

1998

Fostering Balance on the Federal Courts

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Recommended Citation

Carl Tobias, *Fostering Balance on the Federal Courts*, 47 Am. U. L. Rev. 935 (1998)

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ESSAY

FOSTERING BALANCE ON THE FEDERAL COURTS

CARL TOBIAS*

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INTRODUCTION

During the 1992 presidential election campaign, Governor William Jefferson Clinton pledged to increase the numbers and percentages

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of women and minorities on the federal bench while appointing judges who are highly intelligent, demonstrate balanced judicial temperament, and exhibit a commitment to enforcing constitutional rights.¹ The record of judicial selection that President Clinton compiled in his first term as Chief Executive shows that he honored these campaign commitments.² President Clinton chose federal judges who make the judiciary's composition more closely resemble the American populace and who possess excellent qualifications.³

The Clinton Administration named unprecedented numbers and percentages of very capable female and minority lawyers in the first half of its initial term, although it was less successful during the second half-term, partly because the Republican Party captured a Senate majority in 1994. Numerous observers of the federal courts and judicial appointments, therefore, wondered whether the Chief Executive would continue to choose more women and minorities for the courts.⁴ Now that President Clinton has completed the initial year of his final term, judicial selection in the second administration deserves assessment. This Essay undertakes that effort by focusing on the appointment of female and minority federal judges.

Part I of this Essay evaluates how the Chief Executive chose judges during his first term. This Section asserts that the President enunciated clear objectives for appointments and instituted effective procedures, particularly by undertaking special efforts to seek out, identify, and nominate talented women and minorities. Part II of this Essay then examines the selection process during the opening year of the Clinton Administration's second term, emphasizing those features that were different. This analysis reveals that the Chief Executive continued to nominate many highly qualified female and minority candidates but enjoyed less success in having them confirmed. The Essay concludes by suggesting that the President implement addi-

1. See William Jefferson Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16 (criticizing Reagan-Bush judicial appointments that sharply reduced female and minority selections when number of qualified women and minority candidates increased). Responding to the question of how to ensure the appointment of federal judges solely based on qualifications without partisan or political ideology, candidate Clinton stated, "I would appoint to the federal bench only men and women of unquestioned intellect, judicial temperament, broad experience and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy." *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58.

2. See Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 SMU L. REV. 1861, 1866 (1994) (providing female and minority appointment percentages).

3. See *id.* at 1866-67 (demonstrating excellent qualifications of President Clinton's female and minority appointments).

4. Cf. Sheldon Goldman, *Judicial Selections under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 290 (1995) (stating that it is unlikely that the advent of Republican control of the Senate would affect the minority and female profile Clinton's appointees).

tional measures to foster the appointment of substantial numbers of women and minorities over the next three years.

I. CHOOSING FEDERAL JUDGES IN PRESIDENT CLINTON'S FIRST TERM

President Clinton and Administration officials who were responsible for judicial selection carefully developed and applied efficacious practices for choosing judges in his first term.⁵ They articulated laudable goals for selecting members of the bench and instituted procedures which would lead to the realization of those objectives. The Chief Executive, for instance, specifically declared that increasing the numbers and percentages of highly competent female and minority judges would be a significant Administration priority.⁶ The President and his assistants thus worked very closely with senators to identify and suggest the names of candidates who had outstanding qualifications.⁷

A. Selection During the First Year

The manner in which judicial selections were made in 1993 provided a framework that was consistently used throughout the remainder of the first term, and from which there was minimal subsequent deviation. During the initial year of the Clinton presidency, the Administration fulfilled the promises which Governor Clinton made while campaigning for the White House.⁸ Once elected, the Chief Executive occasionally reiterated his pledges to name extremely able lawyers who would increase gender and racial balance on the federal bench.⁹

The Clinton Administration's practices for selecting nominees were similar to those that President Jimmy Carter employed.¹⁰ The

5. See Goldman, *supra* note 4, at 278-80 (describing intricate process and ideological reasoning employed by the Clinton Administration); see also Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 315-20 (1996) (describing President Clinton's efforts in judicial selection).

6. See Tobias, *supra* note 2, at 1868-69 (discussing Administration's intent to appoint men and women from diverse backgrounds).

7. See *id.* at 1870 (discussing interaction and consultation with senators in nomination process).

8. See Clinton Making Sure His Bench Nominees "Look Like America," SEATTLE POST-INTELLIGENCER, Dec. 30, 1993, at A3 (stating that Clinton had made a campaign pledge to "make sure his appointees 'look like America'").

9. See Neil Lewis, *Unmaking the G.O.P. Court Legacy*, N.Y. TIMES, Aug. 23, 1993, at A10 (describing procedures and ideological approaches to early judicial appointments); Susan Page, *Supreme Matter on Home Front*, NEWSDAY, Mar. 24, 1993, at 4 (reporting on President Clinton's first formal news conference in which he discussed filling the vacancy left by Justice Byron R. White on the Supreme Court); see also *supra* note 1 and accompanying text (discussing President Clinton's view of what constitutes a qualified judge).

10. See Tobias, *supra* note 5, at 316-17 n.39 (analyzing similarities between the Clinton and

Clinton Administration's process was also analogous to President George Bush's procedures and differed only somewhat from those which President Ronald Reagan used.¹¹ The essence of this approach is a cooperative effort between the Executive and Legislative Branches.

Attorney General Janet Reno observed that the Administration wished to fill judicial openings "in a careful, thoughtful way with excellence, diversity, and excellence in judicial temperament as the criteria."¹² Bernard W. Nussbaum, the White House Counsel, similarly stated that the Administration's goals and procedures for selecting judges had one objective: "showing respect for the vital role that the federal courts play in our society by naming distinguished men and women from diverse backgrounds for service on the bench."¹³ The Justice Department and White House Counsel's Office, the two Executive Branch entities that shared primary responsibility for helping the President choose judges, evinced strong and clear commitments to these goals and actively participated in instituting effective procedures for attaining them.¹⁴ The Office of White House Counsel had more responsibility for choosing potential nominees than the Department of Justice. The White House, for instance, searched for and identified promising attorneys, while the Justice Department actively participated in reviewing most lawyers only after they became serious candidates.¹⁵

Carter Administrations' selection process, including their use of a coordinated effort between White House, Department of Justice, and Senate).

11. See Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69 (observing that Clinton followed recommendations from senators for the federal district court level while assuming greater interest in the appellate level).

12. Al Kamen, *When Vacancies Are "Judicial Emergencies,"* WASH. POST, Apr. 26, 1993, at A17 (quoting Attorney General Janet Reno) ("We want to do it in an orderly and deliberate way."); Tom Hamburger & Josephine Marcotty, *Two Proposed for U.S. Court by Wellstone*, STAR TRIB. (Minneapolis), Mar. 10, 1993, at 1A (describing how Senator Wellstone did not seek political allies for the bench but sought two of the most qualified individuals for "their sense of justice and community" and how this matched Janet Reno's identification of Clinton's priorities as being "excellence and diversity").

13. *White House Counsel Discusses Nation's Legal Agenda*, 25 THIRD BRANCH 1, 10 (Sept. 1993) (providing text of question and answer session with Bernard Nussbaum); see Steve Albert, *100 Judges Named by July, White House Counsel Promises*, THE RECORDER, Aug. 20, 1993, at 2 (quoting Nussbaum as stating that the Clinton Administration has no ideological test for federal judicial candidates and that the only test is that candidates be "distinguished and diverse").

14. See generally Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1 (reporting that a large number of vacancies in the federal court system offer the Clinton Administration an opportunity to restructure the judicial system); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 254-55 (1997) (describing judicial selection process using the Office of Policy Development, White House Counsel's Office, Senate recommendations, screening procedures, interviews, a Judicial Selection Group, and political implications).

15. See Tobias, *supra* note 5, at 316-17 n.39 (describing responsibilities shared by White House Counsel, Justice personnel, and President in nominating process).

