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# Choosing Judges at the Close of the Clinton Administration

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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## CHOOSING JUDGES AT THE CLOSE OF THE CLINTON ADMINISTRATION

*Carl Tobias\**

*Professor Tobias suggests that federal judicial selection is one important area in which President Bill Clinton hopes that he will leave a legacy. The author finds that the first Clinton Administration realized much success in choosing judges who make the federal judiciary more diverse and who possess excellent qualifications. Over the last five years, however, the Administration has not been equally successful either in placing highly competent female and minority attorneys on the bench or in filling the perennial judicial vacancies, partly because the Republican Party has enjoyed a significant majority in the Senate. The author's analysis shows that similar circumstances existed in 1999. He, therefore, affords suggestions that should enable President Clinton to appoint additional women and minorities, while filling the bench in his final year of office.*

### I. INTRODUCTION

One important area in which President Bill Clinton apparently hopes that he will leave a legacy is the appointment of judges to the federal courts. When Governor Clinton was campaigning for the White House during 1992, the candidate pledged to name lawyers who would enhance balance on the federal bench, would have proper "judicial temperament" as well as would be intelligent, industrious, independent, and committed to the enforcement of essential constitutional rights.<sup>1</sup> The success that the first Clinton Administration realized in selecting judges, who make the federal judiciary more diverse and who possess excellent qualifications, suggests that the President honored his campaign promises, appointing

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\* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Michael Higdon and Peggy Sanner for valuable suggestions and Jim Rogers for generous, continuing support. Errors that remain are mine.

1. See, e.g., *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58 (reporting on the two candidates' specific responses to questions about the federal judiciary); Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16.

unprecedented numbers of very capable women and minorities to the federal courts during his initial half-term.<sup>2</sup>

Over the last five years, however, the Administration has not been equally successful, either in placing highly competent female and minority attorneys on the bench or in filling the perennial judicial vacancies, partly because the Republican Party has enjoyed a significant majority in the United States Senate.<sup>3</sup> These phenomena applied with special force for much of 1999, when partisan political machinations seemingly attended the federal judicial selection process. Indeed, upon the Senators' return from their August recess, the upper chamber had approved only eleven judges, while there were approximately seventy openings on the appellate and district courts. The approach that the President assumed to naming additional women and minorities and to confirming judges for the empty seats, therefore, remained uncertain. Now that President Clinton has completed the third year of his second term, the judicial appointments process in 1999 deserves assessment. This Article undertakes that effort by specifically analyzing the Chief Executive's simultaneous attempts to name more female and minority judges and to fill all of the vacancies in the federal judiciary.<sup>4</sup>

During 1999, the Clinton Administration instituted comparatively few modifications in the selection goals and practices that the Chief Executive and officials who were responsible for choosing candidates had employed over the course of their first six years in office. The initial section of this Article, accordingly, explores judicial appointments throughout the period and emphasizes developments in 1993. I find that the President enunciated clear objectives and implemented efficacious procedures, particularly by seeking out, identifying, and nominating talented women and minorities. The Article then considers the selection process during the third year of the concluding Administration, scrutinizing the developments that were important or different. This evaluation shows that the Chief Executive tendered the names of numerous female and minority counsel who were highly qualified as well as very capable candidates for most of the existing appeals and district court vacancies, but achieved less success in securing the nominees' confirma-

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2. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995) (stating that in the two years subsequent to his election, President Clinton filled over 70% of vacant judicial posts, ensuring greater diversity within the judiciary, and greater opportunity for women and minorities).

3. See B. Drummond Ayres, Jr., *Politics: The Senate; Four Western Senate Races Are Too Close to Call*, N.Y. TIMES, Oct. 15, 1996, at A22 (noting Senate Republicans possessed a six seat majority).

4. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1247 n.51 (1993) (analyzing the difficulty of increasing racial diversity).

tion. The third part of the Article, thus, affords prescriptions that should enable President Clinton to name additional women and minorities, while filling the federal bench in his final year of office.

## II. FEDERAL JUDICIAL SELECTION IN THE INITIAL SIX YEARS

The appointments process during the first term and a half of the Clinton Administration requires comparatively brief examination in this Article because the relevant background has been rather thoroughly explored elsewhere.<sup>5</sup> President Clinton and the officials who helped him in submitting candidates developed and employed effective selection practices.

The Chief Executive and his aides articulated laudable goals for choosing judges and implemented measures that would promote the attainment of these objectives. For example, the President emphatically declared that expanding the numbers and percentages of competent female and minority judges would be a significant Administration priority.<sup>6</sup> President Clinton and his assistants also worked closely with members of the Senate, requesting that senators find and suggest women and minorities with strong qualifications.

### A. Selection During the First Year

The appointment of judges during 1993 warrants emphasis principally because the goals established and the practices instituted in that year were generally followed thereafter, and those responsible for judicial selection minimally departed from the objectives and procedures. The Administration attempted to keep the campaign commitments the Chief Executive had made during the 1992 campaign. For instance, President Clinton reiterated the pledge to name highly skilled lawyers who would increase gender, racial, and political diversity on the federal bench.<sup>7</sup> Janet Reno, the Attorney General, and Bernard W. Nussbaum, the White House Counsel, who played critical roles in choosing judges, concomitantly observed that the Administration would appoint attorneys who

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5. I rely in this section on Goldman, *supra* note 2; 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).

6. See Neil A. Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10.

7. See, e.g., *id.* (reporting a senior White House official's statement that "[w]e have spoken to each and every Democrat in the Senate and told them we expect their recommendations to include women and minorities"); Susan Page, *Supreme Matter on Home Front*, NEWSDAY, Mar. 24, 1993, at 4 (stating President Clinton's promise to make the Supreme Court "look like America"); see also *supra* note 1 and accompanying text.

were well-qualified and who would enhance balance.<sup>8</sup> The Department of Justice and the Office of the White House Counsel, the two Executive Branch entities which had primary responsibility for helping the President, were obviously committed to these goals and applied efficacious processes to attain them.<sup>9</sup>

President Clinton employed practices analogous to those President Jimmy Carter followed; however, the measures that the Clinton Administration implemented did not differ substantially from those on which President George Bush and President Ronald Reagan had relied.<sup>10</sup> The Office of the White House Counsel assumed principal responsibility for identifying potential nominees, while the Department of Justice only became actively involved once lawyers were considered serious candidates.<sup>11</sup>

Senatorial courtesy and patronage were important to nominee selection for the federal district courts because the Chief Executive and his aides usually deferred to senators who represented the areas in which judicial vacancies arose.<sup>12</sup> Members of the Senate typically suggested several candidates from whom the President chose a nominee. The President and his staff specifically requested that senators invoke, or revive, district court nominating commissions, which facilitated the appointment of women and minorities in the

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8. See *White House Counsel Discusses Nation's Legal Agenda*, THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Sept. 1993, at 1, 10 (quoting Bernard Nussbaum that the Administration's goal in judicial appointments was to name "distinguished men and women—from diverse backgrounds" and to find "individuals of experience, judgment, and good temperament"); see also Tom Hamburger & Josephine Marcotty, *Two Proposed for U.S. Court by Wellstone*, STAR TRIB. (Minneapolis), Mar. 10, 1993, at 1A (finding that Wellstone's nominations conformed with Clinton's priorities of "excellence and diversity"); Al Kamen, *When Vacancies are "Judicial Emergencies,"* WASH. POST, Apr. 26, 1993, at A17 (quoting Janet Reno, who stated that the Administration would fill judicial vacancies "in a careful, thoughtful way, with excellence, diversity, and excellence in judicial temperament as the criteria").

9. I base this observation and much of the following discussion on conversations with persons 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) (outlining the specific roles of the many individuals participating in the selection process); Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1 (describing the process of shepherding judicial nominations).

10. See Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69 (stating Clinton's use of tactics similar to those used by Bush); see also *supra* note 9 and accompanying text.

11. See Goldman & Slotnick, *supra* note 9, at 254-55.

12. See Neil A. Lewis, *Clinton is Considering Judgeships for Opponents of Abortion Rights*, N.Y. TIMES, Sept. 18, 1993, at A1 (explaining the traditional practice of presidents to take recommendations from senators of their own party); Michael York, *Clout Sought in Choosing U.S. Judges; D.C. Bar Proposes Nominating Panel*, WASH. POST, Feb. 5, 1993, at D3; see also *supra* text accompanying note 9.

