fits this mold. Additionally, it sought to convince both senators that Manion was qualified and deserved confirmation. "The rating given to Daniel Manion by the ABA," the letter stated, "i.e. 'qualified'—though disparaged by critics—is the identical rating

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[149] Howard Kurtz, "Judicial Nominee Stirs Ideological Fight in the Senate," May 7, 1986, *The Washington Post*. Peter J. Wallinson, Jefferson Session (1), OA 14007, Reagan Library.

given to almost half the Federal judges nominated by Presidents Nixon, Ford, and Carter . . . At what point did a 'qualified' rating become an impediment to nomination to the Federal bench?"[150] Additionally, the administration asserted that Manion received such a low ABA score because he was a country lawyer and proceeded to compare him to another infamous midwestern lawyer—Abraham Lincoln.[151] The letter, however, was just the opening salvo in the administration's fight to save the Manion nomination.

White House Counsel, Peter J. Wallinson, who had recently replaced Fred Fielding, drafted a brief memo comparing the media furor over Manion receiving a "qualified" rating to George Orwell's classic novel *1984*. Wallinson asserted that the media, much like the leaders in *1984*, intentionally distorted the meaning of the ABA's "qualified" rating in order to make him appear unqualified. Reiterating many of the same points in the letter to Bob Dole and Strom Thurmond, Wallinson stated, "Manion is 'qualified' to hold a Court of Appeals seat. Otherwise sensible people have felt compelled to argue that a qualified rating is some kind of liability . . . Since about half of the judicial nominees in the five most recent Presidential administrations carry this rating into their Senate hearings—and have been confirmed without controversy—this cannot be true."[152] The administration's frustrations became evident in Wallinson's impassioned essay because he asserted that the press and Democratic senators evaluated Reagan's judicial nominees on an unfair double standard. A "qualified" rating, which signaled competence before the Manion nomination, was now being politicized to make him look unqualified for failing to achieve the highest rating. Manion only became an issue

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[150] Peter J. Wallinson, Daniel Manion (1), OA 14007, Reagan Library.
[151] Ibid.
[152] Peter J. Wallinson, "The Manion Debate Would Not Surprise Orwell." Peter J. Wallinson, Daniel Manion (1), OA 14007, Reagan Library.

because the Senate Democrats wanted to display their newfound political might and illuminate the Republican Party's weakness.

While the administration fought valiantly to support Manion's nomination, Reagan used his weekly National Radio Address to increase public support for it a few days before the Senate vote on the matter. The administration was simply too invested in saving the nomination to let it fail. Reagan's speech, the administration hoped, would guarantee Manion's confirmation. When making his case Reagan stated, "Manion has substantial litigation experience and a reputation for integrity . . . And the American Bar Association has declared him fully qualified to serve on the federal bench."[153] Reagan attributed the fight over the Manion nomination to sheer partisanship and his refusal to "conform to the liberal ideology of some Senators."[154] The administration's lobbying and media campaign worked to perfection and Manion eventually gained the Senate's confirmation, even without the Senate Judiciary Committee's endorsement, on June 26, 1986.[155]

Though the administration continued to appoint conservative judges to the federal courts, a key contributor to the nomination procedure, Fred Fielding, began making plans to leave the administration during the Manion confirmation fight. On May 23, 1986, Fielding, one of the last remnants of the original cadre of Reagan administration officials, stepped down and Peter Wallinson replaced him on an interim basis. Arthur B. Culvahouse Jr. became the new White House counsel and he instituted two changes. He

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[153] Ronald Reagan, President's Weekly Radio Address, June 21, 1986. Peter J. Wallinson, Daniel Manion (1), OA 14007, Reagan Library.
[154] Ibid.
[155] Philip Shenon, "Reagan Judges Get Lower Bar Rating," *New York Times*, May 25, 1986.

streamlined the nomination process by calling for more concise memos on each prospective candidate, and he continued to appoint increasingly conservative individuals to the judiciary. Culvahouse's goals demonstrated the importance of bringing a new person into the administration, but the Democratic minority attempted to once again constrain the push for more conservative judges.

The new nomination vetting form presented to the FJSC was much more succinct and directly discussed each candidate's jurisprudence. When Fielding served as White House counsel, the forms focused mainly on potential opposition to the nominee and his or her partisan experiences. The forms under Fielding, however, did not delve as deeply into a nominee's jurisprudence as during Culvahouse's term. For example, the evaluation form of Jerome Turner, a nominee during Culvahouse's time as counsel, stated that during the interview Turner said, "he believes that it is a judge's responsibility to eschew policy making."[156] This statement demonstrated that Turner adhered to the administration's desired jurisprudence and showed that the Justice Department interview did ask enough questions to discern the individual's philosophy. While the administration denied that it used "litmus tests," statements such as Turner's indicate that questions about legal issues were asked during interviews to weed out any potential "activist" judges.

