

2000

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Recommended Citation

Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 *Law & Ineq.* 159 (2001)

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Judicial Selection at the Clinton Administration's End

Carl Tobias*

Introduction

During his presidency, Bill Clinton appointed almost half of the presently sitting federal appellate and district court judges. He, therefore, can justifiably claim that he has left a lasting imprint on the federal judiciary. During his 1992 presidential campaign, Clinton promised to choose intelligent, diligent, and independent judges who would increase balance, vigorously enforce fundamental constitutional rights, and possess measured judicial temperament. The initial achievement of the Clinton Administration in selecting members of the federal bench, who make it more diverse and who are exceptionally qualified, demonstrates that the President fulfilled these campaign pledges. President Clinton named unprecedented numbers and percentages of highly competent female and minority judges during his first two years in office. The record compiled is important, because diverse judges can improve their colleagues' understanding of complex questions that the federal courts must decide, might reduce bias in the justice process, and may increase the confidence of the American people in the federal judiciary.

After 1994, however, President Clinton encountered greater difficulty in appointing women and minorities, as well as in filling the perennial federal court vacancies, primarily because the Republican Party had captured a large majority in the U.S. Senate. The adversity he faced was particularly salient during 2000 when partisan politics, especially involving the presidential election, pervaded the confirmation process and when his power reached its nadir at the end of a two-term administration. Indeed, as late as May 2000, there were eighty openings on the appeals and district courts, a figure that constitutes nearly ten percent of the lower federal court judgeships that Congress has authorized. The

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approach that the President would take to choose more women and minorities and to name judges for the vacancies was, therefore, somewhat unclear. Now that the Clinton Administration has concluded its second term, the selection process during the final year merits scrutiny. This Essay undertakes that effort by emphasizing how the President attempted to appoint additional female and minority judges and to fill the empty seats.¹

In 2000, President Clinton minimally changed the judicial recruitment objectives and procedures that he and officials with responsibility for choosing judges had previously employed. Part I of this Essay, accordingly, evaluates selection throughout the administration and focuses on the process during 1993. I determine that President Clinton articulated clear goals and instituted effective practices, principally by searching for, identifying, and nominating extremely capable women and minorities. Part II analyzes the appointment of judges in the second administration's last year, exploring those developments that were significant or different. This assessment ascertains that the President forwarded the names of numerous female and minority attorneys who are very talented and able candidates for many of the appellate and district court openings, but realized less success in having the individuals confirmed. Part III, therefore, provides suggestions for recruiting judges that the new President should consult.

I. Federal Judicial Selection in the First Seven Years

The judicial selection process over the first seven years of the Clinton Administration warrants comparatively brief discussion in this Essay because the relevant history has been rather comprehensively reviewed elsewhere.² The Clinton Administration enunciated praiseworthy objectives for choosing judges and deployed effective procedures to achieve those goals. For example, President Clinton clearly proclaimed that increasing the numbers and percentages of highly skilled women and minorities on the bench would be a critical administration priority. Clinton and his

1. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1247 n.51 (1993) (analyzing certain difficulties that are entailed in enhancing racial diversity).

2. I rely substantially in this subsection on Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265 (1999); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996).

administration also worked closely with senators, asking that they designate competent female and minority counsel.

A. Selection During 1993

The selection of judges during 1993 deserves emphasis primarily because the objectives espoused and the practices prescribed and applied were followed in subsequent years. Officials who played important roles in recruiting judges deviated infrequently from these goals and procedures. The administration attempted to honor the campaign commitments that Clinton had made during the 1992 presidential election campaign.³ For instance, the President repeated his promise to appoint very capable attorneys who would enhance gender, racial, and political diversity in the federal courts.⁴ Attorney General Janet Reno and White House Counsel Bernard W. Nussbaum, officers with central responsibility for choosing judges, correspondingly stated that the administration would name lawyers who had strong qualifications and who would promote balance.⁵ Personnel in the Department of Justice and the Office of the White House Counsel, the specific Executive Branch components that provided the President the greatest assistance, also clearly subscribed to these objectives and implemented effective measures to attain these goals.⁶

The particular practices that the Clinton Administration invoked resembled quite closely the measures that President Jimmy Carter used. However, the procedures instituted also minimally departed from the processes that President George

3. See, e.g., Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16; *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58 (stating Clinton's desire for a more diverse judiciary).

4. See, e.g., Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1; Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10; Susan Page, *Supreme Matter on Home Front*, NEWSDAY (Long Island, New York), Mar. 24, 1993, at 4 (reaffirming the Clinton Administration's vow to appoint more women and minorities to the federal judiciary, but also noting that Clinton's primary concern was that the appointee would be a "great justice"); see also *supra* note 3 and accompanying text.

5. See Tom Hamburger & Josephine Marcotty, *Two Proposed for U.S. Court by Wellstone*, STAR TRIBUNE (Minneapolis, Minnesota), Mar. 10, 1993, at 1A; Al Kamen, *When Vacancies Are "Judicial Emergencies"*, WASH. POST, Apr. 26, 1993, at A17; *White House Counsel Discusses Nation's Legal Agenda*, THIRD BRANCH, Sept. 1993, at 1 (interviewing Bernard W. Nussbaum and noting the Clinton Administration's goal of naming diverse men and women to serve on the federal bench).

6. These ideas and many that follow are premised on conversations with individuals who are familiar with administration selection procedures. See also Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 254-55 (1997).

Bush and President Ronald Reagan employed.⁷ The Office of the White House Counsel had substantial responsibility for delineating and proposing possible nominees, and the Department of Justice generally assumed an active role only after individuals had become serious candidates.

Traditional notions of senatorial patronage and courtesy also figured prominently in the choice of nominees for the federal district courts because Clinton and his staff typically deferred to senators who represented states that experienced judicial openings.⁸ Senators usually recommended multiple prospects from whom the President selected a nominee.⁹ Clinton and his administration also specifically requested that senators employ or revive district court nominating commissions, which had promoted the confirmation of numerous female and minority attorneys during the Carter Administration.¹⁰

Even though the Clinton Administration evinced considerable solicitude for senators from those areas where the openings arose and did not revitalize the Circuit Judge Nominating Commission that President Carter had implemented,¹¹ it exercised greater authority over candidate selection for appellate court vacancies. For example, President Clinton was actively involved in designating

7. See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 236-345 (1997); see also Curtis Reidy, *Clinton Gets His Turn*, BOSTON SUNDAY GLOBE, Aug. 8, 1993, at 69 (stating that President Clinton would use procedures much like those of former President Bush); see also *supra* note 6 and accompanying text.

8. See, e.g., Neil A. Lewis, *Clinton is Considering Judgeships for Opponents of Abortion Rights*, N.Y. TIMES, Sept. 18, 1993, at 1; Michael York, *Clout Sought in Choosing U.S. Judges*, WASH. POST, Feb. 5, 1993, at D3; see also *supra* note 6 and accompanying text.

9. See Goldman, *supra* note 2, at 278-79.

10. See ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* 27-87 (1981) (describing in great detail judicial nominating commissions under the Carter Administration); see also Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 141 (1987); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990); Lewis, *supra* note 4 (mentioning diverse judicial appointments during the Carter Administration).

11. See Goldman, *supra* note 2, at 279 (stating that the Clinton Nominating Commissions were similar to the Nomination Commissions of Presidents Reagan and Bush); Reidy, *supra* note 7, at 69 (stating that Clinton was expected to "rubber stamp" the senators' recommendations); see also GOLDMAN, *supra* note 7, at 238-45 (outlining Carter's involvement in the reform of the judicial selection process). See generally LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980) (describing the Judge Nominating Commission).

Circuit Judge Ruth Bader Ginsburg as his first appointee to the United States Supreme Court.¹²

The Clinton Administration facilitated the confirmation of nominees whom it submitted by informally consulting with the Senate Judiciary Committee and with particular senators about the candidates before formally nominating specific individuals.¹³ This practice apparently led to the noncontroversial confirmation of Judge Ginsburg who, for example, received the endorsement of Senator Orrin Hatch (R-Utah), the ranking Republican on the Judiciary Committee.¹⁴ Moreover, senators judiciously exercised their power of advice and consent. The Senate Judiciary Committee, which has historically exercised substantial control over the confirmation process, was receptive to the Administration's goals for choosing judges and worked carefully with the President and his assistants. For instance, Senator Joseph R. Biden, Jr. (D-Del.), the Chair of the Committee, proclaimed that no "ideological blood test" would apply to nominees who possessed politically moderate or liberal viewpoints but that candidates should increase balance.¹⁵ Moreover, numerous members of the Senate invoked, or reinstated, district court nominating panels, which fostered the Carter Administration's appointment of many talented women and minorities.¹⁶

Clinton initiated special efforts to seek out, propose and promote the candidacies of capable female and minority counsel. The President, the White House Counsel, and additional high-ranking government officials strongly declared that naming very qualified women and minorities was a significant administration

12. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1870 (1994); Martin Kasindorf & Timothy M. Phelps, *In Supreme Company*, NEWSDAY (New York, New York), Aug. 4, 1993, at 23; see also Angie Cannon, *Clinton Reshaping Federal Bench with Female and Minority Picks*, THE HERALD (Miami, Florida), Oct. 13, 1994, at 12A (stating that President Clinton actively participated in selecting lower federal court judges). See generally Goldman, *supra* note 2, at 279 (discussing Clinton's judicial selection process).

13. See Goldman, *supra* note 2, at 278-79; see also Goldman & Slotnick, *supra* note 2, at 266-67 (explaining the judicial selection process under the Clinton Administration).