President Clinton and his assistants assumed considerably more control over the selection of appeals court nominees than district court nominations, even though the Administration appeared responsive to the suggestions of senators who represented the areas where the vacancies occurred.¹⁶ The Chief Executive actively participated in the choice of Judge Ruth Bader Ginsburg as his initial appointee to the Supreme Court.¹⁷

The Administration sought to institute an efficacious confirmation process by informally consulting with the Senate Judiciary Committee and with specific senators before formally nominating individuals.¹⁸ This was particularly true of Justice Ginsburg's appointment, in which careful consultation helped to facilitate her noncontroversial confirmation. For example, Senator Orrin Hatch (R-Utah), the ranking Republican on the Judiciary Committee, supported her candidacy.¹⁹

Senatorial patronage and courtesies were important to the selection of nominees for the federal district courts because the Administration deferred to senators from the locales in which the judicial vacancies existed.²⁰ The lawmakers typically suggested several candidates from whom President Clinton chose a nominee. The Senate then carefully exercised the power of advise and consent. The Senate Judiciary Committee, which has the important responsibility of processing nominees, and numerous senators were receptive to the Administration's purposes in choosing judges and closely cooperated

16. See Reidy, *supra* note 11, at 69 (discussing role of President Clinton and Senators in nominations of judges). President Clinton has not reinstated the Circuit Judge Nominating Commission that the Carter Administration used. See Goldman, *supra* note 4, at 279 (comparing and contrasting judicial selection procedures in the Carter, Reagan, Bush, and Clinton Administrations). See generally LARRY C. BERKSON & SUSAN B. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980) (disclosing that President Carter increased the role of non-lawyers, women and minorities in selecting federal judges, and concluding that the Commission is vulnerable to charges of partisanship because many of its members were affiliated with the President's political party).

17. See Goldman, *supra* note 4, at 279 (describing intimate role President Clinton took in nominating Supreme Court Justice Ruth Bader Ginsburg); see also Tobias, *supra* note 2, at 1870 (noting that the Clinton Administration's close consultation with the Senate Judiciary Committee facilitated Justice Ginsburg's appointment).

18. See Tobias, *supra* note 2, at 1870 (describing Senate's role in Clinton Administration's nominating process).

19. See William E. Clayton, *Panel Endorses Ginsburg*, *HOUSTON CHRON.*, July 30, 1993, at 20 (quoting Sen. Orrin Hatch) ("President Clinton and I are unlikely ever to agree on the ideal nominee to be a Supreme Court [J]ustice . . . In the case of Judge Ginsburg, her long and distinguished record . . . is the critical factor that leads me to support her."); Martin Kasindorf & Timothy Phelps, *In Supreme Company*, *NEWSDAY*, Aug. 4, 1993, at 23 (noting that Senator Hatch believed that Ruth Ginsburg is "unlikely to ever become a liberal judicial activist").

20. See Neil Lewis, *Clinton is Considering Judgeships for Opponents of Abortion Rights*, *N.Y. TIMES*, Sept. 18, 1993, at A1; Michael York, *Clout Sought in Choosing U.S. Judges*, *WASH. POST*, Feb. 5, 1993, at D3 (reporting Clinton Administration's signal that it intends to give Senate a greater role in the selection of judges).

with President Clinton and his aides. For instance, Senator Joseph Biden (D-Del.), chair of the Judiciary Committee, remarked that there would "not be an ideological blood test . . . to see if the candidate is a moderate or liberal . . . [b]ut there will be an insistence upon diversity."²¹ Some senators revitalized district court nominating commissions, which had proved effective in promoting the candidacies of well-qualified female and minority attorneys during the Carter Administration.²²

In addition to this rather traditional approach, the Clinton Administration implemented numerous special efforts to designate and nominate highly talented women and minorities. The President, his White House Counsel, and other senior employees of the Administration forcefully announced that the appointment of very competent female and minority lawyers was a high priority.²³ Several Administration personnel who had major responsibility for selecting judges, such as Janet Reno, the Attorney General, and Eleanor Dean Acheson, the Assistant Attorney General for the Office of Policy Development, are women. The officials and other staff who participated in choosing judges had many professional, political, educational, and personal contacts with female and minority lawyers.²⁴ The Administration also seriously considered the ideas and recommendations for nominees to national, state, and local women's groups, public interest entities, and minority political organizations.²⁵

A number of senators may have been inclined to seek out and suggest female and minority candidates, while the declarations of President Clinton and his assistants may have encouraged additional members of the Senate to institute analogous efforts.²⁶ Numerous

21. Lewis, *supra* note 9, at A10 (reporting Senator Biden's additional observations on judicial selection).

22. See Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140 (1987) (describing how merit commissions expanded the number and types of people involved in the judicial selection process, thereby producing many more female candidates in the Carter Administration); see also Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 174 (1990) (arguing that merit selection commissions were highly successful in increasing the number of female candidates). See generally ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981) (discussing nomination commissions and Carter Administration's process of federal judicial selection).

23. See *supra* notes 5-6 and accompanying text (reviewing announcement of Administration policy regarding judicial selection).

24. For example, one can safely assume that Diane Wood's appointment to the Court of Appeals for the Seventh Circuit was at least partially the result of Administration connections developed while she was the Deputy Assistant Attorney General in the Antitrust Division of the Justice Department.

25. See Tobias, *supra* note 5, at 318-19 (illustrating Clinton Administration's use of non-traditional sources for nominating federal judges).

26. See Steve McGonigle, *Clinton's Judges Changing the Face of Federal Judiciary*, ADVOCATE

senators sought assistance and proposals for potential nominees from individuals and institutions such as women's organizations, criminal defense lawyers and associations, minority political groups, and legal services attorneys and entities.²⁷ A few lawmakers, such as Senator Robert Graham (D-Fla.) and Senator Edward Kennedy (D-Mass.), forwarded the names of several women and minorities,²⁸ while Senator Paul Wellstone (D-Minn.) assembled an advisory panel that helped him recommend two highly-regarded African-American state court judges.²⁹

During 1993, the Clinton Administration named eleven women out of twenty-eight lawyers (thirty-nine percent) and seven minorities out of twenty-eight attorneys (twenty-five percent) to the federal courts.³⁰ President Clinton also nominated eighteen female practitioners out of forty-eight (thirty-seven percent) and thirteen minority lawyers out of forty-eight (twenty-seven percent).³¹ The numbers and percentages of women and minorities appointed were unprecedented.³²

Nearly all of the individuals whom President Clinton named or nominated are exceedingly well qualified. The attorneys confirmed and nominated are intelligent, industrious, and extremely independent while possessing integrity and properly balanced judicial temperament.³³ Numerous appointees and nominees previously enjoyed

(Baton Rouge, La.), Sept. 5, 1994, at 7B (noting that after his election, Clinton urged Democratic senators to reflect diversity when recommending candidates for vacant judgeships).

27. See Jean Christensen, *Alexander's Nomination Moves to White House; Yearlong Delay Has Wellstone Concerned*, STAR TRIB. (Minneapolis), Mar. 10, 1994, at 7A (pointing out strong support for nominee Judge Pamela Alexander among special interest organizations such as the Lawyers Committee for Civil Rights Under Law); see also Hamburger & Marcotty, *supra* note 12, at 1A (detailing the broad nature of the search by Senator Wellstone which led to Judge Alexander's candidacy).

28. For example, the Judiciary Committee held confirmation hearings on two African Americans and one woman whom Senator Graham proposed, and two women and one African American whom Senator Kennedy proposed. See Mark Ballard, *New Contenders for Fifth Circuit*, TEXAS L., Sept. 13, 1993, at 1.

29. See Hamburger & Marcotty, *supra* note 12, at 1A (discussing how Senator Wellstone sought best qualified candidates who were also African-American).

30. See Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 69 (1994) (discussing the composition of and changes within the judiciary since Clinton entered office); see also Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Nov. 19, 1993).

31. See Goldman & Saronson, *supra* note 30, at 69 (detailing Clinton appointments); Dan Freedman, *Clinton Nominates Diverse Judges*, PORTLAND OREGONIAN, Dec. 30, 1993, at A10 (providing a review of Clinton's judicial appointments); see also Tobias, *supra* note 2, at 1866-67 (providing data on Clinton Administration's appointments in first year).

32. See Tobias, *supra* note 2, at 1866 (pointing out high percentage of female and minority candidates who were appointed); Al Kamen, *Vow on Federal Judges Still on Hold*, WASH. POST, Oct. 29, 1993, at A25 (stating that 21 of 33 Clinton nominations have been women or minorities as compared to 1 of Carter's first 26 nominations).

33. See Goldman, *supra* note 4, at 291 (presenting biographies of Clinton appointees); Henry Reske, *Judicial Vacancies Declining*, A.B.A. J., Jan. 1995, at 24 (noting that the good cre-

distinguished careers on the federal or state bench. For example, Justice Ginsburg had pursued a number of path-breaking women's rights cases before President Carter appointed her to the United States Court of Appeals for the District of Columbia Circuit, the second most important court in the country, and she served with distinction on that court for thirteen years prior to joining the Supreme Court.³⁴ Moreover, President Clinton named District Judge Pierre Leval, whom many observers considered one of the finest federal trial court judges, to the Second Circuit.³⁵

In short, the Clinton Administration compiled an excellent record of judicial selection during its initial year. President Clinton enjoyed great success in naming and nominating exceptionally talented women and minorities, eclipsing the Reagan Administration's efforts and easily outdistancing those of Presidents Bush and Carter.³⁶ The Clinton Administration espoused clear objectives for appointing judges and instituted effective selection practices, especially for identifying and nominating very competent female and minority attorneys.

