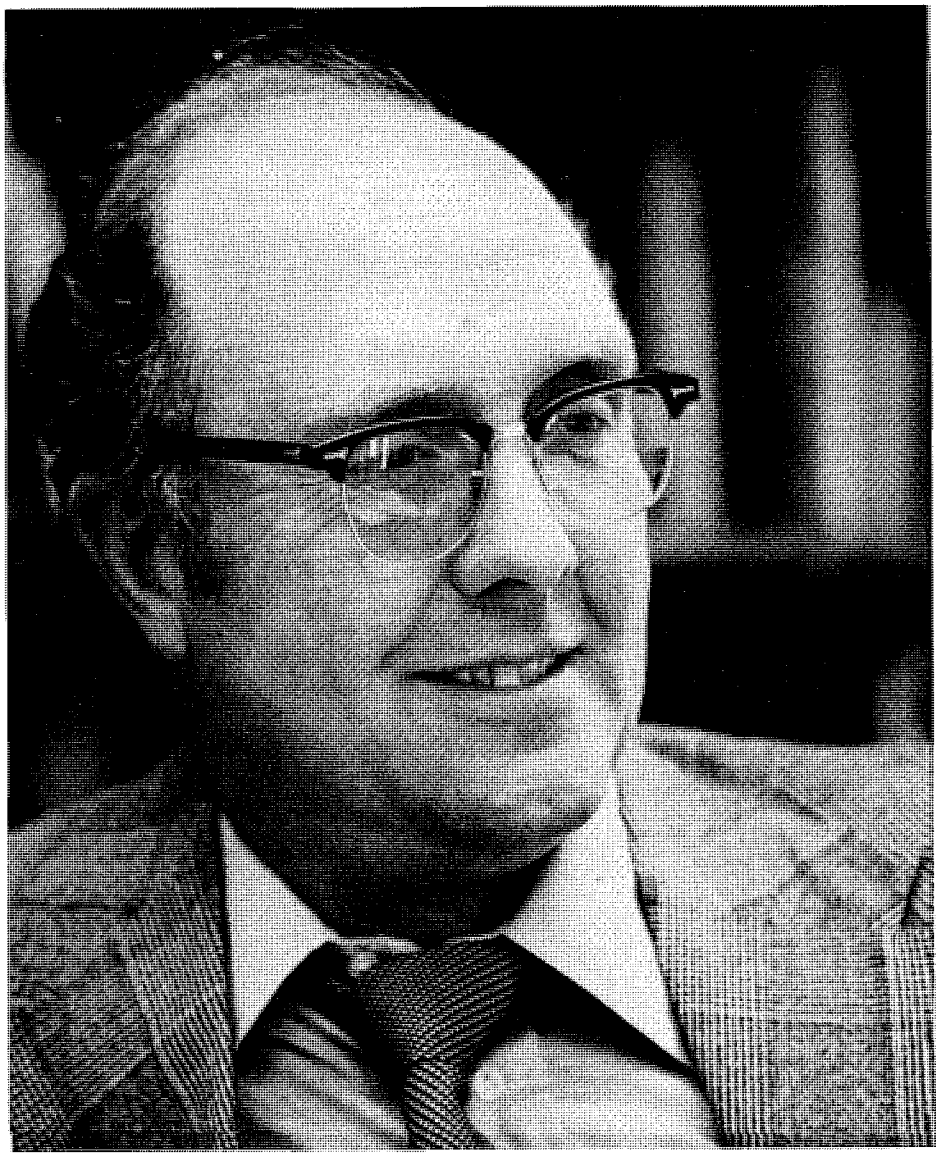
"Merit Selection THE CIRCUIT JU COMMISSION



by
Professor
Carl S. Hawkins

Professor
of
Law

Editor's Note:
Professor Carl S. Hawkins has been a member of the faculty since 1973. He holds a B.A. in Political Science from Brigham Young University and received his J. D. Degree from Northwestern University School of Law. Before coming to the J. Reuben Clark Law School, Professor Hawkins taught at the University of Michigan Law School. Prior to that he was associated with the Washington D.C. firm of Wilkinson, Cragun, Barker and Hawkins, which he entered after clerking for Chief Justice Fred M. Vinson of the U.S. Supreme Court. He has served on countless boards and committees and is a prolific author.