14. See, e.g., William E. Clayton, Jr., *Panel Endorses Ginsburg*, HOUS. CHRON., July 30, 1993, at 20 (noting that the Senate Judiciary Committee voted unanimously to recommend Ginsburg to the full Senate for confirmation); Kasindorf & Phelps, *supra* note 12.

15. Labaton, *supra* note 4; see also Goldman, *supra* note 2, at 279 (finding that Senator Biden was committed to diversity); Lewis, *supra* note 4 (affording more ideas on judicial selection of Senator Biden).

16. See *supra* notes 10-11 and accompanying text (discussing the use of judicial nominating commissions to promote diversity in the judiciary).

priority.¹⁷ Several influential leaders, such as Janet Reno, the Attorney General, and Eleanor Dean Acheson, the Assistant Attorney General for the Office of Policy Development, who had substantial responsibility for denominating candidates, are women.¹⁸ These officers correspondingly pursued and capitalized on the ideas and suggestions for female and minority nominees of national, state, and local women's organizations; public interest groups; and minority political associations.

Several senators seemed predisposed to institute approaches that would lead to the identification and recommendation of more women and minorities, while administration prodding might have prompted other members of the upper chamber to implement similar measures.¹⁹ For example, some senators closely conferred with certain women's organizations and minority political groups about promising prospects generally and about specific individuals. Other senators recommended female and minority candidates²⁰ or used advisory panels that proposed numerous female and minority lawyers.²¹

In 1993, the President appointed eleven women (39%) and seven minorities (25%) out of twenty-eight attorneys to the federal courts.²² Of his forty-eight nominees, eighteen (37%) were women; thirteen (27%) were minorities.²³ No president has ever named or

17. See Cannon, *supra* note 12 (stating that President Clinton actively participated in selecting lower federal court judges and noting that "[d]uring Clinton's first two years in office, 58 percent of his nominations for federal judgeships have been women and minorities, a much higher proportion than any previous President."); see also *supra* notes 3-6 and accompanying text (reporting on the Clinton Administration's commitment to diversity in the federal judiciary).

18. See Goldman, *supra* note 2, at 279.

19. A senior officer in the White House stated that the administration told all Democratic senators that "we expect their recommendations to include women and minorities." Lewis, *supra* note 4; see also *supra* notes 10-11 and accompanying text (discussing the use of judicial nominating commissions to promote diversity in the judiciary).

20. The Judiciary Committee conducted hearings on two African-American attorneys and one female lawyer whom Senator Robert Graham recommended, and two women and one African American whom Senator Edward Kennedy recommended. See Mark Ballard, *New Contenders for 5th Circuit*, TEX. LAW., Sept. 13, 1993, at 1; Cannon, *supra* note 12 (stating that President Clinton actively participated in selecting lower federal court judges).

21. See Hamburger & Marcotty, *supra* note 5 (noting that Senator Wellstone formed a special advisory committee to guide the selection process). See generally Goldman, *supra* note 2, at 279 (describing the Clinton selection committee).

22. Telephone Interview with George Kassouf, Alliance for Justice (Nov. 19, 1993).

23. See *id.*; see also Goldman, *supra* note 2, at 290 tbl.5 (comparing the proportion of nontraditional federal judges from November 3, 1992 through January 1, 1995).

nominated such substantial numbers and percentages of women and minorities during his initial year in office.²⁴

The attorneys whom the Clinton Administration appointed or nominated possessed excellent qualifications. The individuals seem quite intelligent, industrious, and independent, while apparently having much integrity and appropriately balanced judicial temperament. Many of the individuals confirmed and nominated had previously rendered outstanding service as members of the federal or state court bench. For example, Justice Ginsburg was a distinguished jurist on the United States Court of Appeals for the District of Columbia Circuit for thirteen years before the President elevated her to the Supreme Court.²⁵

In short, the President named and nominated a substantial number of highly competent women and minorities. Clinton enunciated laudable goals for selecting judges and implemented effective procedures, particularly by searching for, nominating, and advocating the confirmation of, very capable female and minority lawyers. The Administration's success is especially commendable, given the significant complications that it confronted. First, President Clinton and his aides faced the difficulties that every new administration must experience in the initial year, and several developments compounded these inherent problems. Most important, a Democrat had not occupied the White House since 1980. The Administration, therefore, had no applicable federal judicial selection model, and no personnel possessing relevant experience, from within the last twelve years.²⁶ Second, the President and those who helped him choose judges encountered certain phenomena that were peculiar so early in the life of the Administration. For instance, the resignation from the Supreme Court of Justice Byron R. White only two months after the inauguration required considerable effort of the Office of White House Counsel staff responsible for recruiting judges.²⁷ Time and energy that these employees consumed to identify an exceptional successor for Justice White limited their pursuit of nominees for the appellate

24. See Tobias, *supra* note 12, at 1866; see also Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25 (noting that twenty-one of Clinton's first thirty-three nominees were women or minorities).

25. See *supra* notes 12, 14 and accompanying text.

26. See Ruth Marcus, *President Asks Wider Court Hunt*, WASH. POST, May 6, 1993, at A1; see also Goldman, *supra* note 2, at 276-79.

27. See Joan Biskupic, *Promises, Pressures in Court Search*, WASH. POST, Mar. 21, 1993, at A1; Linda Greenhouse, *White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar. 20, 1993, at 1.

and district courts.²⁸ Therefore, President Clinton compiled an enviable record in light of the obstacles that he experienced during 1993.

B. Selection During the Subsequent Six Years

Federal judicial selection over the subsequent six years of the Clinton Administration requires rather limited assessment in this essay primarily because the objectives and practices which the President employed were analogous to those used earlier. Nevertheless, some examination of certain important developments that occurred in this period is justified, as the treatment should increase comprehension of the process for choosing judges during 2000 and enhance understanding of judicial appointments in the new Administration. Perhaps the most compelling consideration was Republican control over the Senate, which commenced during 1995 and continued for the remainder of President Clinton's time in office.

1. Selection During 1994

The distinguishing characteristic of judicial selection in 1994 was the close cooperation between the Clinton Administration and the Senate Judiciary Committee. The President and those personnel with responsibility for recruiting judicial candidates worked carefully with the Committee, and numerous senators were quite responsive to the Administration's goals in appointing judges. Senator Biden repeated the panel's commitment to according the confirmation process a very high priority.²⁹ The Chair asked that the President submit nominations steadily, a practice which facilitated the Committee's discharge of its duties, and requested that the American Bar Association (ABA) devote sufficient resources to complete expeditious evaluation of nominees.³⁰ These cooperative efforts fostered the relatively noncontroversial elevation of First Circuit Judge Stephen Breyer to the Supreme Court. For example,

28. See Kamen, *supra* note 5. White House Counsel and Justice Department staff also spent much effort on the Waco, Texas standoff. See David Johnston & Stephen Labaton, *Doubts on Reno's Competence Rise in Justice Dept.*, N.Y. TIMES, Oct. 26, 1993, at A1; see also *Text of Reno's Letter Recommending Dismissal*, WASH. POST, July 20, 1993, at A11 (assessing the effort expended on a dispute over the FBI Director).

29. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 147 n.51 (1995) (referring to a letter from Senator Joseph R. Biden, Jr., Chair, U.S. Senate Judiciary Comm., to Chief U.S. District Judges (June 6, 1994)).

30. See *id.*; see also AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1991) (discussing the role of the ABA in the federal judicial nomination process).

Senator Hatch and Senator Strom Thurmond (R-S.C.), the senior Republicans who served on the Judiciary Committee, supported the candidate.³¹ Moreover, many senators depended on current or revitalized district court nominating commissions to identify and promote the appointment of well-qualified women and minorities. Many senators also recommended numerous, talented female and minority attorneys for the positions which became vacant.

In 1994, President Clinton named twenty-nine women (29%) and thirty-seven (37%) minorities out of 101 judges.³² He also nominated twenty-six women (27%) and thirty minorities (31%) out of ninety-five lawyers.³³ The numbers and percentages of females and minorities nominated and confirmed are unprecedented; the figures easily surpassed the statistics for the Reagan Administration and were substantially larger than the achievements of Presidents Bush and Carter.³⁴

The attorneys named and nominated by the Clinton Administration were exceptionally competent. Numerous individuals had been very well respected members of the federal or state court bench.³⁵ For instance, Judge Jose Cabranes was an outstanding federal district judge in Connecticut before he joined the Second Circuit and has received serious consideration for several vacancies on the Supreme Court.³⁶ Moreover, the ABA assigned sixty-three percent of the nominees whom the President tendered the highest ranking as well qualified; this number was ten

31. See, e.g., Joan Biskupic, *Senators Question Breyer's Economics*, WASH. POST, July 15, 1994, at A6; *Open Minds?*, NAT'L L.J., July 25, 1994, at A18.

32. See Tobias, *supra* note 29, at 138 n.4 (referring to DEPARTMENT OF JUSTICE, CLINTON ADMINISTRATION JUDICIAL RECORD, ANALYSIS OF JUDICIAL NOMINATIONS (1994)); Telephone Interview with Barbara Moulton, Alliance for Justice, Washington, D.C. (Sept. 28, 1994). There were more appointees than nominees because some persons whom the President nominated in 1993 were confirmed in 1994. See Tobias, *supra*, at 145 n.40.

33. See Tobias, *supra* note 29, at 138 n.4.

34. See Tobias, *supra* note 29, at 145; see also Angie Cannon, *Clinton Reshaping Federal Bench with Female and Minority Picks*, HERALD (Miami, Florida), Oct. 13, 1994, at 12A (stating that President Clinton actively participated in selecting lower federal court judges and noting that "[d]uring Clinton's first two years in office, 58 percent of his nominations for federal judgeships have been women and minorities, a much higher proportion than any previous President."); Henry J. Reske, *Judicial Vacancies Declining*, A.B.A. J., Jan. 1995, at 24 (noting that Clinton met the challenge of filling the most vacancies in the history of the federal judiciary).

