MERIT SELECTION AND POLITICS: CHOOING A
JUDGE OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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INTRODUCTION

With lightning rapidity the Senate confirmed on August 11, 1978, President Carter's July 20th nomination of J. Dickson Phillips as Judge of the United States Court of Appeals for the Fourth Circuit.1 Confirmation came in the wake of a perfunctory twenty-minute hearing attended by both of North Carolina's Senators and two of its Congressmen.2

It came, too, in the wake of the customary investigation and evaluation of the lone nominee by the American Bar Association's venerable Standing Committee on Federal Judiciary. After conducting approximately sixty-five interviews, chiefly by telephone, and spending the better part of a full day with the nominee at his home, the representative from the Fourth Circuit had drafted a thirty-four page single-spaced report circulated to his committee counterparts from the other circuits. In it, he recommended approval of Phillips with a "well qualified" rating. But telephoned and written votes revealed a split among members. The Committee Chairman subsequently would state that "a substantial majority found him well qualified, and the minority found him exceptionally well qualified." All in all, the Phillips case from the ABA perspective seemed "an easy one" compared to other recent nominations.3 Thus harmoniously ended a political saga which had begun fifteen months earlier with the unexpected death of Judge James Braxton Craven, Jr. from Asheville, North Carolina.

To fill the judicial vacancy so created, the President looked to his novel United States Circuit Judge Nominating Panel for the Fourth Circuit. Its establishment as well as that of similar panels in other circuits fulfilled a campaign promise to bring merit selection principles to the appointment of federal judges.4 Executive Order 11,972 issued less than a

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month after the inaugural provided necessary institutional machinery. It specified that panels were to cast their nets wide in seeking judicial candidates, screen and identify those “well-qualified” for a judgeship, and transmit to the President the names of five possible nominees within sixty days of notification of the vacancy. The Order clearly sought expedition and excellence. Only the latter goal would be achieved in the Fourth Circuit.

I. J. DICKSON PHILLIPS: JUDGE

Although The Nation greeted news of Phillips’ nomination sourly, leading ‘Tar Heel newspapers acclaimed it. Born in the western sandhills of North Carolina, the fifty-six-year-old father of four graduated Phi Beta Kappa from Davidson College, saw combat in World War II as an officer in the parachute infantry, and returned to attend the University of North Carolina Law School where he became associate editor of the law review and a member of the Order of the Coif.

With a single unsuccessful foray into county Democratic politics, Phillips practiced for eleven years in Laurinburg and Fayetteville. One of his partners for a portion of that period was longtime friend and law school classmate Terry Sanford, subsequently Governor of North Carolina and now President of Duke University. The firm’s practice was a mixed one. In addition to criminal cases, it involved a wide variety of civil cases: real estate, probate, administrative, tort, contract, property, estate, and corporate law matters. Clients came from all walks of life; they included personal injury plaintiffs, regulated industries and banks, corporations, partnerships, and sole proprietorships. Increasingly, Phillips became a courtroom advocate in state and federal trial and appellate courts including the Supreme Court of the United States. As a court-appointed attorney, he gained notoriety in his skillful defense of four young Hungarian “freedom fighters” who, as refugees, had enlisted in the United States Army. While stationed at Fort Bragg they were charged with the capital crime of rape.


6. Exec. Order No. 11,972 § 3(b), (c), supra note 5. The subsequent Executive Order 12,059, subdivision 3(a)(2) and (3) repeated the language of Executive Order 11,972, subsections 3(b) and (c).

7. Exec. Order No. 11,972 § 3(d), supra note 5. The superseding Executive Order 12,059, subdivision 3(a)(4) permits the panel to recommend any number of nominees “within the time specified in the notification of the vacancy.”


At trial, Phillips won dismissal of the Government’s case by emphasizing their excessively long incarceration and urging exclusion of their confessions on the basis of the then emerging “McNabb-Mallory” rule.\textsuperscript{11}

Since 1960, he has held both a professorship and, from 1964 to 1974, the deanship of the University of North Carolina Law School, teaching a wide range of courses including legal method, trial and appellate practice, trial advocacy, and appellate review. Among numerous extracurricular activities, Phillips served as Vice-Chairman of the North Carolina Courts Commission which prepared a constitutional amendment and enabling legislation to modernize the state court system. As reporter for the Appellate Rules Committee of the North Carolina Bar Association, he drafted the new State Rules of Appellate Procedure. Later he became Chairman of the State Bar’s Board of Ethics. As a member of the Presbyterian Church in the United States, Phillips sat as Chairman of that connectional church’s permanent Judicial Commission, the function of which is to resolve intra-denominational conflicts. His prodigious efforts won recognition, first by the state bar association which awarded him the John J. Parker Memorial Award in 1975 for “conspicuous service to the cause of jurisprudence in North Carolina” and then by the University of North Carolina which gave him The Thomas Jefferson Award in 1977 for best exemplifying Jeffersonian ideals through “personal influence, scholarship, and performance of duty in teaching, writing, and scholarship.”\textsuperscript{12}

Phillips has been characterized as “[a] lean, gray-haired gentleman with slow Southern diction . . . an educated but down-home manner . . . a family man, a hunter, and a fisherman who keeps in shape by hiking and backpacking. He describes himself as a Franklin D. Roosevelt-Terry Sanford style liberal in politics, but is conservative in his private life.”\textsuperscript{13} Even an element of populism surfaces in his now much qualified opposition to lifetime judicial appointments.\textsuperscript{14} Of the five Panel-endorsed candidates, Phillips alone would possess an acceptable measure of those qualities deemed desirable by North Carolina politicians.