# of Federal Judges"

DGE NOMINATING EXPERIENCE

Candidate Jimmy Carter had promised to support merit selection of federal judges, but senatorial politics required a compromise. The President could have his way with appointments to the Circuit Court of Appeals, which served a wider region than the constituency of any one Senator, but the appointments of federal district judges would still be based upon senatorial nominations, with the President urging the Senators to use nonpartisan advisory commissions.

Less than a month after his inauguration, by Executive Order 11972, February 15, 1977, the President established the United States Circuit Judge Nominating Commission to investigate the qualifications of applicants and recommend the persons best qualified for presidential appointments to the United States Circuit Court of Appeals. The Commission is divided into thirteen panels: one for each judicial circuit, with two each for the geographically large Fifth and Ninth Circuits. Each panel has eleven members including the chairperson, with representation of both sexes, ethnic minorities, lay citizens as well as lawyers, and a resident of each state within the panel's geographic area.

The Executive Order prescribes minimum qualifications for persons to be nominated as circuit judges, including membership in good standing of at least one state bar, integrity and good character, sound health, outstanding legal ability, commitment to equal justice under law, and judicial temperament. Panels are admonished to consider persons who would balance the composition of the court by meeting any "perceived need". A later Executive Order of May 11, 1978, No. 12059, more specifically encourages the Panels to seek out well qualified women and members of minority groups as prospective nominees. The Panels are given sixty days after notification of a vacancy within which to investigate prospective nominees and report to the President the names of at least three persons and not more than five persons found to be best qualified. The procedure for selection is left largely to each Panel, with a few specific requirements for public notice and invitation for interested candidates to apply, a requirement for returning a prescribed questionnaire within a stated time, and a requirement that all names recommended to the President must have the support of a majority of the panel. Each vacancy is filled by nominees from a state designated by the President, usually the state from which the position had previously been filled.

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This nominating process has been used by the President in making sixteen appointments to the United States Circuit Courts of Appeals, and it will be used in filling the 35 new positions created by the Omnibus Judgeship Bill of 1978. The Tenth Circuit Panel was used to nominate candidates for two appointments in 1977, one from Utah and one from Kansas. The Panel was recently reactivated to make nominations for an additional position from Oklahoma.