This success is even more remarkable in light of the substantial difficulties that President Clinton faced in his first term. Because no Democrat had been president since 1980, the greatest obstacle was the lack of recent judicial selection models. Supreme Court Justice Byron White's decision to resign two months after Clinton's inauguration also complicated selection.³⁷ The considerable attention that the Administration devoted to finding an excellent replacement for Justice White could not be accorded to the recruitment of lower court candidates.³⁸ Despite these restraints, President Clinton com-

dentials of Clinton's nominees helped speed up Senate confirmation process).

34. See *Biographies, The United States Court of Appeals for the District of Columbia Circuit, September 1989-August 1990*, 59 GEO. WASH. L. REV. 1420, 1421 (1991) (providing biography of Justice Ginsburg). See generally *supra* notes 12-13 and accompanying text (describing Justice Ginsburg's nomination process).

35. See Arnold H. Lubasch, *Judge With Gentle Firmness*, N.Y. TIMES, Oct. 10, 1984, at B28 (presenting a brief biography of Judge Leval's career).

36. See *infra* notes 55-57, 60, 90 and 120 and accompanying text (providing comparisons and data on the three Administration's judicial appointment records).

37. See Joan Biskupic, *Promises, Pressures in Court Search*, WASH. POST, Mar. 21, 1993, at A1 (describing intense demands and high expectations on President Clinton); Linda Greenhouse, *White Announces He'll Step Down From High Court*, N.Y. TIMES, Mar. 20, 1993, at A1 (claiming that Justice White's vacancy will present an opportunity for Clinton, although he could become entangled in ethnic and gender issues).

38. See Kamen, *supra* note 12, at A17 (discussing Clinton Administration's public statement and process in judicial selection). Senior officials in the White House Counsel's Office and the Department of Justice also expended much energy on the Waco, Texas standoff and the departure of William Sessions as Federal Bureau of Investigation Director. See David Johnston & Stephen Labaton, *Doubts on Reno's Competence Rise in Justice Dept.*, N.Y. TIMES, Oct. 26, 1993, at A1; *Text of Reno's Letter Recommending Dismissal*, WASH. POST, July 20, 1993, at A11 (describing com-

piled an enviable record of selection during his first year.

B. *Selection During the Second Year*

In 1994, Administration officials changed slightly their procedures for choosing judges and carefully implemented the President's new campaign pledges, with the pace of appointments quickening throughout the year.³⁹ Deputy Attorney General Jamie Gorelick repeated the commitment that she made at her confirmation hearing to "keep the pipeline full [with judicial nominees] for the Senate Judiciary Committee" and asserted that the Administration was "on track to live up to that commitment."⁴⁰

The Senate judiciously exercised its power of advice and consent. The Senate Judiciary Committee and a number of senators continued to be responsive to President Clinton's goals in choosing judges and to work closely with the Administration. Senator Biden for example, reiterated the "committee's willingness to treat filling judicial vacancies as one of its highest priorities."⁴¹ He also requested that the "Chief Executive forward nominees to the committee at a steady pace so that [it could] confirm as many judges as possible [in 1994 and] asked the American Bar Association to dedicate the resources necessary to review nominees on a timely basis."⁴²

White House officials continued to have more responsibility for judicial selection than the Department of Justice, which helped identify candidates and was intimately involved in scrutinizing most practitioners only after they became serious contenders for nomination.⁴³ Senatorial courtesy and patronage remained important in the selection of district court nominees, and the Administration continued to defer to senators from the areas in which judicial openings occurred.⁴⁴

prehensive review that Janet Reno undertook in determining whether William Sessions should remain as Director of Federal Bureau of Investigation).

39. See Tobias, *supra* note 5, at 314-15 (describing rapid pace of appointments that reduced the judicial vacancies to 50 by the end of 1995); see also *supra* notes 8-38 and accompanying text (discussing selection process of initial year).

40. Henry J. Reske, *Keeping Pace with Judicial Vacancies*, A.B.A. J., July 1994, at 34 (quoting Deputy Attorney General Jamie Gorelick).

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

42. *Id.* See generally AMERICAN BAR ASS'N, THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1991) (discussing ABA's role in judicial selection).

43. See Ruth Marcus, *Judge in Line for White House Counsel Post*, WASH. POST, Aug. 9, 1994, at A7 (reporting large role White House Counsel played in overseeing judicial selection process); see also Reidy, *supra* note 11, at 69 (describing Department of Justice's limited role).

44. See Lewis, *supra* note 9, at 1 (discussing Clinton's intent to give considerable deference to Democratic senators of particular states with judicial vacancies); Reidy, *supra* note 11, at 69 (citing as an example the probability that Clinton will rubber-stamp the recommended candi-

The Administration also continued to request that senators use district court nominating panels, which a number of senators employed.⁴⁵ The White House retained substantial responsibility for choosing many appeals court nominees,⁴⁶ but the Administration was receptive to the views of senators from the regions where nominees would sit.⁴⁷

The Chief Executive and his aides informally consulted on candidates with the Judiciary Committee and with individual senators before formally nominating attorneys and seeking Senate confirmation.⁴⁸ Indeed, careful consultation apparently facilitated the rather noncontroversial elevation of Circuit Judge Stephen Breyer to the Supreme Court. Senator Hatch and Senator Strom Thurmond (R-S.C.), who were senior Republicans on the Committee, supported Judge Breyer.⁴⁹

In 1994, the President and his assistants continued making special efforts to seek out, discover, and name very competent female and minority lawyers.⁵⁰ Top-level Administration officials continued clear-

dates of Senators Kennedy and Kerry); York, *supra* note 20, at D3 (reiterating Democratic deference).

45. See, e.g., *Commission Seeks Judge Applicants*, MILWAUKEE J., Mar. 24, 1993, at B1 (noting that Wisconsin Federal Nominating Commission, established by Senators Kohl and Feingold, would screen applicants for any future vacancies on federal court level); Bruce Vielmetti, *Panel Screens Applicants for Tampa's Federal Bench*, ST. PETERSBURG TIMES, Apr. 18, 1993, at 3B (observing that judicial nominating commission would suggest three names for each vacant seat to Senator Bob Graham who would pass them to President Clinton); Michael York & Sandra Torry, *In a First for D.C. Delegate, Norton Recommends 4 for U.S. District Court*, WASH. POST, Sept. 29, 1993, at D5 (discussing nominees recommended by Norton's Federal Judicial Nominating Commission).

46. See Goldman, *supra* note 4, at 279 (noting that nominations for courts of appeals judgeships tended to come from the Office of White House Counsel).

47. See Reidy, *supra* note 11, at 69 (stating that most observers expected Clinton to "rubber-stamp" recommendations of Massachusetts Senators Kennedy and Kerry for federal judicial vacancies in Massachusetts).

48. See Goldman & Slotnick, *supra* note 14, at 256-57 (discussing close consultation between White House and Senate Judiciary Committee); Naftali Bendavid, *Judicial Selection, Clinton Style: Avoiding the Big Fight*, LEGAL TIMES, Sept. 11, 1995, at 14-15 (discussing how President Clinton almost completely defused nomination process by consulting regularly with the Senate Judiciary Committee and senators from both parties before nominating a candidate).

49. See Joan Biskupic, *Senators Question Breyer's Economics*, WASH. POST, July 15, 1994, at A6 (recounting how Senator Hatch's support helped Breyer avoid difficult questioning concerning a potential conflict of interest stemming from investments in Lloyds of London, and noting Senator Thurmond's characterization of Breyer as an "able man and a fair man"); Ruth Marcus, *President Asks Wider Court Hunt*, WASH. POST, May 6, 1993, at A1 (noting that Judge Breyer was well regarded by conservatives on the Senate Judiciary Committee); *Open Minds?*, NAT'L L.J., July 25, 1994, at A18 (discussing Senator Hatch's support for Breyer and noting how Senator Thurmond expressed his hope that Breyer would enjoy his time on the Court).