Carter Administration, and lawmakers deployed them in many of the states.<sup>13</sup>

The Chief Executive and his aides exerted more control over the selection of nominees for appeals court openings, but the Administration exhibited solicitude for senators from the regions where the empty seats existed and did not reinstitute the Circuit Judge Nominating Commission that President Carter had used.<sup>14</sup> President Clinton actively participated in choosing Circuit Court Judge Ruth Bader Ginsburg as his initial appointee to the United States Supreme Court.<sup>15</sup>

The Administration fostered the approval of candidates whom it tendered by informally consulting with the Senate Judiciary Committee and particular senators about the candidates prior to their formal nominations. This activity seemed to promote the noncontroversial confirmation of Judge Ginsburg who, for example, had the support of Senator Orrin Hatch (R-Utah), the ranking Republican member of the Judiciary Committee.<sup>16</sup>

The Senate also carefully exercised its power of advice and consent. The Senate Judiciary Committee, which has traditionally assumed considerable responsibility for the confirmation process, and numerous members of the Senate were responsive to the Administration's selection objectives and closely cooperated with the Chief Executive and his aides. For instance, Senator Joseph R. Biden, Jr. (D-Del.), the Committee chair, observed that candidates must be diverse but that there was no "ideological blood test" for nominees who were considered to hold politically moderate or liberal perspectives.<sup>17</sup> Quite a few senators also revitalized district court nominat-

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13. See Lewis, *supra* note 6, at A10 (recognizing the President's outreach to all Democratic senators); see also *supra* note 9 and accompanying text and *infra* note 14 and accompanying text.

14. See Reidy, *supra* note 10, at 69; see also Goldman, *supra* note 2, at 279. See generally LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980) (analyzing the nominating commission President Carter established).

15. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1870 (1994). See generally Goldman, *supra* note 2 (explaining the Clinton Administration's selection process and the extent of President Clinton's involvement).

16. See, e.g., William E. Clayton, *Panel Endorses Ginsburg: Unanimous Vote Sends Nomination to Senate*, HOUS. CHRON., July 30, 1993, at 20; Martin Kasindorf & Timothy Phelps, *In Supreme Company: Ginsburg's Nomination to Top Court is Confirmed*, NEWSDAY, Aug. 4, 1993, at 23.

17. Labaton, *supra* note 9, at A1; see also Lewis, *supra* note 6, at A10 (providing Senator Biden's additional observations on judicial selection).

ing commissions, which orchestrated the confirmation of numerous female and minority judges in the Carter Administration.<sup>18</sup>

The Chief Executive undertook several special initiatives to search for and propose talented women and minorities. The President, the White House Counsel, and other influential political officers clearly and forcefully proclaimed that choosing excellent female and minority judges was an important Administration priority.<sup>19</sup> Some high level personnel, including Janet Reno, the Attorney General, and Eleanor Dean Acheson, the Assistant Attorney General for the Office of Policy Development, who had much responsibility for selecting nominees, are women. These public officials concomitantly sought and relied upon the ideas and recommendations for candidates of national, state, and local women's groups, public interest entities, and minority political organizations.<sup>20</sup>

A number of senators were apparently inclined to implement measures for identifying and suggesting female and minority attorneys, and the Administration's prompting may have encouraged additional members of the Senate to institute analogous efforts. The Chief Executive and his assistants requested that senators tender the names of female and minority practitioners and employ existing, or reinstate disbanded, district nominating panels; lawmakers voluntarily revived some of these commissions.<sup>21</sup> Certain Senate members consulted with women's groups or minority political entities, while numerous senators proposed female and minority counsel<sup>22</sup> or relied upon advisory panels that helped recommend promising female or minority candidates.<sup>23</sup>

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18. See generally ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981) (describing the commissions' roles during the Carter Administration); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140-41 (1987) (comparing the commissions' success in the nomination of female candidates during the Carter Administration with the Reagan Administration's repudiation of the commission); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990) (commenting on the success the commissions enjoyed in augmenting the number of female candidates during the Carter Administration); see also *supra* notes 9-10 and accompanying text.

19. See *supra* note 2 and accompanying text and text accompanying notes 5-6.

20. See generally Goldman, *supra* note 2, at 276-79.

21. A senior White House official stated that the Administration told every Democratic senator that "we expect their recommendations to include women and minorities." Lewis, *supra* note 6, at A10.

22. For example, in 1993 Senators Kennedy and Kerrey proposed two women and one African-American for the federal judiciary. See Matthew Brelis, *Donald Stern Given the Nod for US attorney; Women Picked for Marshal and 2 Federal Judgeships*, BOSTON GLOBE, July 16, 1993, at 1. Similarly, Senator Graham proposed—and President Clinton nominated—Rosemary Barkett for a vacancy in the 11th Circuit Court of Appeals. See David Lyons, *11th Circuit Nominee Faces Uphill Battle*, NAT'L L.J., Oct. 11, 1993, at 6. Senator Graham also proposed the nomination

During 1993, the President named to the federal bench eleven women and seven minorities out of twenty-eight attorneys, representing thirty-nine and twenty-five percent respectively.<sup>24</sup> Clinton correspondingly nominated eighteen women and thirteen minority counsel out of forty-eight attorneys, representing thirty-seven and twenty-seven percent respectively.<sup>25</sup> The numbers and percentages of women and minorities appointed were very unusual.<sup>26</sup>

Practically all of the lawyers who the Clinton Administration named or nominated were exceptionally well qualified. The individuals appear very intelligent, hard working, and independent, while they seem to have considerable integrity and balanced judicial temperament.<sup>27</sup> Quite a few of these people had been distinguished judges in the federal or state court systems. For example, Justice Ginsburg was a highly respected member of the United States Court of Appeals for the District of Columbia Circuit for thirteen years before she joined the Supreme Court.<sup>28</sup>

In short, President Clinton and his aides enjoyed much success in appointing judges during 1993. The Clinton Administration named and nominated numerous, very able women and minorities, and its record easily eclipsed those compiled in the Reagan, Bush, and Carter Administrations.<sup>29</sup> The Chief Executive articulated clear objectives for choosing judges and instituted effective selection practices, especially for identifying and nominating extremely competent women and minorities.

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of Stephan Mickle, an African-American, who was recently confirmed and sworn in as a federal judge for the Northern District of Florida. See *Black Judge Joins Federal Bench; Police: Suicide was Part of Scheme; Tourist Murder Accomplice Charged*, LEDGER (Lakeland, Fla.), June 23, 1998, at B5.

23. See Hamburger & Marcotty, *supra* note 8, at 1A (reporting the wide speculation surrounding the advisory committee created by Senator Wellstone).

24. Telephone Interview with George Kassouf, former Director of the Judicial Selection Project, Alliance for Justice (Nov. 19, 1993) (transcript on file with author).

25. See *id.*

26. See Tobias, *supra* note 15, at 1866; see also Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25 (stating that President Carter nominated only one non-white male in his first 26 nominations).

27. See Kassouf Interview, *supra* note 24.

28. See Goldman & Slotnick, *supra* note 9, at 254-55; sources cited *supra* note 12; see also Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, Preface to Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 715 (1987) (analyzing the D.C. Circuit Court); Colloquy, *The Contributions of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507 (1988) (reporting on a program that reported on the D.C. Circuit Court's role in the development of administrative law); Joan Biskupic, *Ginsburg Hearings Elicit Sketchy View*, WASH. POST, July 26, 1993, at A6 (recognizing Ginsburg's 13 years on the D.C. Circuit and her 20 years of equal rights advocacy).