Under Culvahouse, the Department of Justice interviewers asked more invasive questions because the vetting forms for potential nominees provided an insightful synopsis of a candidate's jurisprudence. For instance, the vetting form for Robert

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[156] President's Federal Judicial Selection Committee Meeting, March 1987 (5), Arthur Culvahouse CFOA 691, Reagan Library.

Nicholas states, "he believes in a limited role for the judiciary."[157] A similar statement was made when discussing James Parker, as he "he [Parker] impressed his interviewers as a person who shares President Reagan's judicial philosophy."[158] The remaining vetting forms that the committee evaluated were littered with examples of direct statements regarding a potential nominee's jurisprudence. After the Manion fight and the 1986 mid-term election results giving control to the Democrats, the administration seemed willing to send the most conservative candidates to the Senate for approval. The administration had proved it could fight and win a major judicial battle, and it seemed willing to continue fighting with a Democratically controlled Senate that was likely to continue to try to slow down the nomination process.

Joe Biden, the Democratic senator who elicited the Reaganites' ire most regularly, became the Senate Judiciary Committee's chairman with the change in party control of the Senate after the 1986 election. At a FJSC meeting on December 4, 1987, Joe Biden was discussed. It was noted that Biden had pledged to grant all nominees "a hearing by the end of Congress and he will not shut down the nomination process as easily as Republican Senates have done in the past."[159] Biden's promise ensured that all Reagan nominees would at least have a hearing and would not be blocked, which pleased the administration. This plan, however, demonstrated Biden's personal ambition to become president more than his willingness to work with the Reagan administration. Biden needed to position himself as a moderate as the election season approached and working with a Republican president only increased his credibility. Thus, Biden could emerge as

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[157] President's Federal Judicial Selection Committee Meeting, December 1987, Arthur Culvahouse CFOA 691, Reagan Library.
[158] Ibid.
[159] President's Federal Judicial Selection Committee Meeting, December 1987, Arthur Culvahouse CFOA 691, Reagan Library.

a moderate national political figure and the Reagan administration could continue to appoint potential nominees. The remaining nominees did receive a fair hearing from the Senate, and many eventually gained confirmation. For the remainder of Reagan's term, the Senate Judiciary's Democratic members' focus shifted from blocking lower court nominees to investigating Iran Contra and fighting the Robert Bork nomination.

The Reagan administration's appointee statistics demonstrated the impact that Reagan had on the nation's judiciary. Over the course of his two terms, Reagan filled 368 out of 736 lifetime federal court position. Seventy-eight of the appointees were appeals court judges, and the remaining 290 were district court judges.[160] The actual number of individuals appointed to the vacancies was lower, however, because eighteen Reagan appointees were elevated from the district to appeals court, one judge—Antonin Scalia—was promoted from the circuit to Supreme Court, and seven judges retired, resigned, or died during the Reagan years.[161] In total, Reagan had appointed 47% of the judges in active service on Article III courts when he left office in 1989 and thereby achieved a pivotal Reaganite goal—to alter the judiciary's philosophical composition.

While the Reagan administration changed the judiciary simply due to the sheer number of judges he appointed during his two terms, it achieved other important goals, such as nominating younger individuals and selecting candidates based on jurisprudence rather than race or gender. The average age of Reagan's judicial appointments did decrease after Edwin Meese became Attorney General during the Administration's second term, as the number of judges appointed under the age of forty rose from 7%

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[160] Goldman, 335
[161] Ibid.

during the first term to twelve percent during the second term. Additionally, the proportion of district court appointees under the age of forty-five increased from 26% during Reagan's first term to a staggering 36% during the administration's second term. The youthfulness of Reagan's appointees, however, became most apparent after realizing that only 20% of all Carter's district court appointees were forty-five years of age or younger. The evidence proved that the Reaganites achieved one of their key goals—the appointment of young jurists who would propagate elements of Reaganite philosophy decades after Reagan's last day in office.[162]

The Reagan administration used affiliation in the Republican Party to signal one's dedication to originalist jurisprudence, which shared many similar ideas, such as limited government and an emphasis on individual freedoms. 95% percent of Reagan's first-term appointees identified as Republicans, which was the highest level of partisanship since Eisenhower's first term, according to scholar Sheldon Goldman.[163] During Reagan's second term, which scholars view as the administration's most partisan time, the White House appointed twice as many Democrats to the district court bench as during the first term. The appellate courts, however, became a completely different story because the not a single Democrat joined them. Positions on the appellate courts were reserved for the most conservative judges because of the courts' ability to craft legal decisions. In fact, three out of four appeals court appointees were not only registered Republicans but displayed significant partisan activism in their past.[164]

Differing from the Carter appointment process, which emphasized selecting women and minorities, the Reagan White House appointed individuals based on their