II. The Circuit Judge Nominating Panel

Although long delay characterized filling of the vacant Fourth Circuit judgeship, the nominating panel itself acted swiftly. Its eleven members appointed in mid-July 1977, the group met for a one-day organizational

\textsuperscript{11} The “McNabb-Mallory” rule rendered inadmissible in federal court an accused’s confession obtained during an unlawful detention. It defined unlawful detention as an unnecessary delay after arrest in bringing the accused before a magistrate, whether or not the confession appeared to be voluntary. 3 C. Torcia, WHARTON’S CRIMINAL EVIDENCE § 675 (13th ed. 1973); see, e.g., Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). A federal statute modified the “McNabb-Mallory” rule in 1968. Id.; see 18 U.S.C. § 3501(e) (1976).

\textsuperscript{12} See Helms won’t block, supra note 10, at 1A, col. 1.

\textsuperscript{13} Life’s chances, supra note 10, at 1, cols. 4-5.

\textsuperscript{14} Id. at 8, cols. 2-3.
session later that month, screened and interviewed applicants on three
days in mid-August, and determined its nominees in a long and sometimes
tendentious one-day final meeting on August 30th. On September 1st, well
within the sixty-day limit, Chairman Wesley M. Walker transmitted
names of the Panel’s five candidates to President Carter.15 That nearly a
year elapsed before the President and Senate acted would attest to the
intrinsic difficulty of divorcing merit selection from politics.

The root cause of the hiatus lay in vastly different conceptions of the
ideal federal judge held by a varying panel majority on the one hand and
North Carolina’s two Senators on the other. Supporting this dichotomy
were the political, social, and economic attitudes of the several actors. In
general, a substantial segment of the eleven panel members, drawn from
the five states of the circuit in proportion to population, held public policy
attitudes incongruent with those widely prevalent in North Carolina.

Panel membership included six men and five women, nine whites and
two blacks, seven lawyers and four laypersons, and a majority of past and
present Democratic Party “activists.” Among the lawyers, two of whom
were women, were several large law firm types, a lawyer-banker, a legal
academic, a black lawyer-politician, and a solo practitioner. Over this
diverse assemblage presided the presidentially-designated Chairman,
sixty-two-year-old Wesley M. Walker of Greenville, South Carolina. Part-
ner in a prominent law firm numbering among its clients banks, textile,
construction, and insurance firms, as well as General Motors,16 he brought
to the chairmanship a low key demeanor and skill gained by long experi-
ence on committees. And significantly he provided a link between the
panel and organized bar. Governor of the South Carolina Bar Association
during 1976-77, he actively participated in the work of the American Bar
Association as a member of the House of Delegates, as Fifth District represen-
tative on the Board of Governors, and as a member of the Board’s
Executive Committee and chairman of its Operations Committee.17

Each state in the circuit enjoyed representation by a lawyer as subse-
quently required of all panels by Executive Order 12,059 issued on May
11, 1978.18 Former Executive Order 11,972 required “approximately equal
numbers of lawyers and non-lawyers,”19 a condition met by the Fourth
Circuit’s Panel with two academic political scientists, a state official con-
cerned with women’s affairs, and a Democratic national committeewoman.
The superseding Order eliminated this language as well as that which

17. See WHO’S WHO IN AMERICA 3363 (4th ed. 1978-79); ABA 1978-79 DIRECTORY 13B,
1A, 2A. The Fifth District of the ABA comprises Florida, Georgia, North Carolina, and South
Carolina. Id. at 1A.
limited Panel size to eleven. Although the amended phraseology conceivably could be utilized to squeeze out some or even all lay members, such a Machiavellian strategy reportedly was not intended by the Administration.

Younger, blacker, and with more women than most state merit selection agencies,21 the Panel best manifested its novelty in its omissions. No “pillars” of commerce or industry and none of the bench sat. The presence of at least one state or federal appellate judge would seem a desirable addition. Although judges in regular active service likely would be unavailable, state judges such as former Chief Justice of the North Carolina Supreme Court, William H. Bobbitt, mandatorily retired at a fixed age, and federal “senior” circuit judges voluntarily retired could make a valuable contribution. Both business and organized labor enjoyed “virtual representation” in the Burkean tradition.22 Agriculture, an important interest in the circuit and the distant and not-so-distant background of some judgeship applicants, had little voice on the Panel. By and large panelists came from urban-suburban environments and had incomes above, sometimes well above, statewide medians in the Fourth Circuit. And their outlook was rather cosmopolitan, a fact which assumed paramount importance as the selection process dragged on.

III. THE PANEL ORGANIZES

Chief Judge Clement F. Haynsworth, Jr., accompanied by his able colleague John D. Butzner, Jr., appeared before the Panel by invitation. They discussed the nature of the courts of appeals, the quantity and quality of Fourth Circuit judicial business, and, in a general way, the kinds of traits deemed desirable in nominees to be selected by the Panel. Although panelists freely questioned both judges, none broached controversial candidate-specific questions.