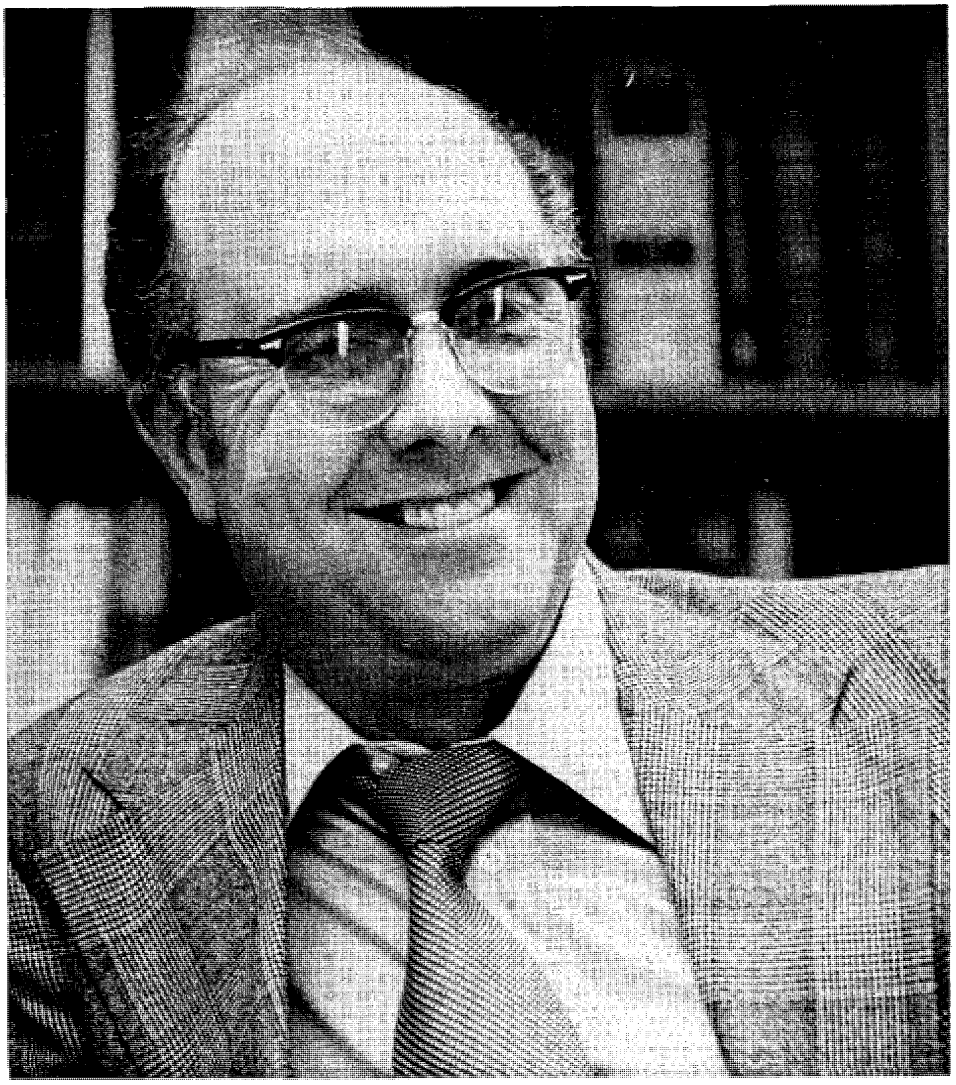
TENTH CIRCUIT PANEL

The Tenth Circuit Panel was first activated in May of 1977 to screen applicants for two vacancies on the Court resulting from the resignations of Judge Delmas C. Hill from Kansas and Chief Judge David T. Lewis from Utah. Eleven members were appointed to the Panel: three each from Colorado and Oklahoma, two from Kansas, and one each from New Mexico, Utah and Wyoming. Five of the eleven members were women and six were men. Seven were lawyers and four were not. Two of the five women were lawyers and five of the six men were lawyers. Five of the seven lawyers were private practitioners from solo practice to small-medium sized firms. The other two lawyers were law teachers. Only one of the eleven Panel members came from an identifiable ethnic minority — a lawyer with Mexican-American lineage.

Nine Panel members were Democrats, while two, including the chairman, were Republicans. All disclaimed knowing why they had been chosen or who had recommended them to the President. Several had been active locally in Jimmy Carter's campaign for the presidency, but most had not been. None was a politically prominent person. Several of the nonlawyer members of the Panel had been active in community affairs and all of the lawyers had been active professionally. The chairman was a veteran litigation lawyer with many years of service in state bar and American Bar Association com-

mittees.

I learned of my apointment to the Tenth Circuit Panel through a call from the Assistant Attorney General, whom I had not known, asking if I was willing to serve. He did not say upon whose recommendation I had been chosen to represent the State of Utah on the panel. It later became apparent that I had not been



recommended by the Utah State Bar. They had nothing against me personally and our relations had been cordial, but understandably they would have preferred representation by a practicing member of the Bar.

PRELIMINARY PROCEEDINGS

Our panel met first in Denver for an orientation and planning meeting. Chief Judge Lewis instructed us on the Court's work and its needs. We reviewed our instructions from the President and the Justice Department and then scheduled dates for publication of notice, submission of applications, and meetings to select candidates for interview and to conduct the interviews in Kansas and Utah. The schedule was tight, because we had to select nominees for two positions within sixty days. We rejected the possibility of dividing into subcommittees to facilitate investigation and interviews. Instead, we decided to have all applicants send copies of their questionnaires and supporting documents to every member of the Panel at the same time their original applications were filed with the chairman. This made it possible for each member of the Panel to review all of the applications before our next meeting, but it also imposed a costly burden upon all of the applicants, because each application required response to a thirty-page questionnaire and the submission of five recent briefs, opinions, or other samples of legal writing.