35. See Keith C. Epstein, *More Minorities, Women Named Federal Judges*, PLAIN DEALER (Cleveland, Ohio), Sept. 25, 1994, at 1A (stating that Clinton is naming a far greater number of women and minorities to federal judgeships, many of whom have extensive experience as state judges or federal magistrates).

36. See, e.g., Joan Biskupic, *Mitchell, Cabranes Said to Top High Court List*, WASH. POST, Apr. 8, 1994, at A1; *On the Short List*, WASH. POST, Apr. 10, 1994, at C6; David G. Savage, *Short List for the High Court*, A.B.A. J., July 1999, at 32.

percentage points greater than the ratings earned by those lawyers whose names the Reagan and Bush Administrations submitted.³⁷

President Clinton, accordingly, also had a strong judicial selection record in the second year of his administration. The President was quite successful, especially given the significant difficulties that arose. For example, Philip Heymann and Webster Hubbell, the initial Deputy and Associate Attorneys General, and Bernard W. Nussbaum, the first White House Counsel, tendered their resignations in 1994.³⁸ When Justice Harry Blackmun decided to leave the Supreme Court early that year, the Administration devoted considerable time and energy to searching for a suitable replacement, using resources which otherwise would have been committed to filling lower federal court vacancies.³⁹ Moreover, the ongoing Whitewater investigation and additional problems diluted the efforts of staff in the White House Counsel's Office and in the Justice Department who played important roles in choosing circuit and district court judges.

2. Selection During 1995

The most salient features of judicial selection from 1995 until 2000 were certain changes in the practices that President Clinton had followed during the initial half term.⁴⁰ The Administration seemingly instituted these modifications as responses to the Republican Party's success in winning control of the Senate during the 1994 congressional elections and in enlarging its majority over the subsequent years of the Clinton presidency.⁴¹ For instance, both the Office of the White House Counsel and the Department of Justice maintained substantial responsibility for selecting judges, but White House personnel apparently assumed a more significant role,

37. See Marcia Coyle, *Clinton's Judicial Choices Change the Bench's Face*, NAT'L L.J., Oct. 24, 1994, at A16; Cannon, *supra* note 12, at 12A; Al Kamen, *Cutler to Face Backlog in Seating Judges*, WASH. POST, Mar. 14, 1994, at A17; see also Tobias, *supra* note 2 at 315.

38. See Gwen Ifill, *The Whitewater Inquiry: Nussbaum Out as White House Counsel*, N.Y. TIMES, Mar. 6, 1994, at A1; David Johnston, *Reno's Top Deputy Resigns Abruptly, Citing Differences*, N.Y. TIMES, Jan. 28, 1994, at A1 (discussing Heymann's resignation); *Justice Aide Leaves Today*, N.Y. TIMES, Apr. 8, 1994, at A15 (discussing Hubbell's resignation).

39. See Kamen, *supra* note 5; Kamen, *supra* note 37; Marcus *supra* note 26.

40. Many ideas below are premised on conversations involving individuals who are familiar with the Administration's practices and on Goldman, *supra* note 2, at 278-79; Goldman & Slotnick, *supra* note 6, at 254-57.

41. See *supra* note 40.

particularly in designating candidates.⁴² The White House staff evinced increased reluctance to tender nominees who might provoke controversy, and exhibited a greatly enhanced willingness to compromise.⁴³ For example, the President did not resubmit the names of certain people whom he had nominated in 1994 and who would probably have proved controversial,⁴⁴ while the White House Counsel expressly proclaimed that the Administration would not forward lawyers whose candidacies could foster confirmation battles.⁴⁵

President Clinton and his assistants continued their practice of informally consulting on potential nominees and undertook concerted efforts to communicate with Senator Hatch when he assumed the leadership of the Senate Judiciary Committee during 1995.⁴⁶ The new Chair publicly declared that the panel would approve each person who was "qualified, in good health, and [who understood] the role of judges,"⁴⁷ and the Committee followed this approach in 1995.⁴⁸ The Committee generally conducted confirmation hearings on one appellate court nominee and four or five district court candidates during every month that Congress was in session.⁴⁹

42. See *supra* note 40.

43. See Goldman, *supra* note 2, at 279; Goldman & Slotnick, *supra* note 6, at 255-57, 270.

44. See Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmation in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 255-56 (1999); Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1; Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20; Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1.

45. See Biskupic, *supra* note 27; *Mikva Moves from Courthouse to White House*, THIRD BRANCH, Sept. 1994, at 1 (interviewing Abner J. Mikva, White House Counsel, and describing the intricate relationship and interaction between each branch of the federal government); Henry J. Reske, *A New White House Counsel*, A.B.A. J., Oct. 1994, at 32 (relating that Mikva was a well-respected choice for White House Counsel); see also Goldman & Slotnick, *supra* note 6, at 255-57.

46. See Tobias, *supra* note 2, at 317-18; Goldman & Slotnick, *supra* note 6, at 255-57; see also Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test with Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31; *Senator Orrin Hatch Looks at Courts, Legislation and Judicial Nominees*, THIRD BRANCH, Nov. 1995, at 1 (noting that the Clinton Administration has consulted Senator Hatch regarding many judicial nominees).

47. Lewis, *supra* note 46.

48. See Tobias, *supra* note 2, at 317-18; Goldman, *supra* note 2, at 290; Gary A. Hengstler, *At the Seat of Power*, A.B.A. J., Apr. 1995, at 70 (relating Orrin G. Hatch's opinion on several legal issues, including the competency and skill required to be a judge).

49. See Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17; see also 143 CONG. REC. S2539 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (contrasting the Committee's efforts when the Democrats controlled the Committee and the Republicans controlled the presidency); Kline, *supra* note 44, at 250 (same).

In 1995, the Clinton Administration appointed seventeen female counsel (32%) and eight minority counsel (15%) out of fifty-three judgeships.⁵⁰ The American Bar Association strongly ranked those individuals whom the President named and nominated.⁵¹ For example, Seventh Circuit Judge Diane Wood had served with distinction as a law professor at the University of Chicago and as a Deputy Assistant Attorney General in the Justice Department.⁵² This selection record was commendable in light of the numerous complications that the Administration faced, some of which may have been attributable to it, and some from the Republican Party's control over the Senate.

3. Selection During 1996

In 1996, the Clinton Administration effectively employed the practices that it had used during the previous year. The White House seemingly assumed greater responsibility for choosing nominees, displaying enhanced amenability to compromise and appearing especially sensitive to the peculiarities of presidential election-year politics. These circumstances could well have been compounded by the fact that Senator Robert Dole (R-Kan.), who eventually became the Republican Party nominee for the White House, was also the Senate Majority Leader until his June resignation. Dole, thus, might have slowed senate confirmation of judicial nominees lest he evince doubts about his own presidential candidacy.

From January through July, the Senate approved only three judges, although the Senate Judiciary Committee had forwarded the names of twenty-six nominees for consideration on the senate floor.⁵³ During July, the leaders of the Republican and Democratic Parties reached a compromise under which they agreed to conduct floor votes on one candidate per day.⁵⁴ This accord enabled President Clinton to name five female (25%) and four minority (20%) candidates out of twenty judges in 1996.⁵⁵ The persons who

50. Telephone Interview with Deborah Lewis, Alliance for Justice (Jan. 22, 1996); see also Tobias, *supra* note 2, at 314.

51. See Tobias, *supra* note 2, at 315.

52. See, e.g., Janan Hanna & John O'Brien, *Phelan: Firm "Very, Very Viable" Despite Loss of Key People*, CHI. TRIB., July 4, 1995, at B3; John Flynn Rooney, *New 7th Circuit Judge Seen as 'More Liberal' Member*, CHI. DAILY L. BULL., July 3, 1995, at 1.

53. Telephone Interview with Mike Lee, Alliance for Justice (Sept. 3, 1996); see also Goldman & Slotnick, *supra* note 6, at 257-58; Kline, *supra* note 44, at 258-69.

54. See 142 CONG. REC. S7503 (daily ed. July 9, 1996) (statement of Sen. Lott) (initiating the proposal to review one candidate per day).

55. Lee Interview, *supra* note 53; see also 142 CONG. REC. S7503 (daily ed. July

received confirmation were quite talented. For instance, Ninth Circuit Judge A. Wallace Tashima had served with distinction in the Central District of California since the late 1970s before being elevated.⁵⁶ The Administration's selection effort for 1996 was admirable, given the significant difficulties that election-year politics presented.

In short, during President Clinton's first term, he fulfilled his campaign promises to choose more female and minority judges and attained the goals for judicial selection that the Administration had established. The President appointed 202 judges to the federal bench; sixty-two (31%) of the judges were women and forty-seven (28%) were minorities.⁵⁷ The numbers and percentages are unparalleled and this record clearly eclipsed those of the three previous administrations. For example, President Clinton named more women between 1993 and 1995 than President Bush chose in four years or the Reagan Administration selected in two terms.⁵⁸ The ABA also assigned President Clinton's appointees the highest ratings since it initially began ranking nominees a half-century ago.⁵⁹

4. Selection During 1997

In the first year of President Clinton's second term, the Administration essentially invoked the goals and procedures it had employed during the initial four years.⁶⁰ The objectives and processes the President and his aides depended on were more akin to those applied in 1995 and 1996 principally because the Republicans achieved a 55-45 senate majority during the 1996

9, 1996) (statement of Sen. Lott) (stating that philosophical principles did not animate his attempt "to get the calendar acted on"); Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1394 (1997) (affording examples of slowed selection in prior election years).