An important issue of judicial ethics would be raised if the judicial representatives were asked to evaluate the written or oral performance of specific lawyers who had appeared before them, or the capabilities of specific judges whose decisions they had reviewed on appeal, or to rank several potential applicants. All publicity of candidacies at this early stage would necessarily arise from personal hunches on the part of panelists or from press rumor. Yet widespread knowledge of such questions and responses

20. Compare Exec. Order No. 12,059 § 2(b), (c), supra note 18 with Exec. Order No. 11,972 § 2(b), (c), supra note 5.


22. Edmund Burke, a British political philosopher of the eighteenth century, originated the concept of virtual representation. “[A] community need not be represented through delegates of its own choosing but . . . its true will might be better reflected by a . . . small group having roots in the national mind and understanding the communal spirit.” M. Sibley, Political Ideas and Ideologies: A History of Political Thought 505 (1970).
likely would chill the application process and, by overtly plunging sitting appellate judges into the political process of judicial selection, subject them to unneeded criticism.

Neither of North Carolina’s two Senators, Republican Jesse A. Helms and Democrat Robert B. Morgan, received an invitation to appear before the Panel. As the Senate plays a constitutionally prescribed function in confirming or not confirming judicial candidates nominated by the President, an appearance by the relevant legislative representatives would seem quite appropriate. Although any citizen may communicate with the Panel, no formal means of obtaining the views of Senators existed. Completely bypassed by the new merit selection machinery, an alienated Senator Morgan complained as he refused endorsement of any panel nominees: “I wasn’t in on the take off; I didn’t want to be in on the landing.” A mere appearance would not likely assuage ruffled Senatorial egos, but it could influence panel decision-making by alerting members to a state’s sometimes peculiar political culture, the Senators’ criteria for selecting judges, and even the names of specific candidates favored by Senators. No restraint should be placed on panelists’ questions directed to the Senators although the legislators could readily invoke the “Senatorial Fifth” with few or no deleterious consequences for themselves.

Executive Order 11,972 subsections 3(a) and (b), called upon the Panel to give public notice of the judicial vacancy, and to “conduct inquiries to identify potential nominees.” The extent to which these duties, duplicated in Order 12,059, subdivisions 3(a)(1) and (2), requires Panels to engage in active recruitment beyond mere notice is unclear. Given the now-abolished sixty-day panel life span and the group’s interstate and ad hoc nature, foraging for nominees seems well beyond panel capacity. Only permanent institutions with members serving for fixed terms, possibly on a staggered basis, and supported by a small Justice Department secretariat, an Office of the Judiciary, could provide the necessary capacity and administrative continuity to permit thorough canvassing of benches and bars, especially in the larger circuits. Such a canvas might well include not only Senators, but also past and present state and national bar presidents, directors of the administrative office of relevant state courts, retired state judges, United States attorneys, state attorneys general, governors, members of the judiciary committees of state legislatures, congressmen, and representatives of interest groups.

24. Exec. Order No. 11,972 § 3(a), (b), supra note 5.
25. See Exec. Order No. 12,059 § 3(a)(1), (2), supra note 18.
26. Executive Order 11,972, subsection 3(d) required a panel to make its recommendations “within sixty days after notification of the vacancy.” Executive Order 12,059, subdivision 3(a)(4) leaves the deadline for recommendations to the President’s discretion in each case.
IV. ASPIRANTS FOR THE BENCH

Twenty-six North Carolinians\(^{27}\) completed the Justice Department application-questionnaire in the short time allotted for securing, responding, and returning it. Screening criteria largely related to the Department of Justice “guidelines” which then stipulated at least fifteen years of legal practice, now reduced to twelve, and an upper age limit of sixty years, since eliminated.\(^{28}\) Thus applicants in the sunrises or sunsets of their careers summarily were screened out as were those applicants who failed to sign their application-questionnaires. Others suffered elimination on more substantive grounds. Thirteen, or fifty percent of the applicants, automatically including all sitting judges, reached the interview stage. These thirteen ranged in age from thirty-seven to sixty with forty-eight the median. They were predominantly white (85%), males (92%), native Tar Heels (77%), educated in North Carolina (69%), usually at the state’s law school in Chapel Hill. Thereafter they had entered a relatively small firm with a general civil and criminal practice and served at the bar a median of twenty-four years. Their active political experience surprisingly had been slight, and if existent at all, involved running for or holding elective office as a member of the North Carolina General Assembly. Seemingly exceptional was the present occupation of interviewees. More than half (53.8%) sat as judges on federal and state benches. Almost another third (30.8%) were legal academics from three of the state’s four major law schools. Only 15.4% pursued an active legal practice.

Whether the paucity of lawyer-candidates in the prime of their careers arose from a diminished sense of public service among members of the profession, a perceived loss of economic status on ascending the federal bench without a commensurate gain in social status, or a perceived lack of viable access to the novel merit selection process is unclear. If the last, changes in panel mechanics might ameliorate the problem. More active recruitment and greater confidentiality of panel proceedings at the personal interview stage conceivably could encourage lawyer candidacies. Executive Order 11,972 did not require any degree of secrecy until transmittal of the nominees’ names to the President, which was to be “in confidence.”\(^{29}\) Order 12,059 eliminated that condition and made no other provisions for secrecy.\(^{30}\) Yet lawyers may contend that they, unlike sitting judges and legal academics, will suffer economic loss if clients learn of their pursuit of a federal judgeship and subsequently hear that they have won neither Panel endorsement nor the nomination itself.