29. See Goldman, *supra* note 2, at 276-77.



This success is more compelling in light of the substantial difficulties the Administration faced. The President and his aides confronted the problems which all nascent administrations must encounter in the first year, and a few developments exacerbated these intrinsic complications. Perhaps most crucial, a Democrat had not won the presidency since 1980. The Administration, thus, had no recent models for appointing judges and lacked staff with relevant judicial selection expertise less than a dozen years old.<sup>30</sup> The Chief Executive and his assistants also experienced some developments that may have seemed unusual so early in the Administration's life. For instance, Justice Byron White's decision to resign from the Supreme Court only eight weeks after the inauguration demanded much effort, particularly of employees in the Office of White House Counsel with responsibility for choosing judicial candidates.<sup>31</sup> Time that personnel devoted to finding an excellent replacement for Justice White was not available for identifying nominees to the appeals and district courts.<sup>32</sup> Given the problems that occurred during its initial year in office, the Clinton Administration compiled a fine record of selection.

### *B. Selection During the Subsequent Five Years*

The appointment of federal judges over the succeeding five years of the Clinton Presidency deserves relatively limited examination in this Article, principally because the practices that the Administration followed were quite similar. However, some treatment of the major developments that transpired during this period is appropriate, as this analysis should improve comprehension of the judicial selection process during 1999.

#### 1. Selection During 1994

The most important feature of judicial appointments in 1994 was the cooperative working relationship among the President and his assistants as well as the Senate Judiciary Committee. The Chief Executive and those officials who had responsibility for selection worked closely with the Committee, and a number of senators were

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30. See Steve Albert, *Clinton Nominates L.A. Judge for Ninth Circuit*, THE RECORDER, Apr. 7, 1995, at 2.

31. See Joan Biskupic, *Promises, Pressure in Court Search*, WASH. POST, Mar. 21, 1993, at A1 (emphasizing the pressure placed on the Administration as a result of Justice White's retirement); Linda Greenhouse, *The Supreme Court; White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 20, 1993, at 1.

32. See Kamen, *supra* note 8, at A17. Officials in the White House Counsel's Office and the Justice Department also spent much energy on the Waco, Texas standoff. See David Johnston, *Doubts on Reno's Competence Rise in Justice Department*, N.Y. TIMES, Oct. 26, 1993, at A1; see also *Text of Reno's Letter Recommending Dismissal*, WASH. POST, July 20, 1993, at A11.

receptive to the Administration goals in choosing judges. Senator Biden reiterated the panel's willingness to assign judicial selection a very high priority.<sup>33</sup> He also specifically requested that the Administration steadily tender nominations, so that the Committee could expedite consideration, while asking the American Bar Association (ABA) to commit the requisite resources that would permit timely ABA review of nominees.<sup>34</sup> Careful cooperation apparently facilitated the rather noncontroversial appointment of Circuit Judge Stephen Breyer to the Supreme Court. Illustrative was the strong support that Judge Breyer received from Senator Hatch and Senator Strom Thurmond (R-S.C.), the senior Republican members of the Judiciary Committee.<sup>35</sup> Numerous senate members employed or revived district court nominating commissions to designate, and foster the confirmation of, talented female and minority attorneys. In addition, senators proposed a number of women and minorities for those openings that arose.

During 1994, the Clinton Administration appointed twenty-nine women and thirty-seven minorities out of 101 attorneys to the federal bench, representing twenty-nine and thirty-seven percent, respectively. Moreover, the President nominated twenty-six women and thirty minorities out of ninety-five practitioners, representing twenty-seven and thirty-one percent respectively.<sup>36</sup> President Clinton again nominated women and minorities to the federal bench in extraordinary numbers; the statistics easily outstripped the results that the Reagan Administration secured and were significantly better than the records compiled by Presidents Bush and Carter.<sup>37</sup>

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33. See Letter from Senator Joseph R. Biden, Jr., Chair, U.S. Senate Judiciary Comm., to Chief U.S. District Judges (June 6, 1994) (copy on file with author).

34. See *id.*; see also AMERICAN BAR ASSOCIATION, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1-11 (1991) (discussing ABA's role).

35. See, e.g., Joan Biskupic, *Senators Question Breyer's Economics*, WASH. POST, July 15, 1994, at A6 (stating that Senator Hatch defended Breyer during the confirmation process); Ruth Marcus, *President Asks Wider Court Hunt*, WASH. POST, May 6, 1993, at A11 (stating that "Breyer is well regarded and liked by some conservatives on the Senate Judiciary Committee, including Sens. Strom Thurmond (R-S.C.) and Orrin G. Hatch (R-Utah)"); *Open Minds?*, NAT'L L.J., July 25, 1994, at A18.

36. See Department of Justice, Clinton Administration Judicial Record, Analysis of Judicial Nominations (1994) [hereinafter DOJ Record] (on file with author); Telephone Interview with Barbara Moulton, former Director of the Judicial Selection Project, Alliance for Justice (Sept. 28, 1994) (transcript on file with author).

37. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 145 (1995); see also Debra Baker, *Waiting and Wondering*, Nat'l Bar Ass'n Mag., Jan/Feb. 1999, at 27 (noting that almost half of the judicial confirmations in 1998 were women and minorities and that three out of every four women and minority candidates were confirmed).

The lawyers President Clinton appointed and nominated were very capable. Quite a few persons had been outstanding federal or state court judges. Illustrative is Second Circuit Judge Jose Cabranes, who rendered distinguished service on the district bench in Connecticut prior to his elevation and who has been a leading contender for appointment to the Supreme Court on several occasions.<sup>38</sup> Moreover, the American Bar Association rated as well-qualified sixty-three percent of the Chief Executive's nominees; this figure was ten percentage points greater than the rankings earned by individuals the Carter, Reagan, and Bush Administrations nominated.<sup>39</sup>

President Clinton, therefore, compiled an enviable record of choosing judges during his second year in office. The Chief Executive enjoyed considerable success, particularly in light of problems that arose during this time. For example, the Administration witnessed the resignations of Philip Heymann and Webster Hubbell, the first Deputy and Associate Attorneys General, and Bernard Nussbaum, the initial White House Counsel.<sup>40</sup> Justice Harry Blackmun's resignation from the Supreme Court in early 1994 also required special efforts that otherwise would have been committed to filling appeals and district court vacancies.<sup>41</sup> The continuing Whitewater investigation and additional difficulties simultaneously consumed the time and energy of officials in the White House Counsel's Office and the Justice Department who actively participated in the appointments process.

## 2. Selection During 1995

The most significant aspects of judicial selection during 1995 were several alterations in the procedures that the Clinton Administration had employed throughout the initial two years.<sup>42</sup> The Republican Party's recapture of the Senate in the 1994 congressional

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38. See, e.g., Joan Biskupic, *Cabranes Said to Top High Court List*, WASH. POST, Apr. 8, 1994, at A1.

39. See DOJ Record, *supra* note 36; Al Kamen, *Cutler to Face Backlog in Seating Judges*, WASH. POST, Mar. 14, 1994, at A17; Henry Reske, *Judicial Vacancies Declining*, A.B.A. J., Jan. 1995, at 24.

40. See, e.g., 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); *Nussbaum Out as White House Counsel*, N.Y. TIMES, Mar. 6, 1994, § 1, at 1 (discussing Nussbaum's resignation).

41. See Biskupic, *supra* note 38, at A1; *On the Short List*, WASH. POST, Apr. 10, 1994, at C6 (discussing possible nominees to replace Justice Blackmun).

42. Much below is based on conversations with individuals who are familiar with the Administration's practices, on Goldman, *supra* note 2, at 278-79, and on Goldman & Slotnick, *supra* note 9, at 254-57.

elections apparently prompted these changes. For instance, although the Office of White House Counsel and the Department of Justice continued to share primary responsibility for judicial selection, White House officials seemed to have an enhanced role, especially in identifying nominees. White House personnel appeared considerably less willing to forward nominees who could prove controversial and evinced greater willingness to compromise.<sup>43</sup> For example, President Clinton failed to resubmit the names of several persons he had nominated during 1994 and who seemingly were controversial,<sup>44</sup> and the White House Counsel publicly declared that the Administration would not proffer attorneys whose candidacies could promote confirmation fights.<sup>45</sup>

The Chief Executive and his aides continued to consult informally on possible nominees, while they attempted to cooperate closely with Senator Hatch when he became the chair of the Senate Judiciary Committee in 1995.<sup>46</sup> Senator Hatch accorded candidates treatment that was analogous to the consideration that Senator Biden afforded President Reagan's nominees during his seventh year in office. Senator Hatch stated that the Committee would approve every individual who was "qualified, in good health, and understands the role of judges,"<sup>47</sup> and throughout 1995 the Committee

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43. See Goldman, *supra* note 2, at 279; Goldman & Slotnick, *supra* note 9, at 255-57.