50. See Keith Epstein, *More Minorities, Women Named Federal Judges*, CLEV. PLAIN DEALER, Sept. 25, 1994, at A1 (observing that Clinton aides telephoned sitting judges and women's groups for suggestions in an effort to nominate top minorities and women for important positions); Marcus, *supra* note 49, at A1 (noting that White House officials described Clinton as "anxious" to name a woman to the bench).

ly proclaiming that the appointment of highly competent women and minorities was quite important.⁵¹ These officials continued to seek and use the input of women's organizations, public interest groups, and minority political entities.⁵²

During 1994, twenty-nine of the 101 judges appointed by the Clinton Administration to the federal bench were female (twenty-nine percent) and thirty-seven were minorities (thirty-seven percent).⁵³ Of the ninety-five nominees submitted by the Administration in 1994, twenty-six were female (twenty-seven percent) and thirty were minorities (thirty-one percent).⁵⁴ The numbers and percentages of women and minorities named and nominated were totally unprecedented⁵⁵ and contrasted sharply with those of the Reagan, Bush, and Carter Administrations.⁵⁶

Similar to President Clinton's first year nominations, his second year nominations were highly distinguished and well respected.⁵⁷ Second Circuit Judge Jose Cabranes, for instance, was a distinguished federal district judge in Connecticut before being elevated,⁵⁸ and Fourth Circuit Judge Diana Gibbon Motz had been a highly-regarded judge on the Maryland Court of Appeals.⁵⁹ The American Bar Asso-

51. See Lewis, *supra* note 9, at A10 (quoting unnamed White House official) ("We have spoken to each and every Democrat in the Senate and told them we expect their recommendations to include women and minorities.").

52. See Epstein, *supra* note 50, at A1; McGonigle, *supra* note 26, at 7B (noting that National Women's Political Caucus has successfully pushed several candidates).

53. See DEPARTMENT OF JUSTICE, CLINTON ADMINISTRATION JUDICIAL RECORD, ANALYSIS OF JUDICIAL NOMINATIONS (1994) [hereinafter DOJ RECORD] (copy on file with author); Telephone Interview with Barbara Moulton, Counsel for the Alliance for Justice (Sept. 28, 1994) (providing statistics).

54. See DOJ RECORD, *supra* note 53. The number of appointees (101) was more than nominees (95) during 1994 because of the carryover of several nominees from the first session to the second session of the 103d Congress. See Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 145 n.40 (1995).

55. See Kamen, *supra* note 32, at A25 (noting that of Carter's first 26 nominations, all but one were white males, while 21 of Clinton's first 33 nominees were women or minorities).

56. For example, at the Federal District Court level, of Clinton's 107 appointments, 34 were female (32%) and 38 were minorities (35%). See Goldman, *supra* note 4, at 285 (discussing first two years of Clinton Administration). Compare this with the records of the previous three administrations' first two years: of Carter's 48 appointments, only 6 (13%) were female and 7 (15%) were minorities; of Reagan's 58 appointments, only 3 were female (4%) and 3 were minorities (4%); of Bush's 48 appointments, only 5 were female (10%) and 2 were minorities (4%). See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 286 (1993).

57. See Goldman, *supra* note 4, at 282-85 (discussing 20 of Clinton's nominees with notable credentials); David G. Savage & Ronald J. Ostrow, *Clinton's Big Bench: Judges of All Stripes and Colors Appointed*, L.A. TIMES, Nov. 16, 1994, at A5 (quoting University of Massachusetts Political Science Professor Shelton Goldman) ("These are highly qualified appointees, better on average than those of Reagan, Bush or (Jimmy) Carter.").

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

59. See *Clinton Picks Diana Motz for 4th Circuit Bench*, BALTIMORE SUN, Jan. 28, 1994, at B9; Marcia Myers, *Diana Motz Joins Federal Bench Today*, BALTIMORE SUN, July 22, 1994, at B1.

ciation ("ABA") rated sixty-three percent of President Clinton's nominees as well-qualified, a figure that is ten points greater than the rankings assigned to Reagan and Bush nominees.⁶⁰

The Clinton Administration's appointments in its first half-term represented substantial progress toward filling the 113 judicial openings which existed at the time of President Clinton's inauguration.⁶¹ When Congress adjourned during October 1994, there were fifty-three vacancies and the Senate had failed to consider fourteen nominees.⁶²

In short, President Clinton enjoyed considerable success naming judges during his second year. This achievement is more striking in light of the problems that the Administration had to address. For example, Philip Heymann and Webster Hubbell, who served as the initial Deputy and Associate Attorneys General, departed from the Administration, as did Bernard Nussbaum, who was the first White House Counsel.⁶³ Justice Harry Blackmun's resignation in the spring of 1994 correspondingly consumed resources which would have been devoted to the nomination of appellate and district court judges.⁶⁴ Other significant events, such as the continuing Whitewater Investigation, distracted policymakers in the White House and the Department of Justice.⁶⁵

C. Selection During the Third Year

During 1995, the Clinton Administration modified somewhat the judicial selection process that it had employed in the initial half-term. The 1994 congressional elections, which shifted control of the Senate

60. See DOJ RECORD, *supra* note 53; Goldman, *supra* note 4, at 281, 287 (comparing ABA ratings of Clinton, Bush, Reagan, and Carter appointees); Al Kamen, *Cutler to Face Backlog in Seating Judges*, WASH. POST, Mar. 14, 1994, at A17 (stating that only about half of Reagan's and Bush's appointees were considered "well qualified" by the ABA); Reske, *supra* note 33, at 24 (noting that Clinton's appointees have received higher ABA ratings up to the midterm than appointees of Reagan, Bush, and Carter).

61. See Joan Biskupic, *Court Vacancies Await New President; Democrat Will Get Early Opportunity to Leave Imprint on Judiciary*, WASH. POST, Nov. 6, 1992, at A1 (reporting that President-elect Clinton will have more than 100 federal judicial posts to fill when he enters office).

62. See DOJ RECORD, *supra* note 53.

63. See, e.g., Gwen Ifill, *Nussbaum Out as White House Counsel*, N.Y. TIMES, Mar. 6, 1994, at A1 (discussing Nussbaum's resignation); 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).

64. See Biskupic, *supra* note 58, at A1 (discussing White House's search for a replacement when Justice Blackmun retired); *Clinton Will Seek "Largeness of Spirit" in Justice Nominee*, ORLANDO SENTINEL, Apr. 7, 1994, at A1; Editorial, *On the Short List*, WASH. POST, Apr. 10, 1994, at C6.

65. See David A. Andelman, *Justice Affirmed: Clinton Administration Appointments to Federal Courts*, 83 MGMT. REV., June 1994, at 34 (noting that Whitewater turned focus of White House to matters other than weekly judicial selection meetings); Ifill, *supra* note 63, at A1 (discussing difficulties faced by White House in light of continuing Whitewater investigation).

to the Republicans, apparently explain certain alterations.⁶⁶ The Office of White House Counsel and the Department of Justice continued to divide primary responsibility for choosing judges, although the White House assumed a more substantial role, especially in identifying possible nominees.⁶⁷ The White House employees with judicial selection duties appeared reluctant to propose potentially controversial candidates and evinced considerable willingness to compromise.⁶⁸ The Administration, for instance, did not resubmit the names of lawyers whom it had nominated during 1994 and who were said to be controversial,⁶⁹ and the White House Counsel stated publicly that President Clinton would not recommend attorneys whose candidacies might lead to confirmation fights.⁷⁰

The Administration continued to consult informally on possible nominees with the Senate Judiciary Committee.⁷¹ The Chief Executive and his aides worked rather effectively with Senator Hatch when he became the Committee Chair during 1995.⁷² The lawmaker apparently treated the Clinton Administration's candidates in a manner similar to the way that Senator Biden had handled President Reagan's nominees during his seventh year. Senator Hatch promised that the Committee would approve all candidates who were

66. See Goldman & Slotnick, *supra* note 14, at 257 (noting that White House's avoidance of controversy in judicial selection became more pronounced in Republican controlled 104th Congress).

67. See Goldman, *supra* note 4, at 278-79; Goldman & Slotnick, *supra* note 14, at 254-57 (stating that White House Counsel's Office would initiate Courts of Appeals and Supreme Court nominees).

68. See Goldman, *supra* note 4, at 279 (discussing how Clinton Administration balanced "political realities" with need to appoint best qualified people).

69. See Joan Biskupic, *Facing Fights on Court Nominees*, *Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1 (discussing Administration's reluctance to waste political capital supporting controversial candidates in fights that could not be won); Neil A. Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20 (stating that Clinton's aversion to any kind of controversy led to his drop of proposed nominees Judith McConnell and Samuel Paz); Ana Puga, *Clinton Judicial Picks May Court the Right*, BOSTON GLOBE, Dec. 29, 1994, at 1 (noting that Clinton Administration's attempts to finesse appointments through the confirmation process could result in Administration's backing away from some previously touted nominees).

70. See Biskupic, *supra* note 69, at A1 (reporting that Clinton Administration does not want to "waste precious political capital in fights that cannot be won"); see also Goldman & Slotnick, *supra* note 14, at 255-57 (discussing Administration's selection process and describing cost-benefit analysis whereby Administration refused to waste resources on futile confirmation fights).

71. See Bendavid, *supra* note 48, at 15 (recounting that Senate Judiciary Committee spent many hours each week consulting with Clinton Administration about potential nominees).