\(^{27}\) President Carter directed the members of the Fourth Circuit Panel to consider “only persons from North Carolina.” Letter from Jimmy Carter to Peter Fish (July 11, 1977).

\(^{28}\) U.S. Dep’t of Justice, Instructions Supplementing Executive Order 11,972, 7 (1977).

\(^{29}\) Exec. Order No. 11,972 § 3(d), supra note 5.

\(^{30}\) See Exec. Order No. 12,059 § 3(a)(4), supra note 18.
IV. HOUSEKEEPING AND INVESTIGATING

Confidentiality at the interview stage presents a difficult, but not insurmountable problem. The Fourth Circuit Panel held all its sessions in the second floor courtroom of the United States Courthouse-Post Office in Charlotte, North Carolina. Publication of forthcoming meetings in the Federal Register let in not only "sunshine," but also an enterprising reporter for The Charlotte Observer who sat outside the courtroom, acted as de facto receptionist, and identified and interrogated each candidate upon arrival for an interview by the Panel. They Seek U.S. Appeals Court Post/Top N.C. Legal Talent Lines Up for Job headlined next morning's Observer. Any serious effort to reduce such publicity would require careful planning, in close cooperation with local officials of Executive Branch agencies, of entrances and exits by candidates. The Fourth Circuit Panel relied upon subordinate judicial personnel for its minimal housekeeping needs. But this practice probably is undesirable, particularly when one or more of the active candidates is on the premises as a resident federal district judge. Because the panels act in an advisory capacity to the President, the Executive, not the Judicial Branch, should provide necessary support services.

The aspect of merit selection least amenable to easy resolution is probably the questions asked of interviewees. The essential task lies in formulating questions which will draw out answers which in turn will enable panelists to apply the laundry list of acknowledged judicial virtues to the flesh and blood individual candidates before them. It is human nature to pose queries which will produce "litmus paper" answers. Simple forthright answers may be satisfactory in the short run, even desirable, but in the long run a great many questions of public policy require "proximate solutions for insoluble problems," as Protestant theologian Reinhold Niebuhr so aptly put it more than three decades ago. And although judges function in an environment combining law and politics in ever varying degrees, their discretion is not unlimited. "Justice" and law may not always coincide. Thus, answers to specific public policy questions may reveal more about a candidate's perception of an intermediate appellate judge's proper role than about his or her real attitude toward substantive issues relating to labor, racial minorities, and the poor. Yet panelists may not so interpret such responses with fatal consequences for the candidate. Improvement of the interview process depends in large measure on the qus-

tions asked. Greater panel permanency augmented by regional workshops, symposia, and conferences for lawyers and lay members would augment experience and encourage expertise in questioning candidates.

An unanticipated problem encountered in the Fourth Circuit related to circulation of candidate exhibits including briefs, published articles, and judicial opinions. After a nominating panel in the land of “Proposition 13” reportedly spent thousands of dollars on reproduction costs, the Justice Department restricted multiple copy reproduction to the application-questionnaire. Only with the greatest difficulty did exhibits circulate among eleven panelists in the absence of staff services and in the limited time available. Examination of such material prior to the interview obviously affects the quality of both questions and responses. A requirement that candidates submit multiple copies of their exhibits largely would eliminate this logistical problem.

Not resolved by improved circulation of printed matter is the conundrum faced by panelists when such material exists in only small or non-consequential quantities. This situation was presented by experienced state trial judges. Judges of courts of general jurisdiction in North Carolina hand down judgments but do not write opinions. Unless these busy judges, who are required to “rotate” systematically in one of four geographically large divisions, can somehow find time to write scholarly articles or contribute written work as part of their extrajudicial activities, panelists are placed in a dilemma. Aware of the importance of writing ability and demonstrated capacity for effective appellate performance, members have before them few writing samples. Briefs may reflect a small town practice or be veritable relics. All likely will pale before the mountains of esoteric publications presented by legal academics and by the voluminous published opinions of judges from state appellate and federal district courts. How to give these hardworking and capable trial judges fair treatment in the merit selection process requires special consideration. If their upward mobility is precluded automatically because of a lack of tangible evidence of eligibility, the consequences for recruitment of competent lawyers for trial benches may become even more difficult than it is at present.35

Letters in support of state trial judges loom with greater relative importance than for other candidates. Letters articulating the candidate’s constituency, which are beneficial at the more advanced political stages of nomination and confirmation, are of less significance for merit selectors. By and large, a “boilerplate” endorsement asserts that the supported candidate possesses some, or more commonly, all of the laundry list of judicial virtues. Many panelists, lawyers, and lay persons alike, who have served on search committees in their businesses, professions, or commu-

nities summarily discount such letters. What is needed are full explanations or, better still, specific examples which apply the various virtues to the individual candidate in question.

V. DISCUSSION AND VOTING

Following the interviews, the Fourth Circuit Panel discussed and voted on its candidates in a daylong session. While discussion must be full and free, introduction of new, particularly derogatory, evidence late in the proceedings without effective opportunity for rebuttal by either the candidate or his or her supporters among panel members can work an egregious injustice. As no rules of evidence prevail, hearsay and mere rumor may boil to the surface at any time. No enduring harm is likely to ensue if time exists to verify the truth of such evidence. But if hearsay emerges late in the proceedings, a negative “fact” literally can smear a candidate and destroy any chance for favorable panel consideration. Either no new evidence should be permitted at late stages or, if such evidence is allowed, any member should enjoy an explicit privilege to obtain a recess of set duration to facilitate verification.