44. See Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1 (stating that Clinton withdrew two nominees because of fears Senate Republicans would oppose them); Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20 (observing Clinton's speed in "drop[ing] judicial candidates if there is even a hint of controversy"); Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1 (stating that Clinton may have to nominate more conservative attorneys than he had previously in order for his nominees to gain confirmation in a Republican Senate).

45. See Biskupic, *supra* note 38, at A1; see also Henry J. Reske, *A New White House Counsel*, A.B.A. J., Oct. 1994, at 32; *Mikva Moves from Courthouse to White House*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Sept. 1994, at 1. See generally Goldman & Slotnick, *supra* note 9, at 255-57 (reporting a statement by Assistant Attorney General Eleanor Dean Acheson that the Administration decided not to engage in confirmation fights because they were "not worth the time and resources").

46. See Tobias, *supra* note 5, at 317-18; see also Goldman & Slotnick, *supra* note 9, at 255-57 (noting Senator Hatch's "substantial professionalism" and his commitment in working with the Clinton Administration on judicial nominees); *Senator Orrin Hatch Looks at Courts, Legislation, and Judicial Nominees*, THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Nov. 1995, at 1, 10.

47. Goldman, *supra* note 2, at 290; accord Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31.

acted in this manner.<sup>48</sup> The panel typically conducted confirmation hearings on one appellate court candidate and three or four district court nominees each month that Congress was in session.<sup>49</sup>

During 1995, President Clinton named seventeen female attorneys and eight minority lawyers out of fifty-three judges, representing thirty-two percent and fifteen percent, respectively.<sup>50</sup> The American Bar Association highly rated the individuals who received nomination and confirmation.<sup>51</sup> An illustrative case was Seventh Circuit Judge Diane Wood who had previously been a faculty member at the University of Chicago and a Deputy Assistant Attorney General in the Justice Department.<sup>52</sup> The record compiled was admirable, given the complications that the Clinton Administration encountered, some of which apparently resulted from the Republican Party's majority in the Senate.

### 3. Selection During 1996

During 1996, the President and his aides essentially followed the procedures that they had deployed over the course of the preceding year. The White House appeared to have additional responsibility for the judicial selection process, exhibited greater willingness to compromise, and was particularly sensitive to the problems that presidential election-year politics presented. These complications were probably exacerbated because Senator Bob Dole (R-Kan.), who ultimately captured the Republican Party nomination for president, was also serving as the Senate Majority Leader until he resigned in June. Senator Dole, therefore, may have slowed Senate consideration of candidates because expediting nominations could have suggested a lack of confidence in his own presidential ambitions.

Between January and July, only three people secured confirmation, even though the Senate Judiciary Committee had approved twenty-six nominees.<sup>53</sup> During July, the Republican and Democratic

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48. See generally Gary A. Hengstler, *At the Seat of Power*, A.B.A. J., Apr. 1995, at 70 (discussing various reforms proposed by Senator Orrin Hatch).

49. See Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17.

50. Telephone Interview with Deborah Lewis, former Director of the Judicial Selection Project, Alliance for Justice (Jan. 22, 1996) (transcript on file with author); see also Tobias, *supra* note 5, at 314.

51. See Tobias, *supra* note 5, 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. I rely substantially in this paragraph on my telephone interview with Mike Lee, former Director of the Judicial Selection Project, Alliance for Justice (Sept. 3, 1996) (transcript on file with author) and Goldman & Slotnick, *supra* note 9, at 257-58.

political party leadership struck a compromise by agreeing to conduct floor votes on one nominee each day. In 1996, therefore, the Clinton Administration named five female counsel and four minority attorneys out of twenty judges, representing twenty-five and twenty percent respectively.<sup>54</sup> The Senate confirmed very capable nominees. For example, Ninth Circuit Judge A. Wallace Tashima had been a distinguished jurist in the Central District of California prior to his elevation.<sup>55</sup> The judicial appointments record which the President compiled for 1996 was commendable in light of the substantial problems posed by election-year politics.

In sum, during the Clinton Administration's initial term, it seemed to honor the pledges regarding judicial selection that Governor Clinton had made when campaigning for president and achieved the objectives for judicial appointments which had been created. The President placed 202 lawyers on the federal courts; sixty-two (thirty-one percent) of those judges are women and forty-seven (twenty-eight percent) are minorities.<sup>56</sup> Again, these numbers and percentages are unparalleled, continuing the Clinton Administration's record as clearly superior to those compiled by the three prior administrations. For instance, President Clinton appointed more women from 1993 until 1995 than the Bush Administration named during an entire term and than the Reagan Administration chose in eight years.<sup>57</sup> Moreover, the American Bar Association gave the Clinton nominees the highest rankings since the Bar Association began assessing the competence of candidates in the 1950s.<sup>58</sup>

#### 4. Selection During 1997

During the first year of the concluding term, President Clinton and his assistants essentially employed the selection objectives and processes that they had used during the initial term that I evaluated above.<sup>59</sup> The goals and practices that the Administration deployed more closely resembled those followed in the third and fourth years than the first half-term, primarily because the Republican Party enjoyed a 55-45 majority in the Senate after the 1996 congressional elections. For example, the White House continued exercising major control, that was seemingly enlarged and consoli-

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54. Lee Interview, *supra* note 53.

55. See Albert, *supra* note 30, at 2; Henry Weinstein, *Clinton Nominates L.A. Judge to U.S. Appeals Court*, L.A. TIMES, Apr. 10, 1995, at B1 (referring to the Los Angeles district judge as "highly regarded").

56. See *supra* notes 21-22, 33, 47, 50 and accompanying text.

57. See Tobias, *supra* note 5, at 314; see also Goldman, *supra* note 2, at 280, 286.

58. See Tobias, *supra* note 5, at 315; see also Lewis, *supra* note 44, at A20; Robert A. Stein, *For the Benefit of the Nation*, A.B.A. J., Mar. 1996, at 104.

59. See Goldman & Slotnick, *supra* note 9, at 265-68; see also *supra* notes 2-56 and accompanying text.

dated, over nominee identification and most choices for the appeals courts, while it exhibited some deference to senators' suggestions for openings on the district courts.<sup>60</sup> The Administration concomitantly maintained special efforts to identify and submit, capable female and minority candidates. For instance, the President tendered the names of an African-American, a Latino, and two women for four Ninth Circuit vacancies before August 1997.<sup>61</sup>

The Clinton Administration encountered complications in confirming judges promptly during 1997, but the Chief Executive and the Republican Party leadership share responsibility for these problems. For example, President Clinton probably forwarded too few individuals whom Republican senators found palatable in the early part of the year and seemed to submit nominees somewhat erratically later in 1997. More specifically, a number of the twenty-two candidates whose names the Chief Executive tendered on January 7 were apparently not acceptable to Senator Hatch or other members of his party,<sup>62</sup> while the President forwarded thirteen people on July 31 immediately before the Senate recessed, a phenomenon that may have frustrated expeditious Committee processing.<sup>63</sup>

The Republican Party leadership shares responsibility for certain delays in confirming candidates. For instance, Senator Hatch could have expended greater energy to expedite Judiciary Committee consideration of nominees, although the Chair asserted that the delay resulted from the Administration's sporadic submission of candidates, some of whom were controversial.<sup>64</sup> Moreover, Senator Trent Lott (R-Miss.), the Senate Majority Leader, occasionally

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60. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 951-52 (1998); see also Goldman & Slotnick, *supra* note 9, at 265-68; Goldman & Slotnick, *supra* note 5, at 265.

61. See White House's Office of the Press Sec'y, The White House, President Clinton Nominates Twenty-Two to the Federal Bench (Jan. 7, 1997) (renominating Margaret McKeown and Richard Paez); White House's Office of the Press Sec'y, President Clinton Nominates James S. Ware to the Federal Bench (June 27, 1997); White House's Office of the Press Sec'y, President Clinton Nominates Susan Graber to the Federal Bench (July 30, 1997).