PRE-INTERVIEW SCREENING

Applications were solicited by published notice and by individual contacts with persons who had been suggested for our consideration and others we thought might be interested. Candidates were required to submit their completed applications by a prescribed date which left us about two weeks to study the files and make such further inquiries and investigation as time would permit. I devoted full time to studying the applications and still did not have as much time as I would have liked for critical evaluation of their professional writing and for making further inquiries of persons who knew the applicants. We received over thirty completed applications from Utah and about twenty from Kansas.

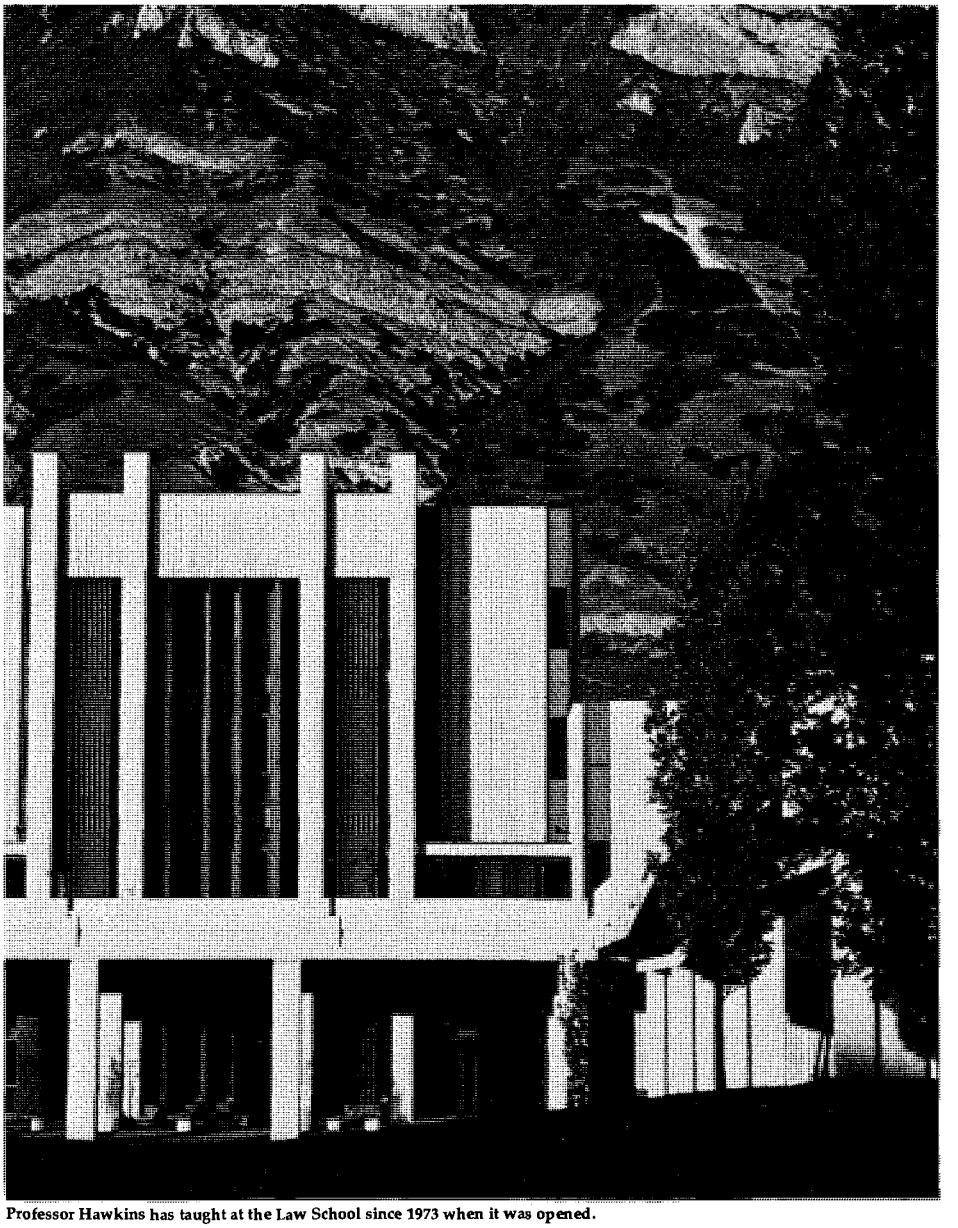
I learned of my appointment to the Tenth Circuit Panel through a call from the Assistant Attorney General, whom I had not known, asking if I was willing to serve.