Chairman Walker initially had screened all applications and, with consent of the full Panel, eliminated those which manifested obvious deficiencies. Shortcomings included breach of age or experience qualifications set by the Department of Justice or, in several instances, failure to sign the completed questionnaire-application form provided by the Department and distributed on request by the Chairman.34

Justice Department instructions specified only that successful candidates receive a majority vote.35 But not all majoritarian voting systems are either fair in the abstract or desirable. To meet the test of fairness, they should be straightforward, simple, and designed to result in selection of

34. The Panel considered the absence of a signature above the line provided on page 17 of the “Questionnaire for Prospective Nominees for United States Circuit Judgeship” to be grounds for disqualification. Seemingly such a signature would attest to authorship, completeness, and veracity of answers on the 32 questions propounded. However, following question 32, which requested citation of three references, another paragraph appeared. Unnumbered, it occupied the exact position that would have been occupied by question 33. It was a waiver and release and read:

I hereby waive any privilege of confidentiality I may have concerning information which the Panel may desire to obtain from any source concerning my qualifications for judicial office. I specifically authorize all institutions, organizations, schools, physicians, hospitals, and individuals to make available to the Panel any information concerning me which the Panel may request.

Insertion of the waiver paragraph between the seventeen pages of questions and answers and the signature line could have led some applicants to construe that line as related solely to this paragraph rather than to the corpus of the form. Thus, their uncertainty about the confidentiality of the process of selecting federal judges may have deterred some applicants from signing the questionnaire.

35. See U.S. Dep’t of Justice, JUDICIAL NOMINATING COMMISSION: CODE OF ETHICS AND RULES OF PROCEDURES ¶ 3 (n.d.).
those candidates enjoying broad and general as opposed to narrow and intense support among panelists.28

In voting on its thirteen interviewees, the Panel employed a variety of voting systems adopted on the basis of members’ motions. Three applicants, generally perceived to lack support among panelists, were screened out by use of a special majority-binary ("yea"."nay") vote requiring assent from three-fourths (8) of the Panel members. When similar votes on two more aspirants revealed that a majority favored their continued consideration, the Panel began voting for those viewed as enjoying unanimous or near-unanimous support among members. Successive simple majority-binary votes functioned effectively to place the two most popular applicants on the presidential list of five. With none of the remaining six candidates clearly favored, utility of this voting system vanished and a secret ballot bloc-voting system was adopted to fill the three remaining positions.

Each panelist voted for three choices. Five applicants received a majority vote while three others obtained only one or none and were eliminated. A five person "run-off" was then held in which each panelist again voted by secret ballot for three choices. Four of the five received simple majorities of six or more votes, the non-majoritarian "loser" was not, however, stricken from the competition. Instead, the Panel held a simple majority-binary vote on the applicant who polled the highest number of votes. He won by a substantial margin and became the third entry on the presidential list.

Two positions were yet to be filled. To fill them, the Panel held another secret ballot bloc-vote with each panelist casting votes for two of the four applicants still in the running. The wholly unexpected outcome of this voting round evoked general protests and resulted in a third "run-off" vote from which the lowest vote getter in the previous round was eliminated. This time the Panel used a single choice-plurality voting system. Each member cast a vote for one of three choices. The panelists' true preferences became apparent when the leading choice of the last bloc-voting round was soundly defeated in favor of two applicants who tied each other. A simple majority-binary vote on each of the two frontrunners followed. They won in turn and were added to a new completed list of five names to be submitted to President Carter.

Both bloc-voting and plurality voting systems are regarded by students of the subject as bad in se; that is, they leave even the wisest, best-informed, and most insightful voter uncertain how best to cast a vote in order to obtain a desired choice.29 Bloc-voting, that is, voting for any two, three or more unranked choices, compels voters to vote for, and apparently

equally strongly for, candidates whom they may approve lukewarmly or even disapprove. In addition, the outcome may be skewed by "bullet-voting;" that is, by refusing to cast all votes to which one is entitled. Plurality voting is no better as it tends to eliminate candidates with weak first-choice support and favors those with intense and narrow support. Thus a panel deeply divided among members seeking judicial activists and those favoring self-restraintists of differing degrees unwittingly may utilize voting systems which preclude compromise and exacerbate extremist positions.

A uniform two-step weighted preferential/simple majority voting system would save panel time and energy as well as provide a fair selection procedure. It would operate as follows:

Vote 1: After full discussion of the relative merits of interviewed candidates, their names are listed in alphabetical order on a secret ballot. Each panelist ranks his or her candidates in preferred numerical order by writing a "1" for first preference, "2" for second, etc. next to the relevant names. No tie votes may be given and no space may be left unmarked. The total vote for each candidate is then tallied and all candidates are ranked on a single list in order of their total vote. That candidate with the lowest total vote is ranked first.

Vote 2: From the top of the above list (lowest total vote), each candidate, in turn, is discussed and then screened in as a panel-endorsed candidate by a secret ballot, simple majority vote of the panel. If a candidate fails to receive the vote of a panel majority, that candidate is eliminated and the panel proceeds to discuss and consider the next ranked candidate. This procedure continues until the prescribed number of candidates has been selected, as under old Order 11,972, or until no other candidates can command support of a panel majority as under Order 12,059 which sets no limit on the number of candidates sent to the President.