62. See Goldman & Slotnick, *supra* note 9, at 268; see also Tobias, *supra* note 60, at 952; Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15.

63. See White House's Office of the Press Sec'y, President Clinton Nominates Thirteen to the Federal Bench (July 31, 1997); see also 143 CONG. REC. S2515, S2523-24 (daily ed. Mar. 19, 1997) (statement of Sen. Grassley) (discussing reasons to assess nominees cautiously).

64. See, e.g., 143 CONG. REC. S2536 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); Hatch, *supra* note 62; see also Goldman & Slotnick, *supra* note 9, at 267-69.

failed to schedule floor debates and votes promptly once the Judiciary Committee approved the individuals.<sup>65</sup>

In 1997, the Chief Executive named six female attorneys and five minority lawyers out of thirty-six judges, representing seventeen and fourteen percent respectively.<sup>66</sup> President Clinton correspondingly nominated nineteen women and twelve minorities for sixty-one vacancies, representing thirty-one and twenty-one percent respectively.<sup>67</sup> The numbers and percentages of female and minority counsel confirmed and nominated are similar to comparable statistics compiled four years earlier.<sup>68</sup> Again, the appointees and nominees were exceptionally well qualified; while several of the judges whose names the President submitted had been placed on the trial courts by Republican chief executives.<sup>69</sup>

In short, President Clinton and his assistants who had selection responsibilities enjoyed a respectable record of choosing judges during 1997. The Chief Executive and those aides continued to name and nominate highly competent female and minority practitioners. The success realized was even more remarkable, given the general difficulties encountered in establishing a second administration while also replacing officials who had previously played major roles in judicial selection.<sup>70</sup>

### 5. Selection During 1998

The attorneys the Clinton Administration appointed and nominated during 1998 were very qualified persons who had rather moderate political perspectives and who would further increase gender and racial balance on the federal bench. For instance, the ABA accorded the nominees strong ratings. Furthermore, numerous candidates had previous experience in the federal or state judiciaries.<sup>71</sup> The Chief Executive forwarded the names of some people who were affiliated with the Republican Party and orchestrated the ele-

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65. See Dan Carney, 57 CONG. Q. WKLY. 845, 847 (Apr. 10, 1999); Goldman & Slotnick, *supra* note 5, at 267, 271-73; Tobias, *supra* note 60, at 953.

66. See Telephone Interview with Stephan Kline, former Director of the Judicial Selection Project, Alliance for Justice (Nov. 21, 1997) (transcript on file with author).

67. See *id.*

68. See *supra* notes 5-31 and accompanying text.

69. See White House's Office of the Press Sec'y, President Clinton Nominates Sonia Sotomayor to the Federal Bench (June 25, 1997); see also White House's Office of the Press Sec'y, President Clinton Nominates James S. Ware to the Federal Bench (June 27, 1997); *infra* note 72 and accompanying text (confirming Judge Sotomayor).

70. For example, the White House Counsel as well as the Deputy and Associate Attorneys General resigned and required replacement. See Tobias, *supra* note 60, at 954.

71. See White House's Office of the Press Sec'y, President Clinton Nominates Twelve to the Federal Bench and One to the D.C. Court of Appeals (Jan. 27, 1998) (providing the judicial experience of the nominees).



vation of Judge Sonia Sotomayor, who President Bush had appointed to the district court.<sup>72</sup>

The objectives and practices President Clinton and his assistants used closely resembled the goals and procedures that they had employed previously.<sup>73</sup> For example, the White House continued to assume primary responsibility for identifying nominees, particularly for appellate court openings, and additionally consolidated its control. The Administration concomitantly maintained the practice of deferring to the recommendations of senators for nominations involving district court openings in their home states.

The President and his staff made numerous special efforts to identify, and tender the names of, extraordinarily talented women and minorities.<sup>74</sup> The White House was instrumental in securing the appointments of Susan Graber,<sup>75</sup> Margaret McKeown,<sup>76</sup> and Judge Kim Wardlaw,<sup>77</sup> as well as pressing for the confirmation of Marsha Berzon and Judge Richard Paez,<sup>78</sup> to Ninth Circuit vacancies in 1998. White House and Justice Department personnel cooperated closely with members of the Senate and requested that they identify and recommend competent female and minority candidates.

Although the President and his aides experienced certain difficulties in facilitating confirmation during the second year of his last term, these complications resembled those encountered over the preceding three years and especially during 1997.<sup>79</sup> These problems, however, can be attributed to numerous persons and institutions who participated in the selection process. The individuals and entities include the Chief Executive and his staff, the Senate Judiciary

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72. See Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1; Neil A. Lewis, *After Delay, Senate Approves Judge for Court in New York*, N.Y. TIMES, Oct. 3, 1998, at B3 (discussing the delay in Judge Sotomayor's nomination).

73. See, e.g., *supra* Parts II.A., II.B.1-4.

74. See *supra* note 18 and accompanying text.

75. See Sheldon Goldman & Elliot Slotnick, *A Clinton Judiciary Sampler*, 82 JUDICATURE 268, 269 (1999) (discussing the Clinton White House nominees).

76. See *id.* at 270.

77. See White House's Office of the Press Sec'y, *President Clinton Nominates Twelve to the Federal Bench and One to the D.C. Court of Appeals* (Jan. 27, 1998) (announcing Judge Wardlaw's nomination).

78. See White House's Office of the Press Sec'y, *Press Briefing by Joe Lockhart* (Sept. 22, 1999) (discussing the White House's tenacity in nominating Paez and Berzon, despite numerous delays).

79. See generally Goldman, *supra* note 2, at 276 (discussing the obstacles facing the Clinton Administration's judicial appointments); Goldman & Slotnick, *supra* note 9, at 254 (outlining the difficulties faced during the confirmation process); Tobias, *supra* note 60, at 942-43, 954 (examining the difficulties Clinton faced in his first and second terms); *supra* notes 41-54, 58-64 and accompanying text.

Committee and its chair, the Senate Majority Leader, and individual senators, particularly members of the Republican Party.

The Administration was apparently responsible for some of the difficulties that accompanied judicial selection. Early in 1998 President Clinton could have undertaken greater efforts to submit additional nominees whom Republican senators could support; the Administration tendered candidates rather sporadically thereafter. For instance, the Chief Executive frequently forwarded the names of more than one person at the same time, a practice that might have complicated the Judiciary Committee's attempts to consider nominees expeditiously.

The Grand Old Party (GOP) leadership in the Senate and specific Republican members of that body also had some responsibility for the relatively slow pace of appointments, especially at the beginning of 1998. For example, Senator Hatch might have reviewed nominees more promptly, although he blamed the Administration's irregular submission of nominees for slowing the process. Moreover, some of these nominees proved unacceptable to him or to other Republican senators partly because of the possibility that they would be "judicial activists."<sup>80</sup> The Senate Majority Leader did not invariably schedule floor debates and floor votes on candidates immediately after they had secured Judiciary Committee approval.<sup>81</sup> It, therefore, appears that all of the major participants in the appointments process might have expended greater effort to improve judicial selection. Only forty judges received confirmation by September 1998, although cooperative efforts involving Senator Hatch and President Clinton accelerated the pace of appointments during the remainder of the year.

In 1998, the Clinton Administration named twenty-one women and eighteen minorities out of sixty-five lawyers to the federal courts, representing thirty-two and twenty-eight percent respectively.<sup>82</sup> The numbers and percentages of women and minorities appointed correspond to those for 1995.<sup>83</sup> All persons confirmed appar-

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80. See, e.g., 144 CONG. REC. S6186 (daily ed. June 11, 1998) (statement of Sen. Hatch) (defending the Senate's role); see also 144 CONG. REC. S659 (daily ed. Feb. 11, 1998) (statement of Sen. Hatch) (defending nominee Margaret Morrow against the accusation that she was a judicial activist); Orrin G. Hatch, *Judicial Nominee Confirmations Smoother Now*, DALLAS MORNING NEWS, June 27, 1998, at 9A.