Our Panel met again in Denver to select those applicants to be given further consideration through interviews and to plan the interviewing process. It was a lively meeting, extending over two days with all members of the panel present. We began with an informal review of the candidates, which revealed that all of the panelists had done their homework well. They were familiar with the basic biographical data for all of the applicants and had occasionally made further inquiries about some of the more promising prospects. I was especially impressed with the preparation and participation of the non-

lawyer members of the Panel. While they had special concerns about the candidates' views on current social problems, especially equal rights for women and minorities, they had also worked very hard to evaluate the professional credentials of the candidates.

Following an open discussion of all applicants, we turned to the selection of candidates for interviews. We identified obvious consensus candidates for inclusion and exclusion. After that, it took much discussion and several rounds of voting to agree upon the additional applicants to be interviewed. There were strong differences of opinion on the merits of individual applicants, but at this preliminary state there was a noticable disposition to include an applicant for interview, even lacking majority support, if several panelists felt strongly enough that the applicant should be interviewed. By this process we reduced the number of applicants for further consideration to ten from Kansas and fourteen from Utah.

Then we turned our attention to planning the interview process. There were wide differences of opinion about how the interviews should be conducted and it took many hours of discussion to work out a compromise. From hindsight, it has become clear that this compromise was the most important single decision made by our Panel and did more than anything else to assure the success of our future deliberations.



Professor Hawkins has taught at the Law School since 1973 when it was opened.

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Developing the list of approved questions was a difficult task. There was a conflict between the desires of some members of the Panel to have very sharp questions on specific social issues and the belief by other members of the Panel that such questions would be improper. We eventually agreed upon eleven questions which would give the interviewee an open opportunity to reveal his or her knowledge, experience and attitudes respecting the role of the federal appellate courts and the administration of civil and criminal justice. More specific probing into controversial social issues would be left to the individual panelists in the second half of each interview.

INTERVIEWS AND FINAL SELECTION

In July, 1977, the Panel met for two days in Kansas and three days in Utah to interview the remaining candidates and select those to be recommended to the President. All Panel members were present for all of the interviews.

Applicants were scheduled to appear at hourly intervals. Each applicant was given a half hour before his scheduled appearance to study the uniform questions. After introduction to the Panel, the candidate was asked to take twenty-five minutes without interruption for responding orally to the uniform questions. Then individual members of the Panel would rotate in asking impromptu questions for twenty-five minutes. The candidates' discussion of the uniform questions proved quite revealing. Wide differences in selective emphasis disclosed that some applicants had special experience and critical or creative observations on these questions, while others merely repeated superficial or ambiguous generalities absorbed from their professional culture. Impromptu questions from individual members of the Panel covered a variety of subjects ranging from personal hobbies and recreational interests to attitudes and positions on contemporary social and political issues. Some members of the Panel had misgivings about others asking pointed questions on specific issues which might come before the federal courts, but the answers did reveal something about the temperament of the applicants. The questioning was always polite and there was no quarreling with the applicants or showing disapproval of the answers given.

At first there was difficulty allocating time among individual members of the Panel for impromptu questions. Some members of the Panel, pursuing intensely a line of questions in which they had special interests, took up so much time that there was not enough time for others to ask their questions. But these difficulties were quickly adjusted. Panel members learned to put their questions more efficiently and restrain themselves in the interest of others. With each interview, the chairman directed the impromptu questioning to begin with a different member of the Panel in rotation, so that over time the opportunities for questioning were equalized.