72. See Goldman & Slotnick, *supra* note 14, at 255-57 (discussing collaborative relationship between Clinton Administration and Senator Hatch's committee); Tobias, *supra* note 5, at 317-18 (stating that this close working relationship resulted in Judiciary Committee voting favorably on all nominees); see also Senator Orrin Hatch *Looks at Courts, Legislation, and Judicial Nominees*, THIRD BRANCH, Nov. 1995, at 1, 10 (discussing the effective working relationship that developed between Clinton Administration and Senate Judiciary Committee).

"qualified, in good health, and understand the role of judges,"⁷³ and in 1995 the Committee did that.⁷⁴ Senator Hatch conducted confirmation hearings on one appeals court nominee and three or four district court nominees each month.⁷⁵

During 1995, the Clinton Administration named seventeen female attorneys out of fifty-three judges (thirty-two percent) and eight minority lawyers out of fifty-three judges (fifteen percent).⁷⁶ Those individuals who were nominated and confirmed had excellent qualifications and received high ratings from the ABA.⁷⁷ One outstanding judge appointed during Clinton's third year was Seventh Circuit Judge Diane Wood, who had been a Deputy Assistant Attorney General in the Justice Department.⁷⁸

Clinton continued to enjoy success in his judicial appointments despite continued distractions.⁷⁹ Republican control of Congress required the Chief Executive and his assistants to devote substantial resources to initiatives, such as the Contract With America and legal reforms.⁸⁰ Republican senators correspondingly had responsibility for scheduling confirmation hearings and votes which could have slowed the pace of appointments.⁸¹ The continuing Whitewater investigations may also have consumed considerable time of White

73. Biskupic, *supra* note 69, at A1 (quoting Senator Hatch).

74. See Al Kamen, *Window Closing on Judicial Openings*, WASH. POST, June 12, 1995, at A17 (reporting that Senate Judiciary Committee had confirmed judges at a rate of four to five a month); Neil A. Lewis, *New Chief of Judiciary Panel May Find an Early Test With Clinton*, N.Y. TIMES, Nov. 18, 1994, at A31 (discussing fast pace of confirmation proceedings under Senator Hatch).

75. See Kamen, *supra* note 74, at A17.

76. See Telephone Interview with Deborah Lewis, Alliance for Justice, Washington D.C. (Jan. 22, 1996).

77. See DOJ RECORD, *supra* note 53; Reske, *supra* note 33, at 24 (noting that 63% of Clinton's appointees received ABA's highest rating, bettering the records of Presidents Bush, Reagan, and Carter); Tobias, *supra* note 5, at 315 (stating that the ABA rated sixty-three percent of Clinton nominees as well-qualified, a rating ten points higher than the rankings of Reagan and Bush nominees).

78. See Janan Hanna & John O'Brien, *Phelan: Firm 'Very, Very Viable' Despite Loss of Key People*, CHI. TRIB., July 4, 1995, at B3 (giving a brief biography of Judge Wood, a native Chicagoian); John Flynn Rooney, *New 7th Circuit Judge Seen as More Liberal Member*, CHI. DAILY L. BULL., July 3, 1995, at 1 (discussing Diane Wood's background and liberal perspective).

79. See Tobias, *supra* note 5, at 320 (recounting problems such as Republican control of Congress, situation in Bosnia, and ongoing Whitewater investigation).

80. See Tom Curry, *The House Delivers, But Then What?*, TIME, Dec. 25, 1995, at 75 (summarizing the ten provisions of the Contract). See generally Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 721-34 (1995) (discussing implications of the Common Sense Legal Reforms Act, passed in February of 1995 by the House of Representatives).

81. See Kamen, *supra* note 74, at A17 (noting that pressure would likely begin to build on Senator Hatch to shut down confirmation hearings). Bob Dole's presidential aspirations may also have complicated the judicial selection process. See Goldman & Slotnick, *supra* note 14, at 256-57 (stating that Dole, as Majority Leader, had the ability to control the flow of the Senate, and that Dole, as presidential candidate, stood to gain much by delaying Clinton's judicial selections).

House and Justice Department staff.⁸²

D. Selection During the Fourth Year

During 1996, the President and his aides followed procedures for choosing judges that were quite similar to those employed in 1995.⁸³ The White House seemed to assume even more responsibility for judicial selection, to display greater willingness to compromise, and to exhibit much sensitivity to the problems created by presidential election-year politics.⁸⁴ These political concerns were probably exacerbated because Senator Bob Dole (R-Kan.), the apparent Republican nominee for President, was also serving as Majority Leader of the Senate until he resigned in June.⁸⁵ This phenomenon meant, for example, that the lawmaker might have been reluctant to process nominees, lest that activity suggest a lack of confidence in his own presidential candidacy.

The Senate confirmed only three judges between January and July, even though the Judiciary Committee had approved twenty-three additional nominees.⁸⁶ During July, the Republican and Democratic Party leadership compromised and agreed to conduct floor votes on one of those nominees per day.⁸⁷

These developments meant that the Clinton Administration appointed five female attorneys out of twenty judges (twenty-five percent) and four minority lawyers out of twenty judges (twenty percent) in 1996. One excellent appointee was Ninth Circuit Judge A. Wallace Tashima, who had been a highly-regarded judge in the Central District of California before being elevated.⁸⁸ The judicial selection rec-

82. See Tobias, *supra* note 5, at 320 (discussing how Whitewater investigation deflected the attention of White House away from judicial selection).

83. See *supra* notes 68-82 and accompanying text (discussing appointment procedures used during third year of first term).

84. See *id.*; see also Bendavid, *supra* note 48, at 17 (discussing cost-benefit analysis used by Clinton Administration to determine whether to fight for a particular nominee).

85. See Sean Piccoli, *Dole at Last Shines in Network Lights; "Defining Moment" Dominates on TV*, WASH. TIMES, May 16, 1996, at A12 (reporting on Senator Bob Dole's resignation from Congress).

86. See Telephone Interview with Mike Lee, Alliance for Justice, Washington D.C. (Sept. 3, 1996) [hereinafter Lee Interview]; see also Goldman & Slotnick, *supra* note 14, at 257-58 (noting that confirmations were "held hostage" by election year politics and power of Majority Leader and presidential candidate Bob Dole to control Senate business in interest of his campaign); Carl Tobias, *Senate Must Move More Quickly on Federal Judge Nominations*, CHRISTIAN SCI. MONITOR, July 23, 1996, at 19 (relating fact that, upon returning from its Fourth of July recess, the Senate had only confirmed three judges since January 2, 1996).

87. See Tobias, *supra* note 86, at 19.

88. See, e.g., Steve Albert, *Clinton Nominates L.A. Judge for Ninth Circuit*, THE RECORDER, Apr. 7, 1995, at 2 (discussing Judge Tashima's credentials and describing him as "ideal" for the Ninth Circuit); Henry Weinstein, *Clinton Nominates L.A. Judge to U.S. Appeals Court*, L.A. TIMES, Apr. 10, 1995, at B1 (noting that Judge Tashima's nomination was lauded across a broad spectrum of judges and attorneys).

ord which the Clinton Administration compiled in 1996 is certainly respectable, particularly in light of the problems that it confronted, most of which could be attributed to election-year politics.

E. Summary of the First Term

During the Clinton Administration initial term, it honored the pledges regarding judicial selection that Bill Clinton had made as a presidential candidate, and his administration apparently attained the objectives which it had set. The President named 198 lawyers to the federal courts; sixty (thirty percent) of those judges are women and fifty-five (twenty-eight percent) are minorities.⁸⁹ This record is unparalleled; it contrasts markedly with the results that President Reagan secured and easily surpasses the achievements of the Bush and Carter Administrations.⁹⁰ President Clinton appointed more women during his first three years than President Bush named in one term and than the Reagan Administration chose in eight years.⁹¹ President Clinton's first-term appointees also earned the highest ratings assigned by the ABA since it began evaluating candidates' qualifications in the 1950's.⁹² Practically all of the judges were exceptionally able and possessed the independence, integrity, intellect, industriousness and balanced temperament which President Clinton proclaimed were crucial to serving on the bench.

Despite the Clinton Administration's ability to attain the judicial selection objectives of appointing very capable judges who would increase gender and racial balance on the courts, the President was unable to fill a significant number of openings on the federal bench by the end of his first term. When the Republican majority quit processing nominees in September 1996, there were sixteen vacancies on the appeals courts and forty-two empty seats in the district courts.⁹³

89. See Goldman & Slotnick, *supra* note 14, at 258 tbl.1 (providing district court appointee statistics for Clinton's first term); *id.* at 267 tbl.4 (providing appeals court appointee statistics for Clinton's first term).