81. See 144 CONG. REC. S8477 (daily ed. July 17, 1998) (statement of Sen. Leahy) (expressing concerns over the delay in Judge Sotomayor's confirmation); Goldman & Slotnick, *supra* note 9, at 272-73 (exploring the average delay between receipt of a nomination and the hearing); *The Senate's Hostage Game*, L.A. TIMES, July 28, 1998, at B6 (discussing the delay in Sotomayor's nomination).

82. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT (1998); Kline Interview, *supra* note 66.

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

ently have strong qualifications. The judges seem very intelligent, diligent and independent, while they evince integrity and balanced judicial temperament. Most of the individuals have comparatively moderate political viewpoints, and a few of them are associated with the Republican Party. Some of the appointees and nominees had prior, valuable experience on the federal or state court judiciaries. Illustrative is Federal District Judge Kim Wardlaw, whom President Clinton elevated to the Ninth Circuit.<sup>84</sup>

In short, the Administration compiled a fine record during 1998. The President continued to appoint and nominate significant numbers of talented women and minorities, while the Chief Executive and his aides articulated clear goals for choosing judges and followed efficacious practices. The success attained is striking in light of the major obstacles confronted by the President. In fairness, the Administration contributed to certain of these difficulties, such as the intensified Whitewater probe and the impeachment inquiry.<sup>85</sup>

### III. JUDICIAL SELECTION IN 1999

Perhaps the most salient characteristic of the judicial selection process during 1999 was the recurrent nature of many developments. Notwithstanding the comparative success in appointing judges that President Clinton and Senator Hatch had realized only the year before, another impasse arose over the seventy-seven appellate and district court seats that remained empty.<sup>86</sup> The Chief Executive and his assistants correspondingly honored selection goals, and followed practices, which were similar to those that they had employed over the previous six years.

The Clinton Administration submitted a package of seventeen appeals and district court nominees immediately after the initial session of the 106th Congress convened and as the President's im-

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84. See White House's Office of the Press Sec'y, President Clinton Nominates Twelve to the Federal Bench and One to the D.C. Court of Appeals (Jan. 27, 1998) (outlining Judge Wardlaw's experience).

85. See Carney, *supra* note 65, at 847; Goldman & Slotnick, *supra* note 5, at 265 (outlining the "hostile political environment" impeding appointments); Charles F.C. Ruff, *Lewinsky Probe Has 'Impact' on President*, WASH. POST, May 28, 1998, at A16 (reprinting a declaration by White House Counsel regarding the Paula Jones and Independent Counsel investigations); *Meet the Press* (NBC television broadcast, Mar. 22, 1998) (interviewing Sen. Lott).

86. See 145 CONG. REC. S10,848 (daily ed. Sept. 14, 1999) (statement of Sen. Leahy) (expressing outrage over the delay in Richard Paez's nomination); John Heilprin, *Hatch Will Go Slow on Nominees*, SALT LAKE TRIB., Aug. 9, 1999, at A1 (discussing Sen. Hatch's control over the pace of the confirmations); *Vacancies in the Federal Judiciary*, Apr. 1, 2000 (last visited Apr. 21, 2000) <<http://www.uscourts.gov/vacancies/judgevacancy.htm>>.

peachment trial before the Senate was about to commence.<sup>87</sup> Senators approved two judges for openings on the Northern District of Illinois in March.<sup>88</sup> Nonetheless, the Judiciary Committee held no hearings on any of the other nominees for the seventy vacancies before the summer of 1999 and the Senate had approved only eleven judges as late as September, although thirty-four judges ultimately secured confirmation by the year's end.<sup>89</sup>

The principle obstacle to judicial appointments during the first half of 1999 seemingly was a controversy caused by an opening on the federal district bench in Utah, the home state of Senator Hatch.<sup>90</sup> Earlier in the year, the Judiciary Committee Chair started "demanding that the [P]resident nominate a conservative aide to Republican Gov[ernor] Mike Leavitt as a federal judge in Salt Lake City."<sup>91</sup> The dispute apparently worsened because Senator Hatch's choice was a "self-described Ronald Reagan conservative whose views on the environment are anathema to Clinton and to environmental groups and other liberal groups that are politically important to the administration" and because numerous Utah Democrats vociferously criticized the candidate's possible nomination.<sup>92</sup> President Clinton eventually honored the request of the Senator by submitting the individual's name for consideration in July.<sup>93</sup> These machinations seemed to preclude the confirmation of any nominees other than the judges approved for the Northern District of Illinois.<sup>94</sup>

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87. See White House's Office of the Press Sec'y, *The President Nominates Seventeen to the Federal Bench* (Jan. 26, 1999) (providing the names and brief biographies of the nominees).

88. See 145 CONG. REC. S3438 (daily ed. Mar. 25, 1999) (statement of Sen. Hatch) (approving of Judges Hibbler and Kennelly).

89. See ALLIANCE FOR JUSTICE, 13TH ANNUAL REPORT 6 (1999).

90. See Joan Biskupic, *Hatch, White House at Impasse on Judgeships*, WASH. POST, June 5, 1999, at A1 (discussing Sen. Hatch's retaliatory act of halting confirmations); Carney, *supra* note 65, at 845; Paul Elias, *Berzon's Ninth Circuit Bid Looks Good*, THE RECORDER, June 17, 1999, at 1 (reporting the resumption of confirmations' success after Clinton agreed to nominate Stewart); Judy Fahys, *Utahn is Bottleneck in U.S. Judge Pipeline*, SALT LAKE TRIB., May 17, 1999, at A1 (discussing the halt in nominations caused by Ted Stewart's nomination); David G. Savage, *Federal Benches Left Vacant Over Utah Tug of War*, L.A. TIMES, May 10, 1999, at A1 (discussing the stall in confirmations).

91. Savage, *supra* note 90, at A1; see also Biskupic, *supra* note 90, at A1; Fahys, *supra* note 90, at A1.

92. Savage, *supra* note 90, at A1; see also Carney, *supra* note 65, at 845-47; Elias, *supra* note 90, at 1 (outlining the controversy over Stewart's nomination).

93. See White House's Office of the Press Sec'y, *President Clinton Nominates Petrese B. Tucker and Brian Theodore Stewart to the Federal Bench* (July 27, 1999); see also Carney, *supra* note 65, at 845.

94. See Biskupic, *supra* note 90, at A1 (outlining the severity of the Stewart dispute); Elias, *supra* note 90, at 1 (discussing the "bottling up" of the confirmation

Several related matters may have concomitantly delayed judicial selection. For instance, early in 1999, President Clinton appeared to tender rather irregularly an insufficient number of nominees whom Republican senators deemed palatable. Senator Hatch correspondingly conducted virtually no hearings or committee votes on candidates prior to mid-June. Of course, the Senate impeachment trial essentially suspended the confirmation process. Slowed judicial appointments can, therefore, be attributed to most of the people and institutions that participated in choosing judges.

The Clinton Administration enunciated objectives, and relied on procedures, which were analogous to the ones used over the prior six years. For example, the White House had the primary responsibility to identify individuals, especially for appellate court vacancies, and exercised increased control over the selection process. The President and his aides continued undertaking special efforts to delineate and forward the names of talented female and minority practitioners, while they closely cooperated with senators and urged the legislators to recommend such candidates. The White House orchestrated the appointments of Marsha Berzon and Judge Richard Paez to the Ninth Circuit.<sup>95</sup>

Despite the complications recounted above, in 1999 President Clinton appointed to the federal courts thirteen women and ten minorities out of thirty-four lawyers, representing thirty-eight and twenty-nine percent.<sup>96</sup> The numbers and percentages of female and minority practitioners who secured confirmation were comparable to those named in 1995.<sup>97</sup> All of these judges are extremely well qualified, while exhibiting intelligence, industry, independence, integrity as well as appropriate judicial temperament. Numerous appointees had previously served with distinction on federal or state courts. The jurists seem to have relatively moderate political perspectives, and a small number have links to the Republican Party. Illustrative of judges who had some Republican Party affiliation and prior judicial service is Seventh Circuit Judge Ann Claire Williams whom President Clinton elevated from the Northern District of Illinois.<sup>98</sup>

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process); Fahys, *supra* note 90, at A1 (discussing the "Stewart dispute" between Clinton and Hatch); Savage, *supra* note 90, at A1 (examining the stall in the confirmation process).