After interviewing the ten candidates in Kansas, the Panel spent one half day in selecting the nominees to be recommended to the President. A period of unstructured discussion of all the applicants was followed by experimental voting, including votes to retain, votes to exclude, straw votes and weighted rankings of candidates. No one of these methods provided a completely satisfactory process for making the final selections, but through their combined use we arrived at three names who were favored by at least a majority of the Panel. Although some members of the Panel felt very strongly that additional candidates should be recommended to the President, no more could muster the six votes required for inclusion and the Kansas list was closed with three names. The nominations were transmitted to the President without ranking and without comments.

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In Utah we took two days to interview the fourteen applicants and a third day to select the final five for recommendation to the President. This time the difficulty was in reducing the recommended list to five nominees because there were more than five who had a minimum of six votes. Again, no single method of balloting provided the answer, but by a combination of the methods mentioned above we eventaully closed the list with the names of the five applicants who had the most support. From among the five Utah nominees, the President appointed Monroe G. McKay. From among the three Kansas nominees, the president appointed James K. Logan.

THE OKLAHOMA POSITION

The Omnibus Judgeship Bill of 1978 added one position to the Tenth Circuit. The President allocated that position to Oklahoma and reactivated the Tenth Circuit Panel in December of 1978 to screen the candidates. Ten of the original panelists, including the chairman, were reappointed, so that our work this time was greatly facilitated. It was not necessary to have a preliminary meeting. The chairman through correspondence and telephone calls arranged the schedule for publication, submission of completed applications, and meetings to interview and select the nominees. At a one-day meeting in Denver we narrowed the list of thirty applicants to fourteen to be further investigated and interviewed. The interviews were conducted in Oklahoma City over two days, using the same procedure that had been developed in Kansas and Utah. An additional half day was required to select the nominees recommended to the President. In this instance only four names were submitted. While there were several others with good professional qualifications, only four could command the minimum of six votes required for recommendation. These four names are now pending before the President for his consideration, and I assume that one of them will be appointed soon.

PERSONAL OBSERVATIONS

My experience with the Nominating Commission produced some positive observations.

The process is workable. The eleven members, representing widely diversified interests and including a substantial number of non-lawyers, can work together and focus their efforts effectively on screening the qualifications for judicial candidates. Lay members of the panel demonstrated their capacity to evaluate professional qualifications and proved that they were fully as committed to the task as were the lawyers. Widely diversified political, social and economic interests were compromised to the extent necessary to achieve a working consensus on at least the minimum number of acceptable candidates from each state.

Partisan political influences were effectively limited. As far as I know, no political pressure was imposed upon any members of our Commission to influence their decisions. Public officials and politicians, whom I knew to be intensely in-

terested in these judicial appointments, scrupulously avoided any contact with me during the selection process. In our Commission deliberations, as well as in informal discussion among the members, the political affiliation of candidates was never overtly discussed as being relevant to our selection decisions.

My observation that partisan political influences were effectively limited does not imply that political considerations were completely eliminated from the appointment process. That would probably not be possible and, in my opinion, it would not be desirable. By vesting responsibility for judicial appointments in the President and Senate, the Constitution demands political accountability. The President did not mean to abdicate that political responsibility through the commission nominating process. The Commission was meant to minimize political considerations while the professional qualifications of candidates are being evaluated, but after professionally qualified persons have been nominated by the Commission, political considerations must surely be weighed by the President in making his final choice.

My most favorable observation concerning the Commission is that its nominations resulted in the appointment of candidates with good qualifications.

It was unfortunate, in connection with the Utah appointment, that some media commentary argued that the merit selection process had been subverted by political considerations in the appointment of Monroe McKay. The Nominating commission recommended five qualified candidates for the Utah position, including Monroe McKay and David Watkiss. The five nominees were never ranked by the Commission. Indeed we were explicity instructed not to rank the nominees, presumably so that the President's Constitutional responsibility for making the final selection would not be compromised. Rumor has it that the Justice Department advised the president that Watkiss and McKay were the two best qualified of the five. Congressman Gunn McKay marshalled political support for his brother, and Governor Matheson marshalled his political support behind David Watkiss. The President appointed Monroe McKay. Some media reports mistakenly implied that Watkiss had been the preferred candidate in the merit selection process. That was not so. The Commission nominated five qualified candidates and fully understood that the final selection was up to the President. While Commission members would have been satisfied with the appointment of any one of the five, including Mr. Watkiss, no nominee had more supporting votes on the Commission than Monroe McKay.