56. See, e.g., Steve Albert, *Clinton Nominates L.A. Judge for Ninth Circuit*, RECORDER (San Francisco, California), Apr. 7, 1995, at 2; Henry Weinstein, *Clinton Nominates L.A. Judge to U.S. Appeals Court*, L.A. TIMES, Apr. 10, 1995, at B1.

57. See *supra* notes 22-23, 32-33, 50, 55 and accompanying text (identifying the number of female and minority judges named by President Clinton during 1993-1996).

58. See Tobias, *supra* note 2, at 314; see also Goldman, *supra* note 2, at 280, 286.

59. See Tobias, *supra* note 2, at 315; Robert A. Stein, *For the Benefit of the Nation*, A.B.A. J., Mar. 1996, at 104 (describing the American Bar Association's procedure of evaluating the professional qualifications of candidates for appointment to the federal courts).

60. See Goldman & Slotnick, *supra* note 2, at 265-68 (explicating the second term selection and confirmation process and its similarity to Clinton's first term); see also *supra* notes 2-59 and accompanying text (explaining Clinton's goals and procedures in judicial selection between 1992-1996).

congressional elections. The White House maintained substantial control, which it apparently expanded and consolidated, over the designation of candidates, especially appellate court nominees, but deferred to senatorial recommendations for district court vacancies.⁶¹ The Administration concomitantly continued efforts to identify, tender, and promote the candidacies of well-qualified women and minorities. For example, President Clinton proffered the names of two female counsel, as well as one African American and one Hispanic American federal district judge, for empty seats on the Ninth Circuit before August 1997.⁶²

The Administration experienced problems in expeditiously appointing judges during 1997; however, both the President and Republican Party leaders were partly responsible for these difficulties. For instance, early in that year, the President may have provided an insufficient number of nominees whom Republican senators deemed acceptable and appeared to forward candidates somewhat erratically thereafter.⁶³ Several of the twenty-two individuals whose names President Clinton submitted on January 7 could have been unpalatable to Senator Hatch or to his political party,⁶⁴ and the nomination of thirteen individuals on July 31, immediately before the Senate's August recess, might well have created complications in prompt Judiciary Committee processing.⁶⁵

61. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 951-52 (1998); see also Goldman & Slotnick, *supra* note 2, at 265-68 (explaining the selection process used by the Clinton Administration); Goldman & Slotnick, *supra* note 6, at 254-255 (relating the selection process employed during Clinton's first term).

62. See Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates Twenty-Two to the Federal Bench (Jan. 7, 1997), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1997/1/7/3.text.1> (nominating Margaret McKeown and renominating Richard Paez); Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates James S. Ware to the Federal Bench (June 27, 1997), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1997/6/27/1.text.1>; Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates Susan Graber to the Federal Bench (July 30, 1997), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1997/7/31/4.text.1>.

63. See Goldman & Slotnick, *supra* note 2, at 268 (indicating that the slow pace of selecting judges could be attributed to the slow pace of nominating judges and presenting them to the Senate).

64. See Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15 (indicating that the Senate should not approve nominees who are activist or who would misuse their authority to implement a liberal agenda); see also Tobias, *supra* note 61, at 952.

65. See Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates Thirteen to the Federal Bench (July 31, 1997),

The Republican leadership correspondingly contributed to the slow pace of confirmation. For example, Senator Hatch could have done more to facilitate Judiciary Committee examination of candidates, especially those who were controversial.⁶⁶ Senator Trent Lott (R-Miss.), the Senate Majority Leader, also did not expeditiously schedule floor debates and votes for some candidates who had received Judiciary Committee approval.⁶⁷

During 1997, the President named six women (17%) and five minorities (14%) out of thirty-six appointees.⁶⁸ Clinton concomitantly nominated nineteen female attorneys (31%) and twelve minority lawyers (21%) for sixty-one vacancies.⁶⁹ The numbers and percentages of women and minorities nominated were comparable to the figures compiled four years earlier; however, the relatively few individuals who received confirmation sharply contrasted with the eighty-five judges whom President Reagan appointed during the first year of his second term.⁷⁰ All of the nominees appear to be extremely talented and several of the district judges submitted were Republican appointees.⁷¹

In short, the Clinton Administration had a respectable record of judicial selection during 1997. The President and his assistants continued to name and nominate well-qualified women and

<http://www.pub.whitehouse.gov/uri-res/12R?urn:pd:oma.eop.gov.us/1997/8/1/6>. text.1; see also 143 CONG. REC. S2522-24 (daily ed. Mar. 19, 1997) (statement of Sen. Grassley) (explaining reasons for assessing nominees cautiously); see *id.* at S2538-41 (statement of Sen. Biden) (responding to the Republicans' claims).

66. See, e.g., 143 CONG. REC. S2536 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch) (noting that no one has questioned the qualifications of the nominee, Merrick Garland); see also Hatch, *supra* note 64; Goldman & Slotnick, *supra* note 2, at 267-69 (indicating one of the problems faced by the Clinton Administration was that Senator Hatch served as the Chair of the Senate Judiciary Committee).

67. See Dan Carney, *Clinton's Deals with GOP on Judgeships Stir Discontent Among Democrats*, 57 CONG. Q. WEEKLY 845, 847 (1999) (stating that Senator Lott has been criticized for blocking nominees for extensive periods of time); see also Goldman & Slotnick, *supra* note 2, at 267, 271-73 (indicating that Senator Lott was determined to continue the slow pace of judicial appointments); Tobias, *supra* note 61, at 953; *supra* note 55 and accompanying text.

68. Telephone Interview with Stephan Kline, Alliance for Justice (Nov. 21, 1997).

69. See *id.*

70. See *supra* notes 4-28 and accompanying text (providing relevant material regarding judicial appointments in 1993); see also Carl Tobias, *Who's to Blame? Who Cares? Just Fill Judicial Vacancies*, SALT LAKE TRIB., Sept. 28, 1997, at AA4 (providing relevant 1985 data). In fairness, the Republicans did control the Senate during 1985.

71. See Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates Sonia Sotomayor to the Federal Bench (June 25, 1997), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pd:oma.eop.gov.us/1997/6/26/1>. text.1; see also *supra* note 62 (nominating Judge Ware); *infra* note 79 and accompanying text (confirming Judge Sotomayor).

minorities.⁷² The success attained was even more notable in light of the problems experienced assembling the second administration and finding replacements for the officials primarily responsible for recruitment.⁷³

5. Selection During 1998

As in earlier years of the Clinton Administration, the individuals whom the President appointed in 1998 were experienced and capable individuals with comparatively moderate political viewpoints who would enhance gender, racial, and political diversity on the federal appeals and district courts. Likewise, the Clinton Administration employed goals and procedures analogous to those used earlier.⁷⁴ It maintained major responsibility for designating nominees, especially for appeals court vacancies, and further consolidated its control of the judicial selection process. It also instituted many special efforts to delineate and proffer the names of highly competent female and minority attorneys.⁷⁵ Furthermore, the Administration continued to work carefully with senators, requesting that the senators find and recommend talented women and minorities and deferring to senators from the relevant states concerning nominations for empty district court seats.⁷⁶

During 1998, the President named twenty-one female (22%) and sixteen minority (25%) attorneys out of sixty-five judges to the federal courts.⁷⁷ Specifically, President Clinton helped orchestrate the confirmations of Susan Graber, Margaret McKeown, and Judge Kim Wardlaw and pressed the appointments of Marsha Berzon and Judge Richard Paez for Ninth Circuit openings during 1998.⁷⁸

72. See *supra* notes 68-71 and accompanying text.

73. For example, the White House Counsel as well as the Deputy and Associate Attorneys General resigned, requiring the Administration to replace them. See Tobias, *supra* note 61, at 954.

74. See Goldman & Slotnick, *supra* note 2, at 265; see also *supra* notes 4-21, 60-62 and accompanying text.

75. See Goldman & Slotnick, *supra* note 2, at 268-84 (providing biographic and demographic information about the Clinton appointees).

76. See Goldman & Slotnick, *supra* note 2, at 267-73 (noting that the Clinton Administration had greater success in the confirmation process in 1998 than in previous years).

77. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT: ANNUAL REPORT 2 (1998); Telephone Interview with Stephan Kline, Alliance for Justice (Jan. 6, 1999). The numbers and percentages of women and minorities confirmed rather closely resemble the relevant figures for 1995. See *supra* note 50 and accompanying text.

78. See Goldman & Slotnick, *supra* note 2, at 269-70 (describing Graber and

Most appointees had relatively moderate political perspectives and a small number had some association with the Republican Party. For example, Clinton elevated to the Second Circuit Sonia Sotomayor, whom President Bush had appointed to the Southern District of New York.⁷⁹ Moreover, numerous appointees and nominees had rendered previous valuable service on a federal or state court bench. For example, Judge Wardlaw, whom President Clinton elevated to the Ninth Circuit, had ably served in the Central District of California.⁸⁰ In short, the President had a laudable judicial selection record during 1998.

The Administration encountered some problems in securing appointments during the second year of the final term that resembled the complications that it had confronted in the prior three years, particularly 1997.⁸¹ These difficulties could be ascribed to Clinton and his Administration, the Senate Judiciary Committee and its Chair, the Senate Majority Leader, and individual senators, especially GOP members.⁸² The President could have tendered more nominees whom Republican senators found acceptable earlier in 1998; instead, he submitted candidates somewhat irregularly thereafter.⁸³ For example, the President often forwarded multiple nominees simultaneously, which may

McKeown); Henry Weinstein, *L.A. Judge Confirmed to 9th Circuit Post*, L.A. TIMES, Aug. 1, 1998, at A22 (describing Wardlaw).