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[162] All facts from this paragraph from Goldman, 337
[163] Goldman, 343
[164] Facts from this paragraph from Ibid.

jurisprudence and age. Though race was a relatively secondary factor in the selection process, each vetting brief did mention it. The White House's focus on Reaganizing the judiciary with originalist judges left it with the worst record in appointing black judges "since the Eisenhower administration. In eight years Reagan named seven African Americans to the federal bench."[165] Carter, in contrast, appointed thirty-seven African Americans to the federal bench during his four-year term. The Reagan administration's failure to appoint African American judges can be attributed to the thorough vetting procedures that prevented many qualified non-conservative lawyers from obtaining a nomination. In fact, Stephen J. Markman, assistant attorney general for legal policy, lamented this fact: "Nothing would please us [the Reagan administration] more than to find more qualified black and minority candidates in this process. It is not easy, however. There simply is not the pool . . ."[166] Markman's answer made sense to those who understood the Reagan administration's detailed vetting process, but to many average Americans the lack of African American appointees made the administration seem hostile to minorities. The dearth of African American appointees helped to solidify the Reagan administration's reputation as an anti-minority administration, which tarnished its overall legacy.[167]

While the Reagan administration failed on the racial front, it was quite successful

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[165] Goldman, 335

[166] *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench*, Hearing Before the Committee on the Judiciary, United States Congress, 2nd Session, February 2, 1988 (Washington D.C.: Government Printing Office, 1990), 4. Cited in Goldman, 335.

[167] The Reagan administration made a series of seemingly anti-minority decisions throughout its eight-year term. A few of the major issues included the appointment of Clearance Thomas to lead the Equal Employment Opportunity Council who was personally hostile to affirmative action and did not vigorously investigate reports of workplace racial discrimination. The Reagan administration failed to successfully appoint Jefferson Sessions nomination to the Southern District of Alabama because of racially his insensitive comments about minorities and the Klu Klux Klan. Also, the selection of William Bradford Reynolds to head the United States Department of Justice Civil Rights Division contributed to the Reagan administration's reputation as hostile to minorities because he did not see a difference between hate crimes for blacks and white. Reynolds asserted that he would run a "color-blind" Civil Rights Division.

at finding female candidates to fill judicial vacancies. At the end of the Reaganites' reign in the White House, the administration appointed one woman to the Supreme Court, four to the appeals courts, and twenty-four to the district bench, which was better than any president with the exception of Carter.[168] Reagan's most progressive decision during his president was arguably his appointment of the first woman—Sandra Day O'Connor—to the Supreme Court. The selection made good on a campaign promise, but demonstrated that the Reagan administration did employ some form of affirmative action when making a selection because, according to Sheldon Goldman, she was not the most "outstanding man or woman available in the entire nation."[169] The administration, however, came to regret the appointment because she became a moderate jurist who became the key swing vote protecting abortion, among other issues.

The Reaganites created a definitive nomination process, but begrudgingly altered it only for female candidates. On June 23, 1982, presidential assistant Ken Duberstein sent out a response to the Ohio Congressional delegation reminding them: "As White House Counsel Fred Fielding indicated in his June 15 letter to you, we have asked for your help in identifying qualified candidates who share the President's judicial philosophy . . . we have also indicated that *we are particularly interested in the Delegation's recommendation of women candidates for the President to consider*."[170] The position ultimately went to a female, Alice Batchelder. Another such instance occurred when Cynthia Holcolm Hall was nominated for as a United States Tax Court judge without the complete support of California Republican senator S.I. Hayakawa. The

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[168] Goldman, 334.
[169] Goldman 329.
[170] Emphasis added. Duberstein to Latta, July 12, 1982, WHORM, FG (078900-086999), #084738. Cited in Goldman, 330.

White House received such rave reviews from Elizabeth Dole, a member of the White House staff and Senator Bob Dole's wife, that it decided to disregard general nomination policy and obtain Senator Hayakawa's approval later in the process. Hall eventually gained the senator's support and was confirmed. The FJSC's strict nomination process was modified only for females, which demonstrated that the Reaganites understood the importance of appointing conservative females to the bench. Thus, through appointing women, Reagan could accomplish two key goals: changing the philosophical and the gender composition of the judiciary.

The Reagan administration's focus on the judiciary resulted in two profound changes in the confirmation process. First, the Reaganites willingly selected candidates who fit its own judicial template—young and active in the Republican Party—first, and worried about all other issues later on in the process. In fact, the Manion situation proved that the Reagan administration would appoint questionably confirmable candidates and use its political clout to help see the nominee through to confirmation. The second change involved the Reagan administration's successful centralization of the confirmation process in the White House. The process became a coordinated effort where the highest-ranking members of the administration would personally evaluate each potential candidate to discern his or her ideological purity and suitability for the position. Over eight years, Reagan instituted profound and sweeping changes to the federal judicial selection process, which was arguably the administration's longest lasting impact on the nation.