The weighted preferential voting system protects against manipulation and deviousness while giving an advantage to candidates broadly supported rather than to candidates receiving narrow and intense support. It works to produce as nominees those candidates who can generate maximum positive harmony among panel members, and therefore facilitates broad compromise as opposed to narrow extremism in selections. It is simple and straightforward in operation because prohibitions on tie votes and on abstentions on selected candidates prevent any form of "bullet-voting." Panelists must cast votes in sequential order. They cannot aggregate their votes and throw them to one or two candidates. The Vote 2 step provides a last clear chance to examine the panel’s preferred ranking of all candidates and to discuss thoroughly the pros and cons of a single candidate before casting a vote. The final vote on that candidate is binary (Yes

40. Exec. Order No. 11,972 § 3(d), supra note 5.
or No), and thus absolutely fair and straightforward. This binary vote ensures that the candidate is supported by at least a simple majority of the panel. No candidate with only minority support among panelists can possibly win and be among those sent to the President. ⁴²

VI. POLITICAL TEMPEST

The Fourth Circuit Panel’s composition and its voting systems combined to produce a slate of five candidates which stunned Tar Heel politicians. In addition to Phillips, the Panel sent the President four other names as required by the since-superseded Executive Order. ⁴³ Listed in alphabetical order as in the letter of transmittal, they were: California-born, raised, and educated William Van Alstyne, age forty-two, a distinguished and peripatetic faculty member of the Duke Law School, an expert in constitutional law, who had presented major civil liberties cases before the United States Supreme Court, including the landmark sixth amendment case of Klopf v. North Carolina; ⁴⁴ Julius L. Chambers, age forty, a black activist Charlotte civil rights attorney, former controversial member of the University of North Carolina Board of Trustees, and president of the NAACP Legal Defense and Education Fund; James B. McMillan, age sixty, judge of the United States Court for the Western District of North Carolina with a propensity for fusing law and moral justice and who had penned the trial court’s opinions in the landmark Charlotte-Mecklenburg school desegregation suit, ⁴⁵ argued for the plaintiffs by Chambers, ⁴⁶ and who more recently had overturned the Price-Anderson Act’s limitation on nuclear disaster liability of power companies; ⁴⁷ and A. Kenneth Pye, age forty-six, New York-born Chancellor of Duke, former Dean of the Duke Law School, and an acknowledged, experienced authority on criminal law and procedure, legal education, legal aid, and military law. ⁴⁸

⁴². My colleague, Professor Ronald Rogowski, generously and materially aided in analyzing panel voting procedures.

⁴³. Exec. Order No. 11,972 § 3(d), supra note 5.

⁴⁴. 386 U.S. 213 (1967) (indefinite postponement of state criminal prosecution denied defendant right to speedy trial guaranteed by sixth amendment).


⁴⁶. E.g., 402 U.S. at 4.


Media publicity of the Panel’s roster early in September 1977 sparked a continuous stream of criticism from Republican Senator Helms and a
sullen silence from his Democratic counterpart, Robert Morgan, who vowed
to remain passive until the President acted. The former’s enduring animosity
and Morgan’s muffled displeasure had received an early impetus in
mid-August when a politician panel member publicly attacked Senator
Helms. The Democratic State Senator in question reportedly “reacted
with outrage” when at a Democratic Party social gathering she was told
that Helms intended to veto Judge McMillan’s confirmation. “The whole
purpose of the commission is to prevent the kind of senatorial courtesies
of the past.”49 To add insult to injury, she added, “I can’t think of a single
person our commission would recommend who would be acceptable to
Jesse Helms.”50

With the gauntlet flung down, the senior Senator from North Carolina
predictably found much wrong with the Panel’s candidates and nothing
right with the Panel itself. He pronounced four of the five candidates
“disqualified” for a federal circuit judgeship.51 Two were not members
of the North Carolina bar. As it turned out, only Professor Van Alstyne fell
within the scope of this criticism. Moreover, neither the original Executive
Order nor its successor order required such membership. Both stipulated
only residency and membership “in good standing of at least one state
bar.”52 Any state bar presumably would meet this criteria. Not so, argued
Senator Helms. Apparently endowed with exceptional insight into the lin-
guistic achievement of Justice Department draftsmen, he contended that
the language required membership in the state bar.53

Helms strictly construed Justice Department guidelines used by the
Panel, and disingenuously argued that Judge McMillan was disqualified
by virtue of his age, eight months beyond the prescribed age of sixty, and
Chambers because he had less than fifteen years’ legal experience.54 Yet
the guidelines defined such experience as including “substantial federal
law mastery as demonstrated by teaching or by professional association
with public or private offices dealing extensively with federal law.”55 After
compiling a distinguished record at the University of North Carolina’s
School of Law, Chambers spent a year earning an advanced law degree at
Columbia Law School where he also taught law and another as an intern
with the NAACP Legal Defense Fund. If this period is included in the

49. Cline, Jesse Helms May Reject McMillan, The Charlotte Observer, Aug. 21, 1977,
at 1B, col. 4 (quoting North Carolina State Senator Kathy Sebo).
50. Id.
51. Guillery, Senator Helms objects to judge choices, The News and Observer (Raleigh,
N.C.) Sept. 9, 1977, at 1, col. 2.
52. Exec. Order No. 11,972 § 4(a)(1), supra note 5; Exec. Order No. 12,059 § 4(a)(1),
supra note 18.
53. See Senator Helms objects, supra note 51, at 6, cols. 1-2.
54. Id., col. 2.
55. INSTRUCTIONS, supra note 28, at 6.
total, Chambers did have the requisite fifteen years' experience.