79. See Kline, *supra* note 44, at 310-11 (discussing the nomination process of Sotomayor); Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B3 (explaining the appointment of Sotomayor); see also Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER (Philadelphia, Pennsylvania), Aug. 4, 1997, at 1 (relating the nomination of Bruce W. Kauffman, a Republican).

80. See 144 CONG. REC. S9670 (daily ed. July 31, 1998) (confirmation of Wardlaw as United States Circuit Judge for the Ninth Circuit); see also Weinstein, *supra* note 78, at A22.

81. See Goldman & Slotnick, *supra* note 2, at 267-71 (evaluating the complications experienced by the Clinton Administration during 1997-1998); Goldman & Slotnick, *supra* note 6, at 256-58 (defining the problems the Clinton Administration had in securing appointments during the second half of the first term); Tobias, *supra* note 61, at 952-54 (explaining Clinton's obstacles in appointing judges); *supra* notes 40-56, 60-67 and accompanying text.

82. See Goldman & Slotnick, *supra* note 2, at 267-73.

83. See Orrin Hatch, *Judicial Nominee Confirmations Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A (relating that the Senate had not received nominees for many of the remaining vacancies). *But see* 143 Cong. Rec. S2538 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (admitting that the Clinton Administration had not sent enough nominees in a timely fashion in the past two years, but stating that it was now the Republican senators who were slowing the pace of the confirmation process), *See also* Goldman & Slotnick, *supra* note 2, at 267 (discussing the difficulty that Clinton faced in obtaining confirmations from the Republican-controlled Congress).

have frustrated the Judiciary Committee's efforts to evaluate the individuals promptly.⁸⁴

The Republican leadership in the Senate and individual Republican senators were also responsible for the comparatively slow pace of appointments, particularly at the outset of 1998. For instance, Senator Hatch could have processed nominees more expeditiously.⁸⁵ Likewise, Senator Lott did not always schedule floor debates and floor votes on candidates promptly after they had received favorable Judiciary Committee consideration.⁸⁶ Each of the major participants in the confirmation process, accordingly, might have done more to foster expeditious judicial selection. The Senate had confirmed only forty judges by September. Thereafter, the pace was quickened only through the cooperation of President Clinton and Senator Hatch.

Overall in 1998, the President named and nominated large numbers and percentages of capable female and minority lawyers, enunciated clear objectives for choosing judges, and followed efficacious procedures. The success achieved is remarkable, given the substantial hurdles that the Administration faced, including the expanded Whitewater investigation and the impeachment probe.⁸⁷

84. See Goldman & Slotnick, *supra* note 2, at 271-73 (noting the dramatic increase in delay in the confirmation process during the Republican-controlled 105th Congress); see also *supra* note 83.

85. Senator Hatch asserted that consideration was delayed by the erratic manner in which the Administration submitted attorneys and by the fact that some of the nominees were unacceptable partly because they might be judicial activists. See, e.g., 144 CONG. REC. S6186 (daily ed. June 11, 1998) (statement of Sen. Hatch) (indicating opposition to the appointment of judicial activists); see also *id.* at S659 (daily ed. Feb. 11, 1998) (statement of Sen. Hatch) (reiterating support for Margaret Morrow and her absence of judicial activism); Hatch, *supra* note 83 (recognizing that the confirmation process suffered from lack of cooperation between the White House and the Senate). But see 143 CONG. REC. S2538-41 (daily ed. Mar. 19, 1997) (statement of Sen. Biden) (responding to Republicans' concerns over judicial activists). See generally Lee Renzin, Note, *Advice, Consent and Senate Inaction - Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1746 (1998) (explaining that Republicans' concerns over judicial activism are misplaced).

86. See, e.g., 144 CONG. REC. S8477 (daily ed. July 17, 1998) (statement of Sen. Leahy) (criticizing the slow pace in approving the appointment of Sotomayor); see also *The Senate's Hostage Game*, L.A. TIMES, July 28, 1998, at B6 (discussing the delay in appointing William Fletcher and indicating that Senator Lott is stalling in calling for a vote); Goldman & Slotnick, *supra* note 2, at 272-73 (stating that Senator Lott played an important role in the delay in floor action on judicial nominees).

87. See Carney, *supra* note 67, at 847 (discussing the success of the Administration in securing appointments despite Clinton's troubles); Goldman & Slotnick, *supra* note 2, at 265; see also Charles F.C. Ruff, *Lewinsky Probe Has 'Impact' on President*, WASH. POST, May 28, 1998, at A16 (indicating the effects that the Lewinsky matter had on the presidency). See generally RICHARD A.

6. Selection During 1999

One particularly striking aspect of the appointments process during 1999 was how substantially it resembled previous judicial selection. The Clinton Administration exerted much control over nominee selection and persisted in its special efforts to nominate skilled women and minorities while working closely with senators to suggest such individuals. Despite the significant success in confirming judges that the President and Senator Hatch had attained only several months earlier, the efforts to fill the seventy empty seats on the appeals and district courts were stymied by two primary factors. First, Clinton failed to forward consistently enough nominees whom Republican senators found acceptable, especially in the beginning of the year. Second, the Senate impeachment trial of Clinton effectively discontinued judicial selection. These events resulted in the Judiciary Committee Chair holding no hearings or votes on candidates before the middle of June.

The Administration proffered a package of seventeen appellate and district court nominees promptly upon the convening of the first session of the 106th Congress and simultaneously with the commencement of the President's impeachment trial before the Senate.⁸⁸ The upper chamber confirmed two nominees for vacant judgeships for the Northern District of Illinois during March.⁸⁹ However, the Judiciary Committee conducted no hearings on any of the nominees for the remaining seventy open positions prior to the summer of 1999.⁹⁰ The Senate confirmed merely eleven judges from January to September 1999.⁹¹ Yet, thirty-four individuals eventually secured appointment by the time the senators recessed.⁹²

impeachment); *Meet the Press* (NBC television broadcast, Mar. 22, 1998) (interviewing Senator Lott and discussing the Lewinsky matter and its effects on the Clinton Administration).

88. See Press Release, Office of the Press Sec'y, The White House, The President Nominates Seventeen to the Federal Bench (Jan. 26, 1999) <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1999/1/26/5.txt.1>.

89. See 145 CONG. REC. S3438 (daily ed. Mar. 25, 1999) (statement of Sen. Hatch) (recommending for confirmation William J. Hibbler and Matthew F. Kennedy to be United States District Judges for the Northern District of Illinois).

90. See *Hearings on Judicial Nominees Resume*, THIRD BRANCH, July, 1999, at (noting that the first judicial nomination hearing of 1999 was held on June 16th); John Heilprin, *Hatch Will Go Slow on Nominees*, SALT LAKE TRIB., Aug. 9, 1999, at A1 (stating that Senate Judiciary Chairman Orrin Hatch had blocked senate action on Clinton's nominees to the federal bench in the first part of 1999).

91. See Heilprin, *supra* note 90.

92. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *Vacancies in the Federal Judiciary* (Sept. 1, 1999), available at <http://www.uscourts.gov/vacancies/09011999/judgevacancy.htm>; see also 145 CONG. REC. S10848 (daily ed. Sept. 14, 1999)

The major obstacle to confirmation during the initial half of the year was a dispute over a vacancy on the federal district court in Utah, the state that the Judiciary Committee Chair represents.⁹³ During early 1999, Senator Hatch began "demanding that the President nominate a conservative aide to Republican Governor Mike Leavitt as a federal judge in Salt Lake City."⁹⁴ The controversy was exacerbated because the candidate was a "self-described Ronald Reagan conservative whose views on the environment are anathema to Clinton and to environmental and other liberal groups that are politically important to the Administration."⁹⁵ Moreover, many Democrats in the state strongly opposed the attorney's appointment.⁹⁶ Clinton ultimately acceded to Senator Hatch's request by nominating the conservative lawyer in July.⁹⁷ Some observers of the judicial selection process claim that this six-month dispute prevented serious senate consideration of any nominees apart from the judges confirmed for the Northern District of Illinois.⁹⁸

Notwithstanding the difficulties encountered in the beginning of the year, thirty-four nominees were confirmed to the federal bench in 1999.⁹⁹ Of those selected, thirteen were female (38%) and ten were minorities (29%).¹⁰⁰ These figures are similar to those during 1995.¹⁰¹ Again, these judges were intelligent, industrious, and independent political moderates; only a few have

(statement of Sen. Leahy) (criticizing the tremendous delay in the confirmation of Richard Paez to the Ninth Circuit); Heilprin, *supra* note 90 (relating that Senate Judiciary Chairman Orrin Hatch warned President Clinton that the confirmation process will not be rushed despite the need to fill vacancies for federal judges).

93. See Carney, *supra* note 67, at 845; Joan Biskupic, *Hatch, White House at Impasse on Judgeships*, WASH. POST, June 5, 1999, at A1; Paul Elias, *Berzon's Ninth Circuit Bid Looks Good*, RECORDER (San Francisco, California), June 17, 1999, at 1; Judy Fahys, *Utahn is Bottleneck in U.S. Judge Pipeline*, SALT LAKE TRIB., May 17, 1999, at A1; David G. Savage, *Federal Benches Left Vacant Over Utah Tug of War*, L.A. TIMES, May 10, 1999, at A1.

94. Savage, *supra* note 93; see also Biskupic, *supra* note 93; Fahys, *supra* note 93.

95. Savage, *supra* note 93; see also Carney, *supra* note 67, at 845-47; Elias, *supra* note 93.

96. See Elias, *supra* note 93.

97. See Press Release, Office of the Press Sec'y, The White House, President Clinton Nominates Petrese B. Tucker and Brian Theodore Stewart to the Federal Bench (July 27, 1999), <http://www.pub.whitehouse.gov/uri-res/12R?urn:pd://oma.eop.gov.us/1999/7/28/19.text.1>; see also Carney, *supra* note 67, at 845 (discussing the possibility of Clinton's nomination of the aide).