95. See Neil A. Lewis, *After Long Delays, Senate Confirms 2 Judicial Nominees*, N.Y. TIMES, Mar. 10, 2000, at A16.

96. See Telephone Interview with Nancy Marcus, former Director of the Judicial Selection Project, Alliance for Justice (Mar. 17, 2000) (transcript on file with author).

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

98. See Matt O'Connor, *True to Herself; Though She Feels Indebted to Black Judges who Paved the Way, Ann Claire Williams is a Trailblazer Herself*, CHI. TRIB.,

In short, the Chief Executive and his assistants attained considerable success during the third year of the concluding Clinton Administration. The President continued to name and nominate numerous talented female and minority counsel, while he and his aides articulated clear selection goals and applied efficacious procedures for achieving their objectives. Their accomplishments are rather striking, given the substantial obstacles encountered. The President had responsibility for certain of these difficulties, such as the impeachment trial. Republican members of Congress, however, also contributed to the situation, as a few Republican senators did not facilitate judicial selection as much as they might have. In the end, the actions of the Chief Executive and his staff were admirable. Nevertheless, they must redouble those efforts and consider implementing the ideas below if President Clinton is to realize additional success in appointing women and minorities and is to fill the federal bench during his final year in the White House.

#### IV. SUGGESTIONS FOR THE FINAL YEAR

Recommendations related to the goals that the Clinton Administration should pursue and how the President and those responsible for judicial selection might attain the objectives require comparatively little exploration in this Article. A number of suggestions have been proffered elsewhere,<sup>99</sup> and some concepts have been examined above. Moreover, the Chief Executive and his assistants have enunciated praiseworthy goals and implemented effective processes for realizing them. Perhaps most importantly, 2000 is a presidential election year, traditionally a time when sitting Chief Executives have experienced the greatest difficulty in securing their nominees' confirmations and judicial appointments have slowed in anticipation that a new administration will assume responsibility for selection.

##### A. *Why President Clinton Should Appoint More Women and Minorities*

President Clinton should attempt to continue naming substantial numbers of women and minorities because many of these individuals will bring diverse viewpoints to judicial service. Such judges could enhance their colleagues' comprehension of controversial public policy questions, such as abortion, discrimination, and affirma-

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Dec. 11, 1999, at 1 (describing the career of Judge Ann Claire Williams and her ascent to the bench of the United States Court of Appeals for the Seventh Circuit).

99. For discussions of proposed goals of the Clinton Administration regarding judicial nominations, see Goldman, *supra* note 2, at 276; Goldman & Slotnick, *supra* note 5, at 265; Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1274-85.

tive action, which the Third Branch must address.<sup>100</sup> Confirming more female and minority judges might help to combat gender, racial, and ethnic bias in the federal courts.<sup>101</sup> Considerable evidence correspondingly indicates that the American citizenry has greater confidence in a federal judiciary whose constitution reflects the population of the United States.<sup>102</sup> Numerous women and minorities, such as Chief Judges Harry Edwards of the District of Columbia Circuit and Stephanie Seymour of the Tenth Circuit, have been outstanding members of the federal bench.<sup>103</sup> Enlarging the numbers of female and minority judges may be one significant sign of a Chief Executive's commitment to enhancing conditions for women and minorities in the country, in the federal courts, and in the practice of law.<sup>104</sup>

A concomitant reason for naming additional female and minority practitioners is the need to rectify or ameliorate the lack of gender, racial, and political diversity on the current federal bench, almost half of whose membership Presidents Reagan and Bush appointed.<sup>105</sup> African-Americans comprised fewer than two percent of the judges the Reagan Administration selected, while President Bush chose only one Asian-American and nine Latino judges.<sup>106</sup> These Republican Chief Executives apparently placed some attor-

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100. See, e.g., Elliot E. Slotnick, *Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POLY REV. 270, 272 (1983) (maintaining that recruiting minorities and women can help offset past underrepresentation in the judiciary); Marion Z. Goldberg, *Carter-Appointed Judges—Perspectives on Gender*, TRIAL, Nov. 1990, at 108.

101. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (Apr. 2, 1990); NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS AND ETHNIC FAIRNESS (1997). See generally Hon. Bruce M. Selya, *First Circuit: A Study of Gender Bias In and Around the Courts*, 32 U. RICH. L. REV. 647 (1998) (discussing the development of a "court user" survey to examine gender bias in the judicial system).

102. See Tobias, *supra* note 99, at 1276; see also Slotnick, *supra* note 100, at 272-73. Certain research also indicates that numerous female and minority judges could improve decisionmaking. See Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J. POLY 425 (1994); see also Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997); Tobias, *supra* note 99, at 1262-64 (recognizing that this hypothesis is controversial).

103. See Tobias, *supra* note 4, at 1244; see also Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991) (listing other outstanding women who have served or are serving on the federal bench).

104. See Tobias, *supra* note 15, at 1876; Tobias, *supra* note 103, at 483; see also Tobias, *supra* note 18, at 175-76.

105. See Carney, *supra* note 65, at 845; Goldman & Slotnick, *supra* note 5, at 283.

106. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993) (displaying charts depicting judicial appointees since the Johnson Administration); Tobias, *supra* note 4, at 1237. African-Americans comprised 5.2% (ten out of 192) of President Bush's appointees. See Goldman, *supra*, at 287, 293.

neys on the bench at least in part because they held conservative political perspectives.<sup>107</sup>

It is problematic that the Reagan and Bush Administrations appointed such a small number of women and minorities because the Presidents were able to select judges from larger, more experienced, pools of female and minority counsel than could President Carter. The United States had only 62,000 female lawyers in 1980, while 140,000 women were practicing law by 1988.<sup>108</sup> Many female attorneys, for example, have pursued challenging careers in the Department of Justice, public interest organizations, private law firms, and the legal academy.<sup>109</sup> The size of the African-American, Latino, and Asian-American bar membership correspondingly expanded from 23,000 during 1980 to 51,000 in 1989, while minority practitioners have participated in numerous stimulating activities, such as the filing of landmark voting rights cases or the production of cutting-edge scholarship.<sup>110</sup>

Another important reason for choosing more female and minority judges is the need to fill all of the current federal court vacancies, thus enabling the judiciary to operate with the complete contingent of judges who Congress has authorized. Appointing lawyers to these empty seats would facilitate the resolution of criminal cases, and decrease the significant civil backlogs in district courts, while permitting appellate judges to address the expanding number of appeals with greater expedition.<sup>111</sup> Increasing the number of appointments would also end what the presidents of seven national

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107. See Carney, *supra* note 65, at 846-47; Goldman & Slotnick, *supra* note 5, at 284; Tobias, *supra* note 4, at 1264-74.

108. See Tobias, *supra* note 4, at 1241 n.22.

109. See *id.* at 1246-47, 1280-81; see also Tobias, *supra* note 15, at 1875; Tobias, *supra* note 103, at 485. See generally 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) (criticizing the legal academy for failing to hire qualified women); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (finding modest results for affirmative action programs).

110. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT 3 (1992); see also Carl Tobias, *supra* note 4, at 1280-81; Tobias, *supra* note 15, at 1875. See generally both Merritt and Reskin articles, *supra* note 109.

111. In 1994, some 220,000 civil cases were pending, and 14,658 had been pending for over three years. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT MID-YEAR REPORT 4 (1994); see also David Savage, *Clinton Missing Opportunity on Court Vacancies, Some Say*, L.A. TIMES, Aug. 18, 1993, at A5 (suggesting civil cases backlogged because of vacancies on the bench); Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Mar. 28, 1997, at 6 (attributing civil backlog to delayed judicial selection).



legal associations described as a "looming crisis in the Nation" during 1997.<sup>112</sup>

*B. How President Clinton Can Appoint More Women and Minorities*

Recommendations for how President Clinton and officials with primary responsibility for selecting judges could choose additional talented female and minority attorneys for the federal courts deserve comparatively little exploration here. Numerous, similar suggestions have been provided elsewhere,<sup>113</sup> while the Chief Executive and those who work with him seem committed to naming more women and minorities, and have implemented efficacious processes to attain this objective.