Significantly, neither Senator contended that any Panel-endorsed candidate was "unqualified" in terms of legal competence. Rather the Panel's error had been one of omission. Except for Phillips, judicial candidates whose backgrounds and attitudes closely harmonized with major components of North Carolina's political culture failed to find their way onto the Panel's list. A cosmopolitan interstate agency had chosen cosmopolitan candidates. Not surprisingly, Panel selection criteria hardly conformed in all respects to that finally articulated by Senator Morgan in his June 1978 endorsement of former Dean Phillips:

He was born and reared in North Carolina, and has lived in our state all his life. He has practiced law in Laurinburg and Fayetteville. He served for ten years as a distinguished dean of the UNC School of Law. He took part in the restructuring of our state court system some years ago. Thus he can be counted on to understand North Carolinians and their concerns. He has practical experience in the law, he has exhibited scholarship second to none, and he has given service to his profession.\textsuperscript{26}

Phillips was, said Morgan, "broadly acceptable to the legal community and to all segments of our people."\textsuperscript{27} Helms, too, thought the legal academic "a gentleman of dignity and competence [and] a commendable choice for the Federal bench."\textsuperscript{28}

Earlier Helms unsuccessfully had demanded that Attorney General Griffin Bell reconvene the Panel in order to expand the list of candidates to include specific named members of various state benches.\textsuperscript{29} Always hovering high on his lists loomed the ghostly candidacy of Naomi Morris, judge of the North Carolina Court of Appeals, who failed to sign the application-questionnaire.\textsuperscript{30} Rebuffed, Helms turned his attention from the Panel's products to the selection process itself. "I think the way this commission performed was atrocious," he declared.\textsuperscript{31} Members asked the wrong questions of interviewees. They asked "political rather than judicial questions," in probing views on abortion, ERA, and other specific controversial public issues.\textsuperscript{32} And their search had been less than exhaustive.


\textsuperscript{58} Statement of Senator Jesse Helms to the Senate Judiciary Committee on the Nomination of Dean J. Dickson Phillips to the Fourth Circuit Court of Appeals 2-3 (Aug. 8, 1976).


notwithstanding the Panel’s ad hoc nature and short life of sixty days. When it was all over, the senior Senator protested to the Senate Judiciary Committee Chairman that the panel had performed “a disservice to the Circuit, the bar, and the State of North Carolina.”

VII. Senatorial Courtes’y

The political cauldron into which the Fourth Circuit judgeship fell is explained not only by the specific candidates submitted by the Panel, but also by the very emergence of such a novel selection system on the political landscape. Even before President Carter heard from his nominating panel the drums of “senatorial courtesy” had echoed resoundingly. Senate Judiciary Committee Chairman James Eastland reportedly assured Senators Helms and Morgan that they would both enjoy an opportunity to reject any unacceptable Panel nominee.

Ordinarily, however, the custom of “senatorial courtesy” involved support by senators accorded “one of their number who objected to an appointment to a federal office in his state, provided the senator and the president were of the same party.” To the extent Republican Senator Helms enjoyed such “courtesy,” he did so largely as a “stalking horse” for the junior Democratic Senator from North Carolina and with the connivance of Eastland.

Application of “senatorial courtesy” to positions on the courts of appeals has been controverted. Its obvious relevance for intrastate district court appointments is distinguishable from its more remote relationship to interstate appellate court selections. The interstate character of appellate court appointments renders their pursuit competitive among states and their respective senators within the circuit.

Counterbalancing this condition favorable to expanded presidential discretion is the concept of state representation on courts of appeals. Appointments drawn from states within the circuit always have been customary. Only recently, however, with rising appellate caseloads and consequent increase in numbers of appellate judgeships, has it become possible to justify expectations held by senators and party officials of each state within the circuit. These politicians now assert an entitlement to their state’s permanent, as contrasted to an earlier custom of rotating, represen-

63. Id.
64. See Jesse Helms may reject, supra note 49, at 1B, col. 1.
66. Id. at 43.
67. Id. "Since there is no legal prescription for distributing circuit judgeships so many to a state, no Senator can claim that as a matter of legal right a particular nomination should go to a person from his state."
tation on the circuit’s bench.68

Yet the representation entitlement is clearly under presidential control. Senatorial courtesy only functions once the President has acted or threatened to act in such a way as to affect a single state. “Conceivably, senators from states in a circuit could combine and work out a plan for distributing circuit judgeships among the states and present a united front against the president’s men if they fail to accept the plan. But this has never been done.”69 Short of such unlikely regional senatorial unity, one might conclude that “[w]hen it comes to making appointments to circuit courts, the balance of power shifts markedly to favor decision-making by the president’s men.” Stonewalling by one state’s senators against a White House candidate could encourage the President to follow a strategy of interstate competition. Judicial candidates are highly fungible; no single state in any circuit enjoys a complete monopoly over superior judicial talent. Thus a President confronted with “senatorial courtesy” may simply move on to another state in the circuit, dispense judicial patronage in a more cooperative atmosphere, and simultaneously humiliate the recalcitrant senator or senators by depriving their state, at least temporarily, of some or even all of its representation on the court of appeals.