98. See Biskupic, *supra* note 93; Fahys, *supra* note 93; Savage, *supra* note 93; see also *supra* note 89 and accompanying text.

99. See ALLIANCE FOR JUSTICE, THIRTEENTH ANNUAL REPORT 6 (1999); Telephone Interview with Nancy Marcus, Alliance for Justice (Mar. 17, 2000).

100. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 91.

101. See *supra* note 50 and accompanying text.

to those during 1995.¹⁰¹ Again, these judges were intelligent, industrious, and independent political moderates; only a few have been affiliated with the Republican party. Moreover, numerous appointees had been members of the federal or state bench. For example, President Reagan named Judge Ann Claire Williams to the Northern District of Illinois where she served with distinction until President Clinton elevated her to the Seventh Circuit.¹⁰²

In short, the Clinton Administration successfully discharged its judicial selection duties during 1999. Clinton enunciated laudable objectives, used effective means to realize those goals, and continued to appoint and nominate a number of very capable women and minorities. These achievements are admirable, given the significant complications that the Administration experienced. Although Clinton contributed to some problems, namely his own impeachment trial, the Republican senators might have done more to expedite the confirmation process. In the final analysis, the Administration compiled a commendable record.

II. Selection During 2000

Most of the difficulties that had accompanied the efforts to choose judges throughout the Clinton presidency manifested themselves again during Clinton's final year in office. The negative factors may have been accentuated, because 2000 marked the conclusion of a two-term administration and was a presidential-election year, circumstances that meant that the President's authority, particularly the power to name judges, was at its lowest point.

The appointment process was sporadic, especially in regard to the full senate consideration of nominees who had received favorable Judiciary Committee votes. Until March 9, 2000, when the entire Senate treated the controversial nominations of Richard Paez and Marsha Berzon to the Ninth Circuit, the Senate had approved only four judges.¹⁰³ Although the upper chamber had delayed voting on Judge Paez for four years, he and Ms. Berzon

101. See *supra* note 50 and accompanying text.

102. See Matt O'Connor, *True to Herself*, CHI. TRIB., Dec. 11, 1999, at 1; *Williams OK'd for Appeals Court*, CHI. TRIB., Nov. 11, 1999, at 6.

103. See 145 CONG. REC. S10848 (daily ed. Sept. 14, 1999) (statement of Sen. Leahy) (criticizing the tremendous delay in the confirmation of Richard Paez to the Ninth Circuit); 146 CONG. REC. S1368 (daily ed. Mar. 9, 2000) (confirming Paez to be United States Judge for the Ninth Circuit); 146 CONG. REC. S4366 (daily ed. May 24, 2000) (statement of Sen. Leahy) (noting that the Senate must act on the judicial nominations promptly and provide the federal judiciary with the resources it needs and to which it is entitled).

additional judicial nominees until May 24, partly because of a controversy that involved the appointment of Professor Bradley Smith, whom Clinton had nominated to the Federal Election Commission.¹⁰⁵ When Democrats finally agreed to a floor debate and vote on Smith, the Senate approved sixteen judges.¹⁰⁶ Over the remainder of the year, the Judiciary Committee conducted several hearings on persons whom Clinton had appointed, approving some.¹⁰⁷ However, the full Senate considered relatively few nominees and the process essentially ground to a halt after the summer presidential nominating conventions.¹⁰⁸

Out of the thirty-nine judges named by Clinton in 2000, eleven were women (28%) and nine were minorities (23%).¹⁰⁹ Although the total number of counsel appointed is considerably smaller than the sixty-plus nominees who secured approval during the final year of the Bush Administration when the Democrats controlled the Senate,¹¹⁰ approximately 100 seats remained vacant

(daily ed. Sept. 14, 1999) (statement of Sen. Leahy) (criticizing the tremendous delay in the confirmation of Richard Paez to the Ninth Circuit); 146 CONG. REC. S1368 (daily ed. Mar. 9, 2000) (confirming Paez to be United States Judge for the Ninth Circuit).

105. See 146 CONG. REC. S4366 (daily ed. May 24, 2000) (statement of Sen. Leahy) (criticizing the delay in the confirmation process and urging "all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year"); see also Thomas L. Jipping, *Trading Away the Judiciary*, WASH. TIMES, July 25, 2000, at A17.

106. See Lizette Alvarez, *Senate Deal Ends Logjam on Nominee and Judges*, N.Y. TIMES, May 25, 2000, at A19; Jonathan Ringel, *Senate Gives Bench a Break*, LEGAL TIMES, May 29, 2000, at 15.

107. See *Nominations Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (June 15, 2000), available at <http://www.senate.gov/~judiciary/wl6152000.htm>; *Nominations Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (July 25, 2000), available at <http://www.senate.gov/~judiciary/wl7252000.htm>.

108. See, e.g., 146 CONG. REC. S7457 (daily ed. July 21, 2000) (confirming Rawlinson for the Ninth Circuit Court of Appeals); see also Jonathan Ringel, *Fate of Clinton's Judicial Appointees Draws Near*, FULTON COUNTY DAILY REP. (Atlanta, Georgia), Aug. 9, 2000, at 1.

109. Telephone Interview with Nan Aron, Alliance for Justice (Nov. 10, 2000); E-mail from Elaine Weiss, Alliance for Justice, to Carl Tobias, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas (Dec. 22, 2000, 08:44:28 AM) (on file with author).

110. See 143 CONG. REC. S2539 (daily ed. Mar. 19, 1997) (statement of Sen. Sarbanes); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 284 (1993); Tobias, *supra* note 2, at 1239 (recognizing that Bush appointed eighteen women out of the sixty-eight judges confirmed in his final year of his presidency); Helen Dewar, *Hatch Denies Bias on Judicial Nominees*, WASH. POST, July 21, 2000, at A29. See generally Gerhardt, *supra* note 55, at 1394 (explaining that presidents in election years face many difficulties in having their nominees confirmed); Jonathan Ringel, *35 Judicial Nominees Stalled in Congress by Election-Year Politics*, LEGAL INTELLIGENCER (Philadelphia, Pennsylvania), Aug. 7, 2000, at 5 (same).

when President Bush left office,¹¹¹ a statistic that contrasts with the fewer than seventy judgeships which were open at the conclusion of the Clinton Administration.¹¹² Furthermore, those individuals who were confirmed seem to be very talented. For instance, Judge Paez had been a highly regarded jurist in the Central District of California before being elevated to the Ninth Circuit.¹¹³ Thus, the Clinton Administration capably completed its judicial selection duties during 2000, particularly in light of the complications created by the last year of a two-term administration and by election-year politics.

In sum, over the course of President Clinton's second term, the President honored the promises that he had made when campaigning for the White House and reiterated once in office.¹¹⁴ The Administration appointed 174 attorneys, who attained the highest ratings which the ABA has ever assigned; fifty-one (29%) of the judges are women and forty-two (24%) are minorities.¹¹⁵ This record is unparalleled in the nation's history. Nearly half of the judges whom Clinton named during his two terms are women or minorities.¹¹⁶ Also, Clinton appointed more African Americans than in the previous sixteen years and more Hispanic Americans than the Bush and Reagan Administrations combined.¹¹⁷

III. Suggestions for the Future

Suggestions related to the judicial selection objectives that newly-elected President George W. Bush should articulate and how he and his Administration may achieve the goals require

POST, July 21, 2000, at A29. See generally Gerhardt, *supra* note 55, at 1394 (explaining that presidents in election years face many difficulties in having their nominees confirmed); Jonathan Ringel, *35 Judicial Nominees Stalled in Congress by Election-Year Politics*, LEGAL INTELLIGENCER (Philadelphia, Pennsylvania), Aug. 7, 2000, at 5 (same).

111. See, e.g., Goldman, *supra* note 110, at 297; Tobias, *supra* note 1, at 1237. See generally Renzin, *supra* note 85, at 1743 n.16 (discussing judicial vacancy rates during the Reagan and Bush Administrations); Jipping, *supra* note 105 (arguing that Democrats allowed the confirmation process to slow during the Bush Administration).

112. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *Vacancies in the Federal Judiciary*, Nov. 3, 2000, available at <http://www.uscourts.gov/vacancies/judgevacancy.htm>.

113. See *supra* note 104 and accompanying text.

114. See *supra* notes 3-5 and accompanying text (discussing Clinton's vow to increase the percentage of women and minorities on the federal judiciary).

115. See *President Clinton Urges Senate to Confirm Judicial Nominees*, U.S. NEWSWIRE, July 30, 2000, available at <http://www.pub.whitehouse.gov/urires/12R?urn:pd:://oma.eop.gov.us/2000/7/31/15.text.1>.

116. See *id.*

117. See *id.*

treatment in this Essay. Nonetheless, some general issues which the President and his staff will confront and certain, specific matters that might arise deserve exploration, while the need to appoint additional women and minorities as well as to fill the many existing judicial vacancies merit assessment.

A. General Ideas

A recently-elected administration should attempt to anticipate and minimize the problems in naming judges that all nascent presidencies inevitably face. These include the myriad legal, policy, and political questions that attend the creation and operation of a new administration and on which the White House Counsel and Department of Justice must furnish advice. A trenchant illustration of the work's daunting nature and of the need to set priorities is that judgeships constitute only a minuscule percentage of the many appointments a president must make.¹¹⁹

Difficulties that relate specifically to choosing judges encompass the establishment of selection objectives and the development of efficacious means to realize them. For example, President Bush and his assistants must decide whether they should assign high priorities to naming more female and minority lawyers, as well as to confirming judges for the numerous open seats. A number of reasons stated earlier and some considered below suggest that both goals warrant emphasis and can be attained.

The President and his Administration should correspondingly formulate effective practices to secure the objectives that it enunciates by determining the respective responsibilities that the White House and the Department of Justice will assume for particular aspects of the selection process. For example, the President and his staff should decide whether the White House will retain principal authority for the identification of potential nominees generally and whether it will control the filling of specific appellate court vacancies. The President and his Administration should also decide whether the Justice Department will continue to be responsible for scrutinizing most individuals only after the persons are serious candidates. Finally, the President and his assistants must decide the amount of deference they wish to accord senators, especially for district court openings that occur in the states that senate members represent.

Federal Judicial Selection, 1993 BYU L. REV. 1257, 1274-85 (1993).

119. For a sense of other difficulties that plagued the Clinton Administration's efforts to appoint judges, see *supra* notes 53, 64-67, 93-98, 104-108 and accompanying text.

The last four presidential administrations have followed relatively similar procedures.¹²⁰ For example, the White House has maintained primary control over the delineation of possible nominees. In particular, the White House has controlled the delineation of nominees for the appeals courts even though the Department of Justice exercised considerable responsibility for evaluating candidates. Moreover, the presidents have deferred substantially to home-state senators when they chose district court nominees.

The nascent administration must institute special efforts to cooperate with the Chair of the Judiciary Committee, with the panel's remaining members and with specific senators. The President should consult the lawmakers by seeking their advice before he formally tenders the names of individual candidates. The President and his staff should also submit nominees as steadily as possible. These measures will facilitate consideration of candidates by the Judiciary Committee and other entities participating in the judicial confirmation process, such as the FBI and the ABA, and maximize the prospects for filling all of the vacancies on the federal bench.

B. Specific Ideas

1. Why the New Administration Should Appoint Additional Women and Minorities

There are several reasons why President Bush should place significant numbers of female and minority attorneys on the federal courts. One reason is that most of these judges will enhance their colleagues' appreciation of controversial public policy issues that the federal judiciary must resolve, including abortion and discrimination.¹²¹ Considerable evidence suggests that the American public has greater confidence in a federal bench whose membership resembles the composition of its citizenry.¹²² A more diverse judiciary may also enhance substantive decision-

120. See GOLDMAN, *supra* note 7 (providing an in-depth analysis of the Presidential administrations of Carter, Reagan, Bush and Clinton).

121. See, e.g., Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 150-51 (1999); Marion Zenn Goldberg, *Carter-Appointed Judge: Perspectives on Gender*, TRIAL, Apr. 1990, at 108. See generally Elliot E. Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270 (1983).

122. See Tobias, *supra* note 118, at 1276; see also Slotnick, *supra* note 121, at 272-73.

making.¹²³ Numerous women and minorities, such as Justice Ginsburg and Chief Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit, have rendered excellent service.¹²⁴

A second reason is that the appointment of additional women and minorities could help to reduce gender, racial, and ethnic bias in the federal civil and criminal justice systems.¹²⁵ The number of female and minority judges named and nominated reflects the Administration's commitment to the improvement of circumstances for women and minorities in the nation, in the federal courts, and in the legal profession.¹²⁶

A third reason to appoint more female and minority lawyers is the need to remedy or ameliorate the lack of gender, racial, and political balance in the present federal judiciary. Approximately half of the judges were named by Presidents Reagan and Bush.¹²⁷ African Americans constituted fewer than two percent of the judges chosen by the Reagan Administration.¹²⁸ President Bush similarly selected only ten African Americans, one Asian American, and nine Hispanic Americans.¹²⁹ Moreover, the Republican Presidents seemed to appoint some nominees, at least in part, for the individuals' politically conservative viewpoints.¹³⁰

123. See Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J. POL. 425 (1994); see also Beiner, *supra* note 121, at 137-51 (recognizing that this assertion is controversial and analyzing the studies of decisionmaking by female and minority judges); Tobias, *supra* note 118, at 1262-64.

124. See Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991); see also Tobias, *supra* note 1, at 1244 (recognizing that President Bush appointed several prominent women, many of whom were excellent judges); *supra* notes 12, 14 and accompanying text (describing President Clinton's judicial selection process which included vigorous efforts to appoint more women and minorities to the bench).

125. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (Apr. 2, 1990); see generally *Commentaries on Bias in the Federal Courts*, 32 U. RICH. L. REV. 647 (1998) (containing reports from each circuit on the existence of bias in the courts and remedial steps being taken).

126. See Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991) (identifying the judicial appointments made by President Bush); see also Beiner, *supra* note 121, at 145; Tobias, *supra* note 10, at 175-76 (noting that successful women already in power may help pave the way for others).

127. See Carney, *supra* note 67, at 845 (criticizing President Clinton for his concessions in appointments); Goldman & Slotnick, *supra* note 2, at 283.

128. See Tobias, *supra* note 1, at 1237.

129. See Goldman, *supra* note 110, at 287, 293 tbl.4 (providing a breakdown of the judiciary's ethnic and racial makeup during the presidencies of Johnson through Bush); Tobias, *supra* note 1, at 1237.

130. See Carney, *supra* note 67, at 846-47; Tobias, *supra* note 118, at 1264-74; see also *infra* note 148.

Republican Presidents seemed to appoint some nominees, at least in part, for the individuals' politically conservative viewpoints.¹³⁰

It is difficult to understand exactly why Presidents Reagan and Bush named such small numbers of female and minority judges because their administrations had the opportunity to choose from considerably bigger and more experienced pools of women and minorities than President Carter. In 1980 when the Reagan Administration began, there were only 62,000 female attorneys in the United States.¹³¹ By the end of his Administration, 80,000 additional women had entered the legal profession.¹³² Many of these attorneys had secured valuable experience in a broad spectrum of public and private practice settings or had undertaken innovative work in law schools.¹³³ The number of African-American, Hispanic-American, and Asian-American lawyers similarly increased from 23,000 to 51,000 during the same time period.¹³⁴ These lawyers succeeded in numerous challenging endeavors, such as the pursuit of novel cases and the publication of groundbreaking scholarship.¹³⁵

A final reason to appoint more women and minorities is the need for filling all of the positions on the federal appellate and district bench that are currently open. This would permit the executive branch to function with the complete complement of the federal judiciary.¹³⁶ Confirming attorneys for these empty seats would improve the resolution of criminal cases and reduce the substantial civil backlogs in district courts.¹³⁷ Furthermore, it would facilitate the disposition of burgeoning appellate dockets.¹³⁸

130. See Carney, *supra* note 67, at 846-47; Tobias, *supra* note 118, at 1264-74; see also *infra* note 148.

131. See Tobias, *supra* note 1, at 1241 n.22.

132. See *id.*

133. See Tobias *supra* note 1 at 1246-47; Tobias, *supra* note 118, at 1280-81. See generally Deborah J. Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997); Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992).

134. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT, ANNUAL REPORT 3 (1992); see also *supra* note 133 and accompanying text.

135. See ALLIANCE FOR JUSTICE, *supra* note 134.

136. Congress has authorized 179 federal appellate court positions and 649 federal district court positions. See 28 U.S.C. §§ 44, 133 (2000).

137. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 42, 103-05 (1995) (assessing caseloads and slowed judicial selection); ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT MID-YEAR REPORT 4 (1994) (analyzing civil backlogs).

138. See *supra* note 137.

Filling the vacancies could also remedy the "looming crisis in the Nation" feared by many national legal associations.¹³⁹

2. How the New Administration Can Appoint Additional Women and Minorities

Recommendations for how President George W. Bush and his Administration might place additional female and minority lawyers on the federal bench require comparatively little assessment here because several analogous suggestions have already been proffered by certain federal court observers and elsewhere in this Essay.¹⁴⁰ Nevertheless, numerous additional ideas can be provided. First, the President should capitalize on the effective actions implemented by previous administrations. For example, the President and his aides should assess effective means of revitalizing efforts instituted by the former Clinton and Bush Administrations to find, evaluate, and nominate talented female and minority candidates. These measures include contacting every member of the Senate in their respective political parties and urging the lawmakers to search for and propose women and minorities.¹⁴¹ Second, the nascent administration should evaluate new methods of proceeding and invoke resources that have not yet been employed.¹⁴²

The selection of Supreme Court Justices and appeals court judges warrants relatively limited analysis because President Bush will probably maintain considerable control over the

139. See Letter to William J. Clinton, President, from N. Lee Cooper, ABA President, et al., July 14, 1997, reprinted in 143 CONG. REC. S8504 (daily ed. July 31, 1997). But see Thomas L. Jipping, *Clinton's Judges Promote Politically Correct Agenda*, LAS VEGAS REV. J., Sept. 17, 1999, at 15B (rejecting the idea of a crisis).

140. For example, paramount to the promotion of women and minorities to the federal judiciary is a strong commitment embraced by a president and his staff. See Goldman & Slotnick, *supra* note 2, at 284; see also Tobias, *supra* note 1, at 1245-49 (describing President Clinton's pledge to appoint more women to the federal judiciary); Tobias, *supra* note 118, at 1274-85 (suggesting that the federal judiciary should be comprised of more women and minorities); *supra* notes 17-21 and accompanying text (describing efforts by the Clinton Administration and Democratic senators to increase the female and minority representation in the federal judiciary).

141. See, e.g., *supra* note 19 (affording Clinton's request); Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 479-80 (1991) (affording Bush's request). The new administration could even consider reinstating the Circuit Judge Nominating Commission that President Carter used. See *supra* note 11 and accompanying text.