My most favorable observation concerning the Commission is that its nominations resulted in the appointment of candidates with good qualifications. Applicants with mediocre and inferior professional or personal qualifications were screened out. All of the nominees finally recommended to the President had good professional credentials. There were strong differences among members of the Commission as to whether a few of the applicants not recommended to the President had qualifications equal or superior to some who were recommended, but there was no lack of good feeling about those who were recommended. The two appointments which the President made to the Tenth Circuit, Judge McKay from Utah and Judge Logan from Kansas are superbly qualified and have already earned good reports for their work on the bench. When the President makes his appointment from among our Oklahoma nominees, a third judge with excellent personal and professional qualifications will be added to the Tenth Circuit.

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Notwithstanding these favorable observations, the commission nominating process has not fulfilled all the claims made for it by its supporters.

There has been no apparent moderation of partisanship in the appointments. Up to now, all of President Carter's appointments to the Circuit Court of Appeals (all circuits) have been Democrats and most of them have been quite active in the party. This partisanship exceeds that of President Carter's three predecessors and will cast doubt upon his commitment to merit selection if some Republicans are not appointed soon.

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Hopes that the commission nominating process would lead to better representation for women and minorities have not been fully realized. No women have yet been appointed Circuit Judges by President Carter, though it seems quite likely that there will eventually be some women appointed to positions which have yet to be filled. The experience of our Tenth Circuit Panel illustrates the problem. We have no women applicants from Kansas or Utah. Even though earnest efforts were made, we were unable to find any women lawyers who had the required fifteen years professional experience and were interested in applying. We did, however, have two women applicants from Oklahoma and one of them was included among the four nominees recommended to the President. In the other circuits three distinguished black jurists were elevated to three different circuits

and one Asian-American was appointed. But we had only two minority applicants for consideration, one for each of two vacancies and none for the third, and there were no minority applicants among the nominees we recommended to the President.

My most serious concern about the commission nominating process arises from my belief that the process screened out several of the best qualified prospects. This is a subjective conclusion which is subject to a high risk of personal bias, both as to the qualifications of candidates and as to the circumstances which led to their exclusion.

Several highly qualified people were screened out at the threshold because they did not want to submit to the commission nominating process. Two superbly qualified Republicans, whom I urged to apply, declined because they could not believe their chances for nomination by the Democratically dominated Commission were worth the trouble. A well qualified Democrat decided not to apply because public knowledge that he was trying for the judicial appointment would have compromised his effectiveness in his present position.

Some of the best qualified candidates who did apply were screened out by special interests within the Commission. Several special interests were identifiable, although the groups were fluid and their interests were often subordinated to other concerns. Academicians on the Commission tended to insist upon elite scholarly qualifications before looking for other qualities. The practicing lawyers on the Commission tended to believe that extensive litigation experience was an indispensable qualification. Women members of the Commission were deeply concerned about the candidates' positions on abortion and the Equal Rights Amendment. And shifting combinations of liberals occasionally coalesced over civil rights and equal justice issues. No one of these special interest groups could defeat or nominate a candidate, but any two combining against a candidate could deny him the six votes required for nomination. For example, a candidate who did not have enough litigation experience to satisfy our practicing lawyers and whose views on abortion were unacceptable to our women members could be excluded, no matter how high his professional, personal, academic and public service qualifications were otherwise. Such combinations eliminated three of the best qualified candidates who came before our Panel, in my opinion.

This is not to imply, and I do not believe, that the persons thus eliminated would have been better qualified than Judge Logan and Judge McKay. But some of those eliminated were, in my opinion, better qualified than some who were recommended to the President. While the decision making process on our Panel successfully screened out persons with mediocre and inferior qualifications, it tended to discriminate among the better qualified people somewhat erratically on combinations of special issues which were not necessarily the best predictors of superior judicial qualifications.