VIII. CARTER ACCOMMODATION

President Carter followed a strategy of accommodation rather than confrontation in filling the Fourth Circuit vacancy. In his letter appointing members of that Circuit’s Panel, he directed them to consider “only persons from North Carolina.”70 Such a restriction undoubtedly reduced his long run political leverage although it was logical as the Tar Heel State enjoyed no representation on the court after Judge Craven’s death. On the other hand, the scope of the Panel’s search always remained a subject of presidential discretion. At any time prior to actual nomination, the President could have amended his directive and reactivated the moribund Panel to canvas judicial timber in another state within the circuit.

Other factors influenced White House-Justice Department political

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69. H. Chase, supra note 65, at 43.
70. Id. (citations omitted).
71. Letter from Jimmy Carter to Peter Fish (July 11, 1977).
strategy and worked against maximization of presidential circuit judge appointment power. All during the winter, spring, and much of the summer of 1978, it became increasingly apparent that Phillips’ candidacy was a viable one. Eight of North Carolina’s Democratic congressmen endorsed him, and even Helms emitted increasingly warm signals of passive approval. Meanwhile, Chancellor Pye had gained sufficient support to become a rumored finalist together with Phillips. In Washington, Attorney General Bell marked time as he labored for his friend of a quarter century, Judge McMillan, as did another panel nominee who reportedly cast his support to the “activist” judge and worked assiduously for his appointment. On several occasions Bell reportedly sought to persuade President Carter to name the district judge, stressing “that McMillan was ‘steady as a rock’ and never ‘flinched’ from defending the Constitution at a time when others temporized.” To appoint the author of the landmark school desegregation decision would be a principled appointment. It would reward courageous judicial decision-making and provide an example worthy of emulation by fellow judges.

Thus to desert strongly supported and exceptionally well-qualified candidates in North Carolina and seek candidates elsewhere in the circuit in order to penalize that state’s Senators undoubtedly seemed to fall in the category of overkill. That strategy appeared especially inappropriate in light of the Administration’s desperate need for Panama Canal Treaty votes. Long before that narrowly ratified treaty came to a vote in mid-April 1978, the Carolina media reported ardent treaty-opponent Helms wooing Morgan’s vote by issuing verbal fusillades on the judgeship issue. As early as October of the preceding year, however, the junior Senator had made clear his support for treaty revision, although a survey one month later listed him as “uncommitted.” Whether because the Administration misperceived Morgan’s treaty position as more doubtful than it really was

73. Statement of Senator Helms, supra note 58, at 3. (“Dean Phillips is a gentleman of dignity and competence who will serve the Fourth Circuit Court of Appeals.”)
77. See id.
78. See id.
or because it was gratified by his friendly support, or whether because the actual cause of the appointment delay arose from disagreement over the nomination within the Executive Branch itself, no apparent attempts were made to adopt a more forceful strategy for challenging “senatorial courtesy.”

IX. RETROSPECT AND PROSPECT

Merit selection in the Fourth Circuit involved a trade-off. Expeditious filling of a judicial vacancy was exchanged for resolute presidential adherence to and defense of merit selection of United States circuit judges. In the short run, litigants before the court of appeals in Richmond probably lost something. In the long run, the intermediate courts of appeals have gained an estimable member. Politics obviously continue to permeate the judicial appointment process, a possibly desirable characteristic given the broad independence of judges once commissioned. Finally, the selection method now existing has survived severe political testing.

The panel method serves several ends. First, the nominating panels perform a representational function; citizens of diverse backgrounds from different states holding an assortment of political attitudes, and from different rungs on the social and economic ladder participate. Second, panels provide an educational role in that volunteer lawyers and especially laymen are exposed to a segment of American national government enjoying low public visibility yet performing functions of far-reaching importance to the country. Third, they contribute to federalism because panels function on a decentralized basis, at the grass roots, and are not part of a vast Washington-based bureaucracy. Fourth, they are in a position to emphasize merit in considering judicial candidates in that, given the time and will, members may scrutinize the actual records of candidates. Political connections as well as personal and professional reputations may be compared and contrasted with actual performance and character adduced from candidate interviews. Thus a sound screening system in a convenient forum is provided. Finally, panels strengthen the President’s hand in judicial appointments. One of the long-enduring legacies of any chief executive is the judges whom he appoints. Assuming he wishes appointees who will reflect credit on his administration, he will seek out competent candidates. Yet presidential seekers of meritorious judicial appointees often have confronted the stark fact of senatorial power rooted in past and present outstanding political obligations back home as well as differing state political cultures. How can the President gain political leverage under such conditions? Nominating panels offer the President help in both finding and screening meritorious candidates and in casting a cloak of legitimacy over

them. 84 Barring dramatic changes in the judicial selection system, 85 excellence on the federal bench is presidentially dependent. Federal merit selection procedures, whether simple or elaborate, are useful only to the extent they provide valuable assistance to the appointing authorities in the Executive Branch. When they cease to so function, their existence must be reconsidered.