90. See *id.* at 261 tbl.3; *id.* at 267 tbl.6 (comparing district and appeals court appointments between Clinton, Bush, Reagan, and Carter administrations); Kamen, *supra* note 32, at A25 (noting that 21 of Clinton's first 33 nominees were female or ethnic minorities).

91. See Tobias, *supra* note 5, at 314; see also Goldman, *supra* note 4, at 280 tbl.1; *id.* at 286 tbl.6 (comparing number of women appointed by Clinton, Bush, Reagan, and Carter Administrations).

92. See Lewis, *supra* note 69, at A20 (noting that sixty-two percent of Clinton nominees were rated as "well-qualified" by the ABA, the highest rating available); Tobias, *supra* note 5, at 315. See generally Robert A. Stein, *For the Benefit of the Nation*, A.B.A. J., Mar. 1996, at 104 (discussing ABA's procedure for rating candidates for federal judgeships).

93. See Michael Rappaport, *Clinton is Unlikely to Push Courts to Left*, WALL ST. J., Nov. 25, 1996, at A13 (stating that there were approximately seventy unfilled vacancies in the judiciary); Joan Biskupic, *Clinton Given Historic Opportunity to Transform Judiciary*, WASH. POST, Nov. 19, 1996, at A19 (stating that when the Senate returns in January, 1997, it faces about 80 nominees

In sum, President Clinton and his assistants enjoyed great success when choosing judges during the initial term, especially in light of the substantial complications that they faced. The Administration was apparently poised to continue and possibly improve upon its success as the second term began, but complications that were principally political in nature frustrated the attainment of these goals.

II. CHOOSING FEDERAL JUDGES IN THE FIRST YEAR OF THE SECOND TERM

Scrutiny of those individuals whom the Chief Executive appointed and nominated during 1997 suggests that the Administration continued to submit the names of very competent persons with comparatively moderate political perspectives who would increase gender and racial balance on the federal bench. For example, the American Bar Association accorded these nominees very high ratings, and a number had prior judicial experience in the federal or state court systems.⁹⁴

President Clinton forwarded the names of some people who were associated with the Republican Party,⁹⁵ and the Administration even nominated for appeals court vacancies Judge Sonia Sotomayor and Judge James Ware, both of whom President Bush had appointed to the district bench.⁹⁶

During 1997, President Clinton and Administration personnel who were responsible for appointments departed only minimally from the selection objectives and procedures of the initial four years examined above. The goals and practices which they employed resembled more closely those followed in the second half term than the first, partly because the Republican Party retained the Senate majority after the 1996 elections. During the first year of Clinton's second term, the White House maintained substantial control over the candidate

needing confirmation); *see also* Lee Interview, *supra* note 86.

94. *See* ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT 1 (1997) [hereinafter ANNUAL REPORT 1997] (announcing that "[t]he American Bar Association rated 66.7% (24 of 36) of President Clinton's appointments as 'well qualified' and the remaining 33.3% (12 of 36) as 'qualified' and that "[n]inety-two percent (33) of the judges confirmed in 1997 'were in private law practice or judicial service at the time of appointment.'"); *see also supra* notes 33-36 and accompanying text (discussing qualifications of past Clinton appointees).

95. *See* Shannon P. Duffy, *Clinton Announces Nominees for Eastern District Court*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1 (noting that Clinton's nomination for the Eastern District of Pennsylvania bench was an "obvious" compromise between the Administration and Pennsylvania Senator Arlen Specter).

96. *See* OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, PRESIDENT CLINTON NOMINATES JAMES S. WARE TO THE FEDERAL BENCH (June 27, 1997); OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, PRESIDENT CLINTON NOMINATES SONIA SOTOMAYOR TO THE FEDERAL BENCH (June 25, 1997).

identification phase and most nominations to the appellate courts. The Administration concomitantly continued to exhibit considerable deference to home-state senators' recommendations of individuals for nomination to district court vacancies.⁹⁷

President Clinton and his aides also continued undertaking special efforts to find, and tender the names of, very competent women and minorities. Several senior Justice Department officials, including Attorney General Reno and Assistant Attorney General Acheson, who had orchestrated the appointment of numerous female and minority judges in the first Clinton Administration, again had significant responsibility for selection during 1997. The White House concomitantly played a major role in the decisions to nominate two women, a Latino and an African American for four of the five Ninth Circuit openings in the first seven months of the year.⁹⁸ Department of Justice and White House personnel also continued working closely with senators by encouraging them to identify and suggest talented female and minority candidates, while these Administration officials and Senate members sought the assistance of entities, such as women's groups and minority political organizations.

President Clinton did experience difficulty in expediting appointments during his fifth year in office, the blame for which lies partially with the Clinton Administration itself. The President may have tendered too few nominees who were acceptable to Republicans early in 1997 and apparently submitted names rather irregularly thereafter. Clinton nominated twenty-two individuals on January 7, but Senator Hatch asserted that many of the nominees would not secure confirmation because Republicans found them unacceptable.⁹⁹ The Chief Executive's submission of thirteen district court nominees on July 31 was ill timed,¹⁰⁰ coming immediately before the Senate recessed and thereby complicating the Judiciary Committee's efforts to process the package promptly.¹⁰¹

97. See *supra* note 95 and accompanying text (describing Administration's deference to Senator Spector).

98. The President renominated William Fletcher, Margaret McKeown, Susan Graber, and Judge Richard Paez on January 7, 1997. See OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, PRESIDENT CLINTON NOMINATES TWENTY-TWO TO THE FEDERAL BENCH (Jan. 7, 1997); OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, PRESIDENT CLINTON NOMINATES SUSAN GRABER TO THE FEDERAL BENCH (July 30, 1997); see also *supra* note 96 and accompanying text (nominating Judge Ware, an African American).

99. See *supra* note 98 (listing some of the nominees); Orrin G. Hatch, *There's No Vacancy Crisis in the Federal Courts*, WALL ST. J., Aug. 13, 1997, at A15).

100. See OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE, PRESIDENT CLINTON NOMINATES THIRTEEN TO THE FEDERAL BENCH (July 31, 1997).

101. Cf. 143 Cong. Rec. S2515, S2523-24 (daily ed. Mar. 19, 1997) (statement of Sen. Grassley) (discussing reasons for caustiously evaluating nominees).

The Republican Senate leadership and specific GOP senators also shared responsibility for delayed appointments in 1997. For example, Senator Hatch, as chair of the Judiciary Committee, might have processed nominees more promptly, even though he claimed that confirmation was slowed by the Administration's erratic submission of names, many of whom were unacceptable to the senator or his Republican colleagues apparently because they could be "judicial activists."¹⁰² The Senate Majority Leader, for his part, did not always schedule floor debate and floor votes on nominees immediately after they had received Judiciary Committee approval.¹⁰³

In short, it is quite difficult to assign precise responsibility for delayed judicial appointments during 1997. The above examination demonstrates that all of the principal participants in the selection process probably could have done more to facilitate the appointment of additional judges. Indeed, only nine judges had been confirmed by September, although the pace of judicial selection improved considerably over the remainder of 1997. The concerted efforts of Senator Hatch and the Clinton Administration led to the confirmation of twenty-seven additional judges in the last ten weeks of the first session of the 105th Congress.¹⁰⁴

During 1997, President Clinton appointed six women (seventeen percent) and five minorities (fourteen percent) out of thirty-six attorneys to the federal bench.¹⁰⁵ Out of sixty-one positions, the Chief Executive nominated nineteen female practitioners (thirty-one percent) and twelve minority lawyers (twenty-one percent).¹⁰⁶ These numbers and percentages of women and minorities named and nominated somewhat resemble the record compiled in 1993.¹⁰⁷

Nearly all of the persons appointed or nominated seem to have excellent qualifications. Most of the attorneys have relatively moderate political views, and a few have Republican Party affiliations.¹⁰⁸ Some notable nominees in 1997 included Federal District Judges Richard

102. See, e.g., *id.* at S2536 (statement of Sen. Hatch) (voicing displeasure with legislating through judicial appointments); Hatch, *supra* note 99 ("[T]oo many of the president's judicial appointees have misused their judicial authority to implement a liberal agenda that President Clinton has been unwilling or unable to implement through the political process.")

103. See ANNUAL REPORT 1997, *supra* note 94, at 15 (detailing a tactic whereby the Senate leadership delays consideration of an issue to prevent a judicial nominee from getting a hearing before the Senate Judiciary Committee or from being voted on by the Senate).

104. See Telephone Interview with Douglas Dand, Assistant White House Counsel, White House Counsel Office (Sept. 2, 1997).

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

106. See *id.*

107. See *supra* notes 30-32 and accompanying text (discussing the change in composition of the federal judiciary brought on by the Clinton Administration).