If my experience was typical, then more than 1,100 person-hours of Commission members' time was expended on making nominations for each vacancy, and if that time were valued at professional rates it would amount to more than $100,000.

This does not imply any criticism of the demeanor of my colleagues on the Panel. We were all representing special interests, to some extent, consistent with the apparent logic underlying our appointments. The extent to which we subordinated our special interests to broader concerns varied more accordingly to personality than to the interests represented. The flaw, if any, was in the structure of the Nominating Commission, with members apparently selected to represent a particular combination of special interests. Ironically, the "representation logic" carried far enough would lead to the popular election of judges, which would be the antithesis of "merit selection". Our Nominating Commission was a hybrid — neither randomly representative nor purely merit-directed in its concerns.

When we met in Oklahoma to interview candidates, we were repeatedly reminded of the late Alfred P. Murrah and the great contributions he had made as a member of the Tenth Circuit Court of Appeals. Candidate after candidate recalled Judge Murrah as probably the greatest jurist to sit on the Tenth Circuit and as the candidate's personal ideal of a federal judge. But Judge Murrah would never have been appointed to the federal bench if he had been required to be nominated by our Commission. At the time of his appointment, he did not have the minimum years of professional experience required by our Executive Order, and it is doubtful that his academic and practice credentials would have satisfied those special interests of our Commission, to say nothing of whether his views on contemporary social justice issues would have been acceptable to other members of our Panel. For similar reasons, such great jurists as Justice Felix Frankfurter and Justice Hugo Black would never have made it through a similar nominating commission process. The nominating commission process is not impeached, by such ad hominum arguments, but they do illustrate some systemic limitations in the process.

Moreover, the nominating commission process is rather costly. One of our applicants estimated that it had cost him more than $3,000 in billable professional time and incidental expenses to complete his questionnaire. If that expense is multiplied by the twenty or thirty applicants that we had for each position, it becomes a sizeable sum. To that would have to be added the travel and lodging expenses for eleven panel members to meet and interview the candidates, which I would estimate at more than $5,000 for each vacancy to be filled. I estimate that I spent more than 100 hours on each vacancy, studying the qualifications of candidates, traveling and attending Commission meetings, and communicating with interested persons. If my experience was typical, then more than 1,100 person-hours of Commission members' time was expended on making nominations for each vacancy, and if that time were val-

ued at professional rates it would amount to more than $100,000.

Nobody would object to such costs if they were necessary to find those candidates with the best professional credentials. But that could be accomplished with much lower expenditures of time, money and effort. An informal advisory committee, composed of three knowledgable professionals from the state where the appointment is to be made, could have very quickly identified the five best qualified professional persons in Kansas, Utah or Oklahoma, just as surely and just as accurately as did our Commission. As to measuring the candidates' professional and personal qualifications against broader criteria of public interests, the local Senator and the President should be able to do that, or else the political system has failed anyway. Trying to represent the public interest through the commission process runs a risk of distorting the public interest through the skewed composition of the Commission, while obscuring the President's political accountability for how public interests were resolved in the process.

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This does not imply that I would favor delegating the evaluation of qualifications to the local bar association and the American Bar Association. In one case where I had the opportunity to compare their evaluation process with ours, theirs was much more superficial and did nothing to allay public concerns that professional associations may be incapable of rising above guild interests in assessing the qualifications of candidates.

Nobody is opposed to the "merit selection" of judges. Even the advocates of popular election of judges believe that it results in the selection of the best qualified people, except that they would evaluate qualifications more in terms of responsiveness to popular sentiment than in terms of professional skills and experience. The nominating commission process was developed largely as an antidote to the popular election of state judges. The federal appointment process, even with its occasional abuses, has produced a generally superior bench. The traditional federal appointment process leaves the President and the Senators with ample flexibility to get adequate information on the qualifications of candidates, without resorting to the more cumbersome extremes of the Nominating Commission as it is now constituted. Whether the weighing of public interest in the appointment process is better served by the participation of a nominating commission is a much more difficult question, but my experience has left me with doubts.