Conclusion

The Reagan administration marked a definitive change in executive branch powers because the White House became the primary actor in the nomination process. After evaluating three key mid-twentieth century presidents—Nixon, Carter, and Reagan—one can see that the Executive evolved from passively nominating individuals that senators endorsed to becoming an active participant in the nomination process during the Reagan administration. The shift of the appointment power to the executive, however, occurred under Carter who sought to remove executive influence from the entire process. Carter's merit selection panels pushed the nomination power outside the Senate's hallowed halls and into an apolitical vacuum, which neither the president nor Senate absolutely controlled. Reagan used some of the political momentum accrued in the 1980 electoral victory's wake to dismantle the merit selection boards and position the executive as the primary actor in the nomination process. Asserting the Executive's dominance over this nascent power, mainly through selecting younger and more conservative candidates, defined the remainder of the Reagan administration.

Rather than acknowledge the Carter administration's achievements in regard to changing the nomination process, Attorney General William French Smith derided the Carter courts for overly politicizing the courts. Smith wrote in his memoirs, "In administrations prior to that of President Carter, there was always a tendency to appoint at least *some* members of the opposite party . . . But during the Carter years, to my knowledge *no* Republicans were appointed. And the folks who were appointed were during those years were, consistently, the most liberal stripe."[171] Besides Smith's

[171] William F. Smith, *Law and Justice in the Reagan Administration: The Memoirs of an Attorney General.* Palo Alto, California: Hoover Institution Press, 1991. 73

statistics being false, since 9% of all Carter's appointments were either Republicans or independents, Smith used a political attack in order to justify the Reagan administration's decision to appoint almost exclusively Republicans.[172] Smith's argument made the Reagan administration seem vindictive and reactionary. Instead of attacking Carter, Reaganites should have acknowledged the distinctly important role that Carter played in making the White House a primary actor in the nomination process. Without Carter's changes, Reagan's dreams of revolutionizing the judiciary would have faced larger barriers, especially from senators attempting to assert their power to advise the president on all nominations.

A mere sixteen years after Reagan left office, in May 2005, the Senate experienced an infamous political crisis when Senate Democrats opposed George W. Bush's nominees to fill ten vacancies on various appellate courts across the nation because they were seen as ideologically extreme.[173] The Democratic filibuster against these nominees caused the Republican leadership to threaten employing the "nuclear option," which would alter the Senate's rules so a filibuster could not be used to block a judicial nominee. The heated political atmosphere cooled after a deal was brokered between seven Democrats and seven Republicans whereby they would not join a filibuster against a judicial nominee unless, according to Arkansas Senator Mark Pryor, "extraordinary circumstances" existed.[174] While the vagueness of the language confounded many political observers, the deal nonetheless preserved one of the Senate's pivotal rules erected to preserve the institution's deliberative ethos.

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[172] Goldman, 281

[173] Sheryl Gay Stolberg, "Senators Who Averted Showdown Face New Test in Court Fight," *New York Times*, July 15, 2005.

[174] Ronald Brownstein and Janet Hook, "News Analysis; High Court Nomination May Prove a Deal-Breaker," *Los Angeles Times*, July 7, 2005.

The entire episode was due to a discrepancy in the meaning of the Senate's Constitutional right to "advise and consent" with the Executive regarding judicial nominees. Democratic Senators realized they were so far on the sidelines of the nomination process that they felt the need to transform this common practice into a political crisis as a means to voice their unhappiness. The Bush administration, however, was following the precedent of previous presidents who centralized the selection process in the White House as a means to vet potential candidates to ensure that the nominee's judicial philosophy matched the president's. The power of senators and representatives to nominate judges due to political patronage had been diminishing since Reagan took office, and the Senate Democrats seized upon this incident to reassert their former starring role in the nomination process. The lower courts had become a highly politicized branch by the beginning of the twenty-first century when the selection process became professionalized by the work of many officials reviewing each candidate, and institutionalized in that each administration continues to centralize the judicial selection process in the White House.

While the journey to assert the president's primacy in the nomination process took a strange path, Reagan's actions ensured that the executive would become the leader in nominating the judiciary. The nomination power became an important, although continually understated, aspect of executive clout, because it allowed a president's policy to continue being heard several decades after the individual left the Oval Office. The Reagan administration brilliantly created a rigorous vetting process, which guaranteed that almost all appointed judges would continue to further Reagan's jurisprudence long after he left office. Thus, Reagan's impact on the judiciary was indelible. The Reagan

White House completed a process that Thomas Huston opined about some twenty years before Reagan assumed office turning the judiciary into Reagan's lasting bulwark of conservatism.