108. See *supra* notes 95-96 and accompanying text (discussing compromise nominations).

Paez, Marjorie Rendell, Sonia Sotomayor and James Ware.

In sum, the Clinton Administration compiled a very respectable record of appointing judges during the first year of its second term. The Chief Executive continued to name and nominate significant numbers of highly capable women and minorities, while the President and his assistants articulated clear goals for choosing judges and implemented efficacious selection procedures.

The Chief Executive made commendable progress, even though he faced the difficulties that most Presidents experience when beginning a second administration. Some factors compounded these inherent problems; White House Counsel Jack Quinn, for instance, resigned before Inauguration Day,¹⁰⁹ and the continuing Whitewater investigations and other responsibilities continued to distract numerous lawyers in that office. The Administration correspondingly spent much of the year attempting to fill the Deputy and Associate Attorney General positions held by Jamie Gorelick and John Schmidt at the Justice Department, which meant that it lacked leadership, and lost time from the judicial selection process.¹¹⁰ These internal complications were exacerbated by the significant majority which the Republican Party commanded in the Senate, and by certain difficulties in working with the GOP leadership, and by some Republican senators' partisan and even uncooperative approaches to appointments.

In the final analysis, President Clinton and his assistants had a commendable record of judicial selection, given the enormous hurdles that they confronted during the initial year of the second administration. The Chief Executive and his aides must seek to achieve greater success in the remainder of his concluding term by continuing to rely on the objectives and procedures which they have used, and by considering certain recommendations, discussed below, for appointing judges.

III. SUGGESTIONS FOR THE REMAINDER OF THE SECOND TERM

Suggestions regarding the objectives that the Clinton Administration should pursue in the remainder of the second term and how it can attain those goals warrant further discussion. Many recommendations have been offered elsewhere,¹¹¹ some have been mentioned

109. See *President's Counsel Quits*, N.Y. TIMES, Dec. 2, 1996, at B22.

110. See Helen Dewar, *Confirmation Process Frustrates President*, WASH. POST, July 25, 1997, at A21 (characterizing the appointment of Deputy Attorney General Eric H. Holder as a "recent breakthrough" on Senate action of administration nominations); Greg Pierce, *Clinton vs. Clinton . . .*, WASH. TIMES, Aug. 12, 1997, at A6 (recanting criticisms of Attorney General Janet Reno for length of vacancies in three key positions).

111. See, e.g., Goldman, *supra* note 4, at 290-91 (speculating on the impact of Republican

above, and President Clinton and officials with judicial selection duties in the first administration and the initial year of the second term enunciated praiseworthy objectives and instituted efficacious procedures for realizing them; however, several specific ideas deserve consideration.

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

One significant reason for appointing additional highly competent female and minority attorneys is the diverse viewpoints that nearly all of these lawyers will bring to judicial service. The judges could enhance their colleagues' appreciation of complex public policy issues addressed by the courts, such as the right to die and affirmative action, which the courts must address.¹¹² Naming additional women and minorities may also decrease gender and racial prejudice in the federal courts.¹¹³ Certain evidence correspondingly indicates that the American public has greater confidence in a federal judiciary whose composition more closely resembles the broader makeup of American society.¹¹⁴ Many of these jurists, such as Justices Ruth Bader Ginsburg and Sandra Day O'Connor and District of Columbia Circuit

control over the Senate on judicial selections); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1274-85 (suggesting such goals as selecting judges based on merit and creating balanced federal courts by considering gender, race and political views).

112. 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. & POL'Y REV. 270 (1983) (examining justifications for and criticisms of affirmative action in the judicial selection process by analyzing data on all judicial nominees sent by the Carter Administration to the 96th Congress); Marion Zenn Goldberg, *Carter-Appointed Judges—Perspectives on Gender*, TRIAL, Apr. 1990, at 108 (discussing study which found significant differences between male and female judiciary appointees).

113. See, e.g., FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. 167 (Apr. 2, 1990) (concluding that judicial selection should give "due regard for the heterogeneity of the American people"); NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 191-204 (1993) (stating different perceptions on gender because there are "so few women of federal bench"); Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus For Judicial Reform*, 21 ARIZ. ST. L.J. 237, 273 (1989) ("As increasing numbers of women become lawyers and judges, men in these positions will no longer view their female counterparts as oddities, to be treated with chivalry or scorn.")

114. See Tobias, *supra* note 111, at 1276 (stating that this is particularly true for poverty-stricken individuals); see also Slotnick, *supra* note 112, at 273 (stressing that "affirmative action efforts are . . . instrumental in assuring a bench which fosters greater public confidence"). Research also suggests that numerous female and minority judges might improve decision making. See Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 JUDICATURE 165, 168 (1983) (discussing the liberal influence of Carter's appointees); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J. POL'Y 425, 436 (1994) (stating that the appointment of women has had substantial impact on decision making in employment discrimination cases); see also Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997) (indicating relationship between race and gender and sympathy to disadvantaged in society).

Chief Judge Harry Edwards, have rendered distinguished service.¹¹⁵ Increasing the number of female and minority judges can concomitantly be a valuable sign of a presidential administration's commitment to improving conditions for women and minorities in the country, in the federal civil and criminal justice system, and in the legal profession.¹¹⁶

Another critical reason for naming additional female and minority attorneys is the need to rectify the lack of gender, racial and political balance on the current federal judiciary, over half of which were appointed by Presidents Reagan and Bush.¹¹⁷ African Americans comprised fewer than two percent of Reagan appointees, while President Bush placed one Asian American and only nine Latinos on the courts.¹¹⁸ A number of judges may have been named during the Reagan and Bush Administrations primarily for their conservative political credentials.¹¹⁹

The failure of President Reagan and President Bush to appoint greater numbers of women and minorities is particularly troubling because their administrations had larger, more experienced, pools of female and minority lawyers on which to draw than did President Carter. For instance, while Carter had only 62,000 female practitioners from whom to choose in 1980, there were over 140,000 in 1988,¹²⁰ which evidences the increasing number of women who are actively engaged in challenging legal practices.¹²¹ The number of Af-

115. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1244 (1993) [hereinafter Tobias, *Closing the Gap*]; see also Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477, 483 (1991) (suggesting that President Bush should appoint more women) [hereinafter Tobias, *Women*].

116. See Tobias, *supra* note 22, at 176; Tobias, *Women*, *supra* note 115, at 483.

117. See ANNUAL REPORT 1997, *supra* note 94, at 5-8 (relating data on composition of federal judiciary and noting that majority of judges were appointed by Presidents Reagan and Bush); see also Nathaniel R. Jones, *Whither Goest Judicial Nominations, Brown or Plessy?—Advice and Consent Revisited*, 46 SMU L. REV. 735, 738 (1992) (stating that 579 Article III judgeships were filled during the Reagan-Bush years (1981-1992), of which 19 were filled by African Americans and 26 by Hispanics).

118. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993) (comparing U.S. Appeals Court appointees by administration). African Americans comprised 5.2% (ten out of 192) of President Bush's appointees. See *id.* at 287, 293. Of the 192 judges, nine were Latinos and one was an Asian American. See ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT 4 (1992) [hereinafter ANNUAL REPORT 1992].

119. See Jones, *supra* note 117, at 742 ("Presidents Reagan and Bush . . . institut[ed] a process that ensures that the [judicial] candidates' beliefs are in ideological—as distinguished from political—alignment with their own."); Biskupic, *supra* note 93, at A19 (referring to Reagan's "highly public effort to place young, strongly opinionated conservatives on the courts" and stating that President Bush followed that lead); Tobias, *supra* note 111, at 1264-74 (reiterating President Reagan's objective to make courts more conservative).

120. See Tobias, *Closing the Gap*, *supra* note 115, at 1241 n.22 (demonstrating that President Bush had larger pool of female attorneys than President Carter).