Certain recommendations can be proffered, nevertheless. President Clinton and the individuals who are responsible for judicial selection may want to evaluate effective ways of redoubling their laudable efforts to seek out, designate, and appoint extremely capable female and minority counsel. The President and Administration personnel might elaborate previous endeavors, consider new means of proceeding, and capitalize on resources which they have yet to deploy.

The choice of Supreme Court Justices and appellate judges requires less assessment because the White House continues to exercise substantial control over vacancies involving those positions.<sup>114</sup> The President and the White House Counsel, therefore, should ensure that White House staff understand the need to name more women and minorities to the federal bench and invoke the finest measures for realizing this goal. Actions that the Administration instituted during its initial seven years show that the personnel appreciate the objective and have adopted efficacious ways to achieve the goal.

The selection practices for district court judges warrant greater examination, as the Chief Executive has deferred to senators from the areas in which vacancies arise when he nominates attorneys for these openings. The lawmakers' predilections, or the encouragement of the Administration, has seemingly led some members of the Senate to adopt new, or employ existing, practices for identifying and fostering the candidacies of talented women and minorities as well as to recommend numerous female and minority practitioners. President Clinton should express appreciation to those senators

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112. See Letter from N. Lee Cooper, ABA President, to William J. Clinton, President (July 14, 1997), reprinted in 143 CONG. REC. S8,504 (daily ed. July 31, 1997).

113. See, e.g., Goldman & Slotnick, *supra* note 5, at 284; Tobias, *supra* note 4, at 1245-49, 1274-85. See generally Goldman, *supra* note 2, at 276.

114. See Goldman, *supra* note 2, at 279; Tobias, *supra* note 5, at 316-17.

who have helped him attain the Administration's objectives; the Chief Executive could then contact specific members of the upper chamber who have not yet fostered the Administration's objectives, asking that they propose women and minorities.<sup>115</sup> Moreover, the President could use mechanisms, such as commissions, which will seek out, and promote the nomination of, these qualified individuals. President Clinton also might reiterate publicly his determination to name numerous female and minority judges.

The President and his assistants should work cooperatively with all legislators who serve on the Senate Judiciary Committee, especially its Chair, by consulting with them on nominees. The aides and senators could concomitantly secure help from additional sources who will know competent female and minority lawyers. Those staff and lawmakers might seek assistance from institutions, namely bar associations, which may offer certain types of help. Less traditional sources, including women's organizations or minority political groups, could also prove more valuable in this effort than traditional sources. The Chief Executive must also invoke the help of every female senator because each legislator can persuade other members of the Senate to propose more female and minority attorneys and assist the administration in advancing potential nominees' candidacies.

The qualifications and networking of women and minorities, who presently constitute about one-fourth of the legal profession in the United States, will be critical. Nearly as significant could be the efforts and contacts of female and minority Cabinet members, including Labor Secretary Alexis Herman and Transportation Secretary Rodney Slater; of women and minorities throughout the federal government, such as Deputy Assistant Attorney General Beth Nolan; and of Hillary Rodham Clinton, who chaired the American Bar Association Commission on Women in the Profession.<sup>116</sup>

### *C. A Word About Politics and Filling the Federal Bench*

The above examination of judicial selection during 1999 suggests that the comparatively small number of judges named and the relatively few female and minority lawyers who secured confirmation can be ascribed primarily to political considerations. Neglecting the effects of politics on the appointments process generally or on the choice of women and minorities specifically would be impractical. Moreover, the influence of political factors will increase sub-

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115. See *supra* note 21 (quoting a White House official who said the Administration expected that all Democratic senators would suggest women and minorities).

116. See Carl Tobias, *supra* note 4, at 1248-49.

stantially over the course of the Clinton Administration's final year in office.

It is difficult to predict precisely how political phenomena might affect judicial appointments, especially the selection of women and minorities during 2000. For example, a crucial element of the calculus that Republicans and Democrats must assess will be the prospects for each party's Presidential nominee to capture the White House. Senators on both sides of the aisle will correspondingly be circumspect about actions that the electorate might interpret as evincing insufficient confidence in their respective candidates for the Oval Office. More specifically, most Republican members of the Senate, who control the upper chamber, will want to leave a substantial number of judgeships vacant so that the GOP presidential contender, George W. Bush, if triumphant, can fill the empty seats. Democratic senators may wish to confirm judges for numerous openings as a hedge against the possibility of a Republican victory. Democrats will correspondingly appreciate that the Chief Executive's authority is weakest during the final year of an administration, a situation that the impeachment controversy has probably accentuated. Indeed, Professors Sheldon Goldman and Elliot Slotnick, two astute observers of federal judicial selection, aptly summarized most of these concepts: "successfully appointing federal judges, particularly those at the circuit court level, will be increasingly difficult for a lame duck (and wounded) post-impeachment Clinton presidency entering a presidential election year."<sup>117</sup>

The above ideas will apparently have several important ramifications for federal judicial selection in 2000. First, the appointment of judges will gradually slow throughout the year and may well abruptly halt after the summer nominating conventions. Second, those judicial candidates receiving confirmation will be individuals who are acceptable to Republican as well as Democratic members of the Senate, a phenomenon that will place a premium on moderation and willingness to compromise. More specifically, the overwhelming majority of Republican Senators are most likely to support those nominees whose political perspectives they perceive are rather conservative.

These propositions suggest that President Clinton and his assistants must carefully consider how they can best continue to appoint capable female and minority judges and attain other important objectives, such as promptly filling all seventy-seven of the present vacancies on the federal bench.<sup>118</sup> The President and Administration

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117. Goldman & Slotnick, *supra* note 5, at 278; accord Carney, *supra* note 65, at 847.

118. See *Vacancies in the Federal Judiciary, Apr. 1, 2000* (last visited Apr. 21, 2000) <<http://www.uscourts.gov/vacancies/judgevacancy.htm>>.

personnel may wish to evaluate and employ certain approaches. One straightforward notion would be to nominate candidates, a number of whom are well qualified women and minorities, for each current opening. The Chief Executive could correspondingly force the issue of delayed selection by using the Presidency as a bully pulpit to shame or criticize Republican senators, or by relying upon recess appointments.<sup>119</sup> Moreover, the Administration might consider allowing the GOP to recommend some nominees in exchange for Republican approval of Democratic nominees or for the enactment of a new judgeships bill.<sup>120</sup>

The ideas explored earlier indicate that President Clinton should closely reexamine the goal of confirming numerous competent female and minority lawyers as well as additional objectives, namely filling the empty seats, at some point during his last year in office. For instance, the Chief Executive may want to weigh, and even balance, these significant purposes. This might specifically mean that the practice—whereby a larger proportion of second-term appellate court “appointments have gone to white males at the expense of nontraditional candidates”<sup>121</sup>—will become prevalent during 2000. Indeed, the “moderation, compromise, and accommodation [that] have been paramount in the [A]dministration’s appointment behavior”<sup>122</sup> may well be more pronounced in its waning days, as the President approaches the nadir of his authority.<sup>123</sup>

## V. CONCLUSION

President Clinton and his aides with responsibility for choosing judicial nominees compiled a commendable record of selection during the first seven years of his Administration. The Chief Executive and his aides articulated admirable goals and implemented efficacious means for attaining the objectives. The Administration placed unprecedented numbers and percentages of talented female and minority judges on the courts. If the President and those who assist him redouble these efforts, they could appoint more women and

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119. See, e.g., *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc) (holding that a recess appointee can exercise the judicial power of the United States); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (explaining the Chief Executive’s power to make recess appointments and examining the constitutional legitimacy of the mechanism).

120. See Goldman & Slotnick, *supra* note 5, at 271.

121. *Id.* at 283.

122. *Id.* at 284; accord Carney, *supra* note 65, at 847.

123. I do not champion these ideas. The President must be pragmatic about filling vacancies and must assess their significance generally and in specific courts, even though he may conclude that filling the seats is less important than naming more women and minorities.

minorities and even fill the vacancies on the federal bench during the final year of the Clinton Administration.