142. For helpful, recent suggestions that could expedite selection, see Citizens for Independent Courts, *Report of the Task Force on Federal Judicial Selection*, 51 ADMIN. L. REV. 1031 (1999); Committee of the American Judicature Society, *Eliminating Unnecessary Delays in Filling Federal Judicial Vacancies*, 83 JUDICATURE 100 (1999).

nomination process for vacancies in those positions.¹⁴³ Therefore, the President and the Office of White House Counsel must emphasize the need for additional female and minority judicial appointments and develop the best techniques for attaining this objective. The Clinton Administration's initiatives could provide an informative template for structuring the executive action.

The procedures for choosing district court nominees deserve somewhat greater exploration since all presidents have exercised deference to senators of the areas where openings have arisen. First, President Bush should first identify a prominent public forum in which he announces a strong commitment to naming large numbers of women and minorities.¹⁴⁴ Second, the President might encourage senators to institute mechanisms, such as district court nominating commissions, that will designate and promote the candidacies of very competent female and minority counsel.¹⁴⁵ Third, the President should enlist the aid of every female senator, because those legislators can convince their colleagues to recommend additional women and minorities and help facilitate the approval of nominees.¹⁴⁶ Fourth, both the executive branch and senators should seek assistance from individuals and institutions that may help to delineate numerous female and minority attorneys, including state and local bar associations, women's groups, and minority political organizations.

The abilities and networking of women and minorities, who now comprise more than a quarter of the legal profession in the United States, will be important to the efforts discussed above. Equally significant might be the endeavors and contacts of female and minority Cabinet members, such as Secretary of Agriculture, Ann Veneman, Secretary of Housing and Urban Development, Mel Martinez, and Secretary of State, Colin Powell, as well as other women and minorities across the federal government.¹⁴⁷

143. See Tobias, *supra* note 2, at 316-17; Goldman, *supra* note 2, at 279.

144. See, e.g., *supra* notes 3-5 and accompanying text (describing President Clinton's announcement of his commitment to a more diverse judiciary).

145. See, e.g., *supra* note 10 and accompanying text (explaining President Carter's use of district court nominating commissions to promote the confirmation of numerous female and minority attorneys to the federal judiciary); see also *supra* notes 14-15 and accompanying text (describing the importance of the President gaining support from senators to expedite and effectuate his judicial selection process).

146. See, e.g., *supra* notes 14-15 and accompanying text (describing how senators influence the judicial selection process); see also Goldman *supra* note 2, at 279 (recounting how females within the Clinton Administration promoted the expansion of women to federal judicial positions).

147. See Tobias, *supra* note 2, at 1248-49; Goldman *supra* note 2, at 279 (recounting how females within the Clinton Administration promoted the

3. A Word About Politics and Filling the Federal Bench

The above examination of the appointments process during several years of the Clinton Administration, especially in 2000, indicates that the small number of judges named and the comparatively few women and minorities confirmed can be attributed partly to political considerations. Therefore, recently-elected President Bush must analyze carefully the impacts of politics on selection generally, and on the choice of female and minority judges specifically. Moreover, politics is an intrinsic feature of judicial appointments, one that will receive much scrutiny at the Bush Administration's commencement.

It is difficult to predict exactly how political phenomena will influence selection, particularly of women and minorities. One important factor that the Republican and Democratic Parties should evaluate is whether the President's margin of victory is a mandate for change from the American electorate, both generally and as to specific judicial appointments.¹⁴⁸ A related idea is how much the President wants to emphasize nominees' political perspectives, especially vis-à-vis the time-honored, merit-based qualifications, such as intelligence, diligence, independence, and balanced temperament.¹⁴⁹

Another significant factor that warrants assessment is the nascent status of the administration. Most recently-elected presidents have been able to rely on a reservoir of good will and to exercise considerable authority, particularly when choosing judges, despite the finite political capital that they have to expend on these appointments.¹⁵⁰

The establishment of a new administration may also raise innumerable issues, some that can be anticipated and others that are unpredictable. In the arena of judicial selection, foreseeable questions will include how much control the White House should

expansion of women to federal judicial positions); *supra* note 5 and accompanying text (discussing how Attorney General Janet Reno proclaimed that she would promote balance in the judiciary).

148. For example, President Reagan claimed that he had a mandate to appoint conservative judges. See DAVID O'BRIEN, JUDICIAL ROULETTE 60-64 (1988); Tobias, *supra* note 118, at 1264-65; see also Robert A. Carp et al., *The Voting Behavior of Judges Appointed By President Bush*, 76 JUDICATURE 298 (1993) (describing the same mandate for President Bush).

149. One reason espoused for slow processing of certain Clinton Administration nominees was their potential to be "judicial activists." See *supra* notes 64, 66, 85 and accompanying text.

150. The Clinton Administration had a well-known aversion to spending political capital on judicial selection, especially on controversial candidates. See Goldman & Slotnick, *supra* note 6, at 270; Kline, *supra* note 44, at 315-22; see also *supra* notes 43-45 and accompanying text.

retain over the process, the amount of deference to accord senators when designating nominees for appellate and district court vacancies, and how closely to confer with the Senate Judiciary Committee, its Chair, and individual senators. Less predictable, albeit probable, are the resignations of Supreme Court Justices, although their precise number and timing defy accurate prognostication.¹⁵¹ Unforeseeable issues will include many political controversies, most of which tangentially involve judicial selection but may significantly affect it, nonetheless.¹⁵² The President must remember that a single dispute that implicates the choice of judges can delay the entire appointment process, as the controversies over nominees for the vacancies on the Utah district court and the Federal Election Commission so vividly demonstrate.¹⁵³

The propositions above might have numerous, important consequences for the recruitment of judges throughout the nascent administration, especially at its outset. First, judicial selection may not proceed very smoothly or expeditiously, at least during the initial year of the presidency. For example, the Bush Administration will need to establish, experiment with, and refine its system for choosing judges and the Senate must institute and calibrate the confirmation process. In doing so, each political party will probably attempt to test the other's limits, particularly in terms of the perceived political viewpoints that candidates possess. Second, the judicial nominees who are most likely to win confirmation will be individuals deemed acceptable by both Democratic and Republican senators. Thus, political moderation and amenability to compromise may be paramount.

Generally, the President and administration staff should closely cooperate with, and be responsive to, the Senate. Moreover, they must attempt to maximize efficiency by anticipating and treating the foreseeable and less predictable developments. The Supreme Court resignations are illustrative. Because identifying excellent successors can deplete the already scarce resources available for appeals and district court recruitment,¹⁵⁴

151. See, e.g., *supra* note 27 and accompanying text (describing how the Clinton Administration was forced to expend much effort in naming a successor for Supreme Court Justice Byron R. White only two months after Clinton's inauguration).

152. See, e.g., *supra* note 87 and accompanying text (describing how the Whitewater investigation and impeachment probe of President Clinton may have stymied the judicial selection process in 1998).

153. See *supra* notes 93-98, 105 and accompanying text.

154. See, e.g., *supra* note 27 and accompanying text (describing how the Clinton Administration was forced to expend much effort in naming a successor for Supreme Court Justice Byron R. White only two months after Clinton's

the President and his aides should plan for this contingency. The Administration might compile a list of several potential nominees, but it should recognize that the choice would ultimately depend on the complex constellation of variables that obtain only after a specific resignation materializes. Those factors include political phenomena, such as whether the vacancy occurs during an election year or during a Supreme Court term when the Justices have issued many controversial opinions.

The President and his Administration should also analyze how they can appoint additional, talented female and minority judges and attain other significant goals, namely filling the nearly seventy current vacancies on the federal bench. In doing so, the President and staff may wish to assess and deploy certain measures. One specific direct action would be to nominate candidates, many of whom are capable women and minorities, for every open seat. If the political party that does not control the White House refuses to cooperate, the President could force the issue by using the presidency as a bully pulpit to criticize the opposition.¹⁵⁵ Another possibility may be to orchestrate the introduction and passage of a judgeships bill.¹⁵⁶ The President could premise this initiative on the congressional recommendations for additional judicial positions.¹⁵⁷ The President might even consider permitting Democrats to propose some nominees in exchange for its approval of his candidates or for passage of a judgeships measure.¹⁵⁸

155. See *supra* note 142.

156. See, e.g., Federal Judgeship Act of 1999, S. 1145, 106th Cong. (1999). See generally *Can the Federal Courts Cope Without More Judges?*, THIRD BRANCH, Nov. 1999, at 8 (analyzing whether the courts need more judges).

157. The congressional recommendations are supported by conservative estimates of a substantial increase in judicial workloads and courts' dockets since 1990, when lawmakers last enacted judgeships legislation. See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 23 HASTINGS CONST. L.Q. 744, 753 (1997). But see Charles E. Grassley, Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals (1999), available at <http://www.senate.gov/~grassley/releases/1999/p9r03-07.htm> (recommending that no additional judgeships be created); J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1161-63 (1994) (suggesting that more judges are not needed). See also ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999 ANNUAL REPORT OF THE DIRECTOR 16, 19, 23-25 (outlining data on filings); JUDICIAL CONFERENCE OF THE U.S., *supra* note 137, at 103-05 (assessing caseloads of federal judiciary).

158. See Goldman & Slotnick, *supra* note 6, at 271; see also Federal Judgeship Act of 1999, S. 1145, 106th Cong. (1999). A judgeships bill may be an empty gesture, unless the confirmation process can be improved. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); Carl Tobias, *Federal Judicial Selection in a Time of Divided*

Conclusion

President Bill Clinton appointed unprecedented numbers of highly qualified female and minority judges, although his Administration achieved less success in its final year and left almost seventy seats empty. If President George W. Bush capitalizes on the lessons to be derived from the judicial selection efforts of the last four presidents, the nascent administration can name additional women and minorities while filling all of the current vacancies on the federal courts.