121. See *id.* at 1246-47 (citing as examples D.C. Circuit Chief Judge Patricia McGowan Wald and New York Court of Appeals Chief Judge Judith S. Kaye); Tobias, *supra* note 111, at 1280-81

rican-American, Latino and Asian-American attorneys also rose during the same time period, from 23,000 in 1980 to 51,000 in 1989, with many of these lawyers participating in a wide range of equally rigorous legal endeavors.¹²²

It is also important to fill all existing vacancies, so that the federal courts will be operating with the complete contingent of judges authorized. Naming attorneys to those openings would enable the judiciary to resolve criminal cases more expeditiously and reduce the district courts' enormous civil backlogs.¹²³ Indeed, in July 1997, the "looming crisis in the Nation brought on by the extraordinary number of vacant federal judicial positions and the resulting problems that are associated with delayed judicial appointments"¹²⁴ led the presidents of seven national legal groups to write an open letter to President Clinton and Senate Majority Leader Trent Lott. The letter implored the "President and the Senate to devote the time and resources necessary to expedite the selection and confirmation process for judicial nominees" and "all participants in the process to move quickly to resolve the issues that have resulted in these numerous and longstanding vacancies in order to preserve the integrity of our justice system."¹²⁵ Chief Justice Rehnquist, in his 1997 Year-End Report on the Federal Judiciary, warned that "the quality of justice that traditionally has been associated with the federal judiciary" will "erod[e]" if the high number of judicial vacancies is not addressed.¹²⁶

(emphasizing the existence of female attorneys in high profile litigation, public interest advocacy, and academia); see also Tobias, *Women*, *supra* note 115, at 485 (asserting that non-traditional legal careers provide women with valuable perspectives and qualities). Women have worked, for instance, at the Justice Department, public interest groups, and large law firms. See *id.* at 1246-47 (discussing traditional and non-traditional participation of women in legal profession); Tobias, *supra* note 2, at 1875 (noting that Attorney General Janet Reno and Hillary Rodham Clinton have been critical in the recruitment process).

122. See ANNUAL REPORT 1992, *supra* note 118, at 3. Such attorneys, for example, have pursued landmark civil rights suits, practiced criminal law, or written path-breaking legal scholarship. See Tobias, *supra* note 111, at 1280-81; Tobias, *supra* note 2, at 1875 (indicating that Commerce Secretary Ronald Brown was critical in recruitment process).

123. On March 31, 1994, 219,424 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 Robert Schmidt, *The Costs of Judicial Delay*, LEGAL TIMES, Apr. 28, 1997, at 6 (suggesting that the judicial shortage backlogs civil cases).

124. Letter from N. Lee Cooper et al., ABA President, to William J. Clinton and Trent Lott, Senate Majority Leader, July 24, 1997, reprinted in 143 Cong. Rec. S8046 (daily ed. July 24, 1997) (on file with *The American University Law Review*).

125. *Id.* at S8046; see also Letter from Guy A. Zoghby, President, American Judicature Soc'y, to Editors, NAT'L L.J., Apr. 3, 1995, 20 (urging President Clinton and Republican senators to "make a bipartisan commitment to fill judicial vacancies promptly [because they] threaten the federal courts' ability to resolve Americans' disputes fairly and interpret the law justly").

126. ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROCESS ANNUAL REPORT 1 (1997) (quoting William J. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (Dec. 31, 1997)).

B. How President Clinton Can Appoint More Women and Minorities

Although numerous suggestions as to how President Clinton and his assistants can name additional talented women and minorities to the bench have been afforded elsewhere,¹²⁷ several additional ideas may be proffered here. The Chief Executive and officials responsible for judicial selection may want to examine effective ways of redoubling their commendable efforts to seek out, designate and name increasing numbers of competent women and minorities. President Clinton and administration personnel should expand earlier endeavors to appoint female and minority lawyers, considering new means of proceeding and relying upon previously untapped resources.

The White House has retained substantial responsibility for nominees to the Supreme Court and the appeals courts.¹²⁸ The Chief Executive and the White House Counsel, therefore, must insure that White House staff who help choose judges comprehend the significance of naming more female and minority attorneys and employ the finest processes for achieving this goal. Experience during the Clinton Administration's first five years indicates that these personnel understand the objective and have instituted quite efficacious procedures for realizing it. The goals and practices for selecting district court judges, however, warrant more scrutiny because the Chief Executive has deferred to senators from the areas where the judges will serve in appointing them.¹²⁹

The lawmakers' concerns or the Administration's prompting has seemingly led numerous senators to implement, or continue using, measures for identifying and fostering the candidacies of extremely capable female and minority lawyers and to submit the names of many women and minorities. The President should consider praising those Senate members who have helped him secure the Administration's judicial selection objectives while encouraging others to institute similar efforts.

President Clinton might reiterate in an important public forum that he is clearly committed to naming greater numbers of very tal-

127. See, e.g., Tobias, *supra* note 111, at 1281-85 (suggesting use of capable administration officials, diligence in seeking highly qualified candidates, and informal consultation with both the Senate and the American Bar Association Standing Committee on Judiciary); Tobias, *Closing the Gap*, *supra* note 115, at 1245-49 (suggesting clearly articulated commitment to appointing more female judges). See generally Goldman, *supra* note 4, at 276-78 (discussing President Clinton's commitment to diversity).

128. See Goldman, *supra* note 4, at 279 (examining the process of judicial selection); see also Tobias, *supra* note 5, at 316-17 (detailing procedures employed by Clinton Administration).

129. See *supra* note 44 and accompanying text (discussing Administration's deference to Senators' nominees for district court judges).

ented female and minority attorneys. The Chief Executive could even write to specific senators, asking that they forward the names of women and minorities,¹³⁰ and institute more formal mechanisms, such as nominating panels, which will seek out, and promote the appointment of, these lawyers.

Administration employees who are responsible for judicial selection also must work closely with the Judiciary Committee Chair and the whole Committee by, for instance, consulting on possible candidates. The staff and senators should concomitantly request the advice of additional sources that will be aware of highly competent female and minority practitioners. These Administration personnel and members of the Senate could seek input from conventional sources, namely bar associations, which might offer some aid. Equally significant will be less traditional contacts, such as women's organizations or minority political groups. President Clinton as well must enlist the assistance of every female senator. Those lawmakers can persuade their colleagues to recommend more women and minorities and assist the Chief Executive in fostering potential nominees' candidacies.

The qualifications and networking abilities of female and minority lawyers, who now constitute some one-quarter of the country's practicing attorneys, will be critical to the endeavor. Similarly important may be the efforts and contacts of women and minorities in the Cabinet, such as Attorney General Janet Reno; of female and minority officials across the federal government; and of Hillary Rodham Clinton, who chaired the American Bar Association Commission on Women in the Profession.¹³¹

C. *A Word About Politics*

The above examination of federal judicial selection during 1997 suggested that political phenomena were at least partly responsible for the relative dearth of judges who secured confirmation and concomitantly for the small numbers and percentages of women and minorities appointed. It would be naive to ignore the effect of politics generally on selection, and specifically on the appointment of female and minority judges, particularly because that impact could well increase over the course of the second Clinton Administration.

130. See *supra* note 26 (quoting White House official who stated that the Administration had encouraged all Democratic senators to support women and minorities).

131. See Tobias, *Closing the Gap*, *supra* note 115, at 1248-49 (stating that President Clinton must "move beyond 'old boy networks,'" and suggesting that new female attorney networks will be highly resourceful).

The precise significance of politics for judicial selection, especially the appointment of women and minorities during the rest of the concluding term, however, remains unclear. For example, numerous Republican senators will probably be more willing to confirm nominees whom they perceive as rather conservative or politically moderate, even if it is impossible to correlate specific lawmakers' opposition to women or minorities with their gender or race because few senators would publicly so admit.

These propositions suggest that the Clinton Administration may want to consider how it can most effectively continue to appoint well-qualified female and minority judges while attaining other important objectives, such as promptly filling the 80 vacancies on the federal bench. The measures that the President and his assistants might invoke range across a broad spectrum. The Chief Executive, for instance, could force the issue of delayed judicial selection by using the presidency as a bully pulpit for cajoling or blaming the Republicans or by employing recess appointments.¹³² The Administration might concomitantly submit nominees, including many talented women and minorities, for all current openings. The Chief Executive could even evaluate the possibility of allowing the Republicans to recommend some percentage of candidates in exchange for confirming a substantial number of nominees or for approving a statute which would authorize new judgeships.¹³³ Implicit in the ideas above is that President Clinton, at some juncture, particularly later in the second term, may want to consider balancing the goal of filling empty seats with other significant objectives, namely appointing additional very competent female and minority judges.¹³⁴

CONCLUSION

President Clinton compiled an excellent record of judicial selection during his first five years in office. He clearly identified the Administration's objectives when appointing judges and implemented efficacious means for attaining the goals. The Chief Executive

132. See generally *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc) (finding recess appointments constitutional); see also Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (discussing constitutionality of recess appointments).

133. See Goldman & Slotnick, *supra* note 14, at 271 (suggesting ways to overcome Republican plan to block Clinton appointments).

134. This Essay does not suggest that the President implement the ideas in this paragraph, but that he should be realistic and pragmatic about filling vacancies. The President might want to calculate how critical the openings are as a general matter, and in specific courts. The Administration may ultimately conclude that filling the bench is less important than naming additional highly capable women and minorities.

named unprecedented numbers and percentages of exceptionally able women and minorities while limiting vacancies on the federal bench. If the President and his assistants redouble their efforts, the Administration could appoint additional highly capable female and minority judges and fill all of the openings during the